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AMENDMENT TO RULES.

SUPREME COURT OF NORTH CAROLINA.¹

1. WHEN EXAMINED. Applicants for license to practice law will be examined on other time. All examinations will be in writing.
the first Monday of each term, and at no Amended and adopted Feb. 8, 1898.

¹For rules as originally adopted, and amendments thereto, see 12 S. E. v.; 22 S. E. v.; 27 S. E. v.

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WALTERS et al. v. LAURENS COTTON MILLS et al.

(Supreme Court of South Carolina. Sept. 18, 1898.)

**ABATEMENT—PENDENCY OF ANOTHER SUIT—TROV-
VER AND CONVERSION—PUNITIVE DAMAGES—AP-
PEAL—NOTICE—SERVICE—EXCEPTIONS—SUFFI-
CIENCY—REVIEW.**

1. The pendency of another action will not abate the suit, where the action referred to is prosecuted by only one of the present plaintiffs, and is for the recovery of personal property alone, while the present action includes a demand for punitive damages.

2. Defendants forcibly took charge of plaintiffs' property as they were in the act of leaving town to seek work elsewhere, and it was alleged that such seizure was prompted by a desire that plaintiffs should be thereby forced to remain and labor with defendants. *Held*, that a nonsuit as to demand for punitive damages was properly refused. (By a divided court.)

3. Exceptions alleging error in giving or refusing certain numbered requests for instructions, or "in charging on the facts," or in not setting a verdict aside, will not be considered, as they fail to set out what appellants desire the court to consider.

4. Under the constitutional requirement that the supreme court must pass on every question that fairly rises or is presented by the record, questions directed to jurisdiction on alleged failure of notice of appeal will be considered, even where the case is dismissed on its merits.

5. Code Civ. Proc. § 345, requires that written notice of appeal shall be served on the opposite party or his attorney within 10 days after the rising of the circuit court. Section 411 provides that, in case of service by mail, the notice must be deposited in the post office, directed to the person on whom it is to be served at his place of residence, and the postage paid. Notice with postage paid was deposited in the post office, directed to the attorney of respondents at 1 o'clock on the tenth day after the rising of the circuit court, but did not reach such attorney until the eleventh day. *Held* a sufficient service.

Appeal from common pleas circuit court of Laurens county; James Aldrich, Judge.

Action by J. C. Walters and Mollie Walters against the Laurens Cotton Mills and others. From a judgment for plaintiffs, defendants appeal. *Affirmed*.

N. B. Dial, for appellants. John J. McMahon, for respondents.

POPE, J. The plaintiffs having recovered a judgment for the recovery of certain proper-

ty, and also a judgment for punitive damages, the defendants now appeal to this court for a reversal of such judgment.

Quite a number of the exceptions raise the question as to whether the defendants were not entitled to introduce testimony, both oral and written, relating to a suit of Mollie Walters, who is one of the plaintiffs here, against the defendant the Laurens Cotton Mills, before a magistrate, for the recovery of the same personal property referred to in the action at bar. The circuit judge refused to allow such testimony to be admitted. It appears from the "case" that the suit in the magistrate's court referred to was between one of the plaintiffs only, and sought to recover personal property alone; while in the case at bar the plaintiffs are J. C. Walters and Mollie Walters, the defendants are the Laurens Cotton Mills and W. E. Lucas, and the object of the suit at bar is not only the recovery of the personal property, but also punitive damages. The law is well settled that, in order for the plea of the pendency of another action to defeat another suit, three things must appear: (1) The parties must be the same. (2) Identity in the thing sued for. (3) Identity in the cause of action. These conditions are not answered. Hence there was no error in the circuit judge, as here alleged in the first, second, third, fifth, and sixth exceptions.

Again, the appellants insist that the circuit judge erred in refusing to grant a nonsuit as to plaintiffs' second cause of action, which was for punitive damages. It is now settled law that if there is any evidence—legal evidence—tending to prove the cause of action as alleged by plaintiffs, it is not the duty of the judge to grant any nonsuit; the issue must go to the jury. By looking into the testimony as it appears in the "case," it is seen that the defendants forcibly took charge of plaintiffs' property just as they were in the act of leaving the town of Laurens to seek work elsewhere, and it was alleged that such seizure was prompted by a desire that plaintiffs should be thereby forced to remain and labor with the defendants. Of course, these were questions of fact for the jury. Punitive damages are awarded in our courts. *Spellman v. Railroad Co.*, 85 S. C. 475, 14 S. E. 947, and

cases therein cited. There was no error as here complained of.

The defendants' eighth, ninth, tenth, and eleventh exceptions are as follows: "(8) Because he erred in charging plaintiffs' seventh request. (9) Because he erred in not charging defendants' first, second, and third request. (10) Because he erred in charging on the facts, in violation of the constitution of this state. (11) Because he erred in not setting the verdict aside, and ordering a new trial." We will positively decline to pass upon these requests, because they fail to comply with the requirements of our rules, in this: that they each fail to specify and set out what it is the appellants desire us to consider. Again and again this court has directed the attention of counsel to this matter. Possibly a refusal by us to permit such disregard of rules may cause such rules to be noticed by the bar. It will be noticed that, so far as we have considered the respondents' point, the court is without jurisdiction to entertain the appeal, because notice of appeal was not served upon the respondents' attorney within 10 days after the rising of the court of common pleas, when the judgment was rendered. Inasmuch as the appeal must be dismissed upon the merits, it might seem that our duty to pass upon this objection as to the jurisdiction did not exist. The constitution requires this court, however, to pass upon every question that fairly arises, or is presented by the record. We cannot agree with the respondents for the following reasons, briefly stated: It is in the power of the general assembly to provide the method in which appeals are to be presented to this court. The general assembly has declared that this court may disregard any errors in the preparation of papers for appeal, except the notice of appeal. This being so, we cannot be too careful in observing this requirement of the statute. Section 345 of our Code of Civil Procedure requires: " * * * And in all other appeals to the supreme court the appellant or his attorney shall, within ten days after the rising of the circuit court, give like notice [written] of his intention to appeal to the opposite party or his attorney. * * * " It will be observed that written notice to the opposing party or his attorney is required; so that, as to the service of this written notice, we must look elsewhere in the Code for guidance. Section 408 provides: "Notices shall be in writing, and notices and other papers may be served on the party or attorney, in the manner prescribed in the next three sections, when not otherwise provided by this Code of Procedure." We look in vain through the Code of Procedure for any other directions regulating the service of notices of appeal other than those fixed in sections 409, 410, and 411. Hence they apply. Section 409 substantially directs that, in the event personal service of the notice is desired, how it shall be done. Section 410 provides: "Service by mail may be made where the person making the service and the person on

whom it is to be made reside in different places between which there is a regular communication by mail." The attorney for plaintiffs resided in the city of Columbia, in this state, and the attorneys for defendants resided in the city of Laurens, in this state, and there is a regular communication by mail between the two places just named. Section 411 provides: "In case of service by mail, the paper must be deposited in the postoffice, addressed to the person on whom it is to be served, at his place of residence, and the postage paid." It is admitted the notice was deposited by the appellants in the post office at Laurens, addressed to the attorney for respondents at Columbia, S. C., postage prepaid, at 1 o'clock of the afternoon on the tenth day after the rising of the court, but did not reach respondents' attorney at Columbia by mail until the eleventh day. This court had decided in the case of *Sullivan v. Speights*, 12 S. C. 562, that "the service was complete from the time the paper to be served is deposited in the post office, addressed to the person upon whom it is to be served, at the place of his residence, with the postage paid." Hence we think we have jurisdiction to hear the appeal, but, as before remarked, it must be dismissed on the merits.

The members of this court being equally divided in opinion, under the constitution, the judgment of the circuit court stands affirmed.

GARY, A. J., concurs.

JONES, J. I agree with the Chief Justice that there was a total failure of evidence as to the second cause of action, and that the circuit court erred in refusing the motion for nonsuit as to that cause of action. On this ground there should be a new trial. I do not think there was error in the ruling of the circuit court as to the record of the magistrate's court. The defense was pendency of another action between the same parties for the same cause of action. The circuit court's ruling was based expressly on this defense, and, as it is not disputed that the parties to both actions were not the same, the ruling was correct. In this connection it was not suggested that the record was competent as against Mrs. Mollie A. Walters on the question whether the property sued for belonged to Mrs. Walters alone, or to her and her husband jointly. Later in the progress of the case the circuit court expressly ruled that said record could be used to contradict Mrs. Walters' testimony. On this line appellant was not restricted in showing what Mrs. Walters did in the proceedings before the magistrate, and her affidavit therein as to her ownership of the property, etc., was introduced in evidence.

McIVER, O. J. (dissenting). It seems to me that there are two grounds upon which a new trial should be granted in this case: (1) Because of error in ruling out the testimony as to the action brought in the magistrate's court

by the plaintiff Mollie A. Walters against these defendants for the recovery of the same goods sued for in this action. (2) Because of error in refusing the motion for a nonsuit as to the second cause of action stated in the complaint.

While it may be quite true that the record of the former action was not competent as a bar to this action, for lack of the necessary identity of parties, yet it was competent, as well as pertinent to the question as to whether the goods sued for belonged to the plaintiffs jointly, or to one of them separately.

As to the second ground, the allegation in the complaint upon which the second cause of action was based was that the defendants "forcibly, maliciously, and oppressively, with design to reduce plaintiffs to destitution and dependence, and thus to compel them to remain in the employ of the said corporation against their will, and to work for the said corporation upon its own terms," seized and carried away the goods sued for, and "detained the same unlawfully, maliciously, and oppressively, with design to intimidate their remaining employees, and deter them from exercising their rights as freemen to go at will, and pursuant to defendants' general policy and system of oppression and tyranny in that regard." I am unable to find any testimony whatever which even tends to sustain these allegations, or any one of them. On the contrary, the testimony of both of the plaintiffs tends to show that the whole controversy arose out of a dispute between the parties as to the amount the plaintiff J. C. Walters was owing the company, and whether the goods taken were to stand as security for any amount that might be due; and, so far as I can perceive, there was not the slightest evidence that the defendants acted either maliciously or oppressively, or were actuated with any design to force the plaintiffs to remain in their employ. For these reasons, thus briefly indicated, I am compelled to dissent.

(53 S. C. 126)

SATCHER et al. v. GRICE et al.

(Supreme Court of South Carolina. Sept. 3, 1898.)

ADVERSE POSSESSION—PRESUMPTION—DISABILITY OF OWNER—ACCRUAL OF CAUSE OF ACTION—WILLS—TITLE OF DEVISEE.

1. In an action for possession of land which has been held by a stranger for more than 20 years, where there is no evidence that his possession was permissive, or in subordination to plaintiff's rights, it is presumed to have been adverse.

2. Under Code Civ. Proc. § 108, providing that, to prevent or arrest the running of the statute of limitations, a person entitled to commence an action for lands must show a disability "at the time such title shall first descend or accrue," the fact that plaintiff is a minor when the action is commenced does not arrest the statute, where it has already commenced to run against the one under whom the minor claims.

3. While there is no statute limiting the time for admitting a will to probate, and while Rev.

St. 1893, § 2006, provides that no devise shall be admitted as evidence until after probate of the will, yet the title of a devisee vests immediately on testator's death, and hence it is from that time that the statute of limitations commences to run against his right of action to recover the land.

Appeal from common pleas circuit court of Edgefield county.

Action by Amos W. Satcher and others against Lucretia Grice and others. From a judgment of nonsuit, plaintiffs appeal. Affirmed.

Croft & Tillman, for appellants. Sheppard Bros., for respondents.

JONES, J. This is an action to recover the possession of land, and the appeal is from a judgment of nonsuit based on the ground that plaintiffs' action is barred by the statute of limitations. The plaintiffs claimed title to the land in dispute under the will of their grandfather, Amos W. Satcher, Sr., who died in 1842, seized and possessed of the said land. The will was dated January 18, 1842, but was not probated until in May, 1896, a few days before the commencement of this action. The second clause of the will devised the land to his daughters, Lizzie, Cherry, and Nancy, and the third clause devised the same land to them, "to hold jointly as long as they live, and, should either die without issue, their part to go to the other, and at their death to their brothers and sisters, and to their issues of their bodies." Lizzie and Nancy died previous to 1860, without issue. Cherry married Eldred S. Grice, and died, without issue, in 1871, in possession of the land. Eldred S. Grice remained in possession until his death, in 1896. Some time after the death of his first wife, Cherry, Eldred S. Grice married the defendant Lucretia Grice, who, with her son and co-defendant, have been in possession since his death. The plaintiffs are the children or issue of Ira H. Satcher, Henry Satcher, and Lois Watson, who were children of the testator. These brothers and sisters of Cherry were living at the time of her death, in 1871. Under this will Cherry took a life estate in the land, and at her death the brothers and sisters named took a fee conditional, the words "and to their issues of their bodies" being words of inheritance, and not of purchase. The possession of Eldred S. Grice, a stranger to the will, having begun in 1871, and having continued for more than 20 years previous to his death, without any evidence that it was permissive or in subordination to rights of others under the will, is presumed to have been adverse. The statute of limitations, being 20 years at the time of the death of the life tenant, Cherry, commenced to run against the tenants in fee conditional, all of whom were sui juris, in 1871, whereas the action was not commenced until 1896. It is contended that one of the plaintiffs was a minor when the action was commenced, and that this fact saves the statute. The minor in question was born June 14, 1875, and the stat-

ute had commenced to run against her father, Ira Satcher, under whom she must claim, and could not be arrested by such disability. *Shubrich v. Adams*, 20 S. C. 52.

It is further argued that the statute did not commence to run against plaintiffs until the probate of the will, in 1896, at which time it is alleged the right of action accrued. It is true that there is no statute in this state limiting the time during which a will may be admitted to probate, and it is true that section 2006, Rev. St. 1893, provides that "no devise of real estate shall be admitted as evidence in any case until after probate," etc.; but these facts cannot in any way control the operation of the statute of limitations in reference to actions to recover the possession of land. The effect of the probate of a will is to establish the fact that the will has been according to the form prescribed by statute, or, in other words, to ascertain the original validity of the will. *Burkett v. Whittemore*, 36 S. C. 433, 15 S. E. 616; 19 Am. & Eng. Enc. Law, 181. Since the fee cannot be in abeyance, a devisee of land takes under the will directly from the testator, immediately on his death. *Crossland v. Murdock*, 4 McCord, 217; 19 Am. & Eng. Enc. Law, 181. Such title, therefore, vests on the death of the testator, and not at the probate of the will. The probate, whenever it occurs, relates back to the death of the testator. The devisee's cause of action against a trespasser on the devised land accrues at the time of the trespass. To prevent or arrest the running of the statute, the person entitled to commence an action to recover land must show a disability,—as infancy "at the time such title shall first descend or accrue." Code Civ. Proc. § 108. In this case, as shown, the right of action accrued, on the death of the life tenant, in 1871, to the tenants in fee conditional, the parents of the plaintiffs, then under no disability. This conclusion renders it unnecessary to consider the other grounds upon which the motion for nonsuit was based. The judgment of the circuit court is affirmed.

(96 Va. 277)

ARTTRIP v. RASNAKE et al.

(Supreme Court of Appeals of Virginia. July 11, 1898.)

DEEDS—MENTAL INCAPACITY—EVIDENCE—PARTNERSHIP—MORTGAGES—LIEN—FORECLOSURE—SALE.

1. In a suit to foreclose a mortgage, wherein defendant alleged want of capacity to execute the instrument, evidence merely that she was ill seven or eight months before the mortgage was made, and acted queerly at times not specified, did not show a general derangement, shifting the burden of proof on complainant to show her legal capacity to contract when the deed was executed.

2. Testimony of persons present at the factum of a deed, as to the mental condition of one of the contracting parties, is of more weight than the opinions of witnesses based on the erratic conduct of such party.

3. Partnership relation is precluded where a party avers that he had no part or parcel in the profits of the business, and acted only as salesman and servant.

4. To decree a sale of land under a mortgage wherein parties contract for a sale, without first having a reference to a commissioner to report liens, where no question of priority of liens is raised, is not erroneous.

5. A mortgage remains a lien until the debt it was given to secure is satisfied, and is not affected by a change in the evidence of indebtedness.

Appeal from circuit court, Buchanan county.

Separate bills by J. S. Rasnake & Son against Floyd Artrip and Alice Artrip, by M. T. Browning against Floyd Artrip, and by Alice Artrip against Floyd Artrip. The causes were heard together, and a decree was rendered, from which Alice Artrip appeals. Affirmed.

Wm. E. Burns, for appellant. Finney & Stinson, S. W. Williams, and R. Walter Dotson, for appellees.

CARDWELL, J. This is an appeal by Alice Artrip to a decree of the circuit court of Buchanan county, rendered October 3, 1896, in the following named causes, heard together: J. H. Rasnake & Son against Floyd Artrip and Alice Artrip. M. T. Browning against Floyd Artrip, and Alice Artrip against Floyd Artrip.

In the first-named cause, the bill, filed in August, 1895, alleges that Floyd Artrip and Alice, his wife, are indebted to the complainants for the purchase price of a stock of goods and merchandise sold by complainants to the defendants, to the amount of \$1,438.79, for which amount Floyd and Alice Artrip executed their joint bonds,—one for \$280, payable in 4 months, and three for \$384.79, payable, respectively, at 8, 12, and 18 months, after their date,—and secured their payment by mortgage dated March 2, 1893, to complainants, J. H. Rasnake & Son, conveying a tract of 180 acres of land, another of 50 acres, and another of 64 acres, all situate in Buchanan county, and all the real estate owned by the defendants; that the mortgage was duly executed and delivered by defendants, Floyd Artrip and wife, to complainants, but was never put to record in the clerk's office of Buchanan county court, because complainants had implicit confidence in the honesty and integrity of Floyd Artrip, and at that time also in Alice Artrip, and therefore did not go to the expense and trouble of recording same; that Floyd Artrip paid the \$280 bond in full, and July 16, 1894, paid a large part of the second-named bond of \$384.79, and on that date he and his wife, Alice, executed their joint bond to complainants, payable one day after date, for \$157, the balance due on this bond, and upon the bond of \$157 Floyd Artrip made a number of payments, the date and amount of each payments being given; and that on the second bond for \$384.79 Floyd Artrip had paid \$175.

It is further alleged that complainants had caused an attachment in this suit to be issued and levied upon certain lands belonging to Alice Artrip, and that the rents and profits of the lands for five years will not pay the debt of complainants and "keep down the

interest on the same." The prayer of the bill is that a sale of the land be made to pay complainants' debts, etc.

The bill was taken for confessed as to Floyd Artrip, but Alice Artrip filed her demurrer and answer thereto, and in her answer says that she was incapable of transacting any business at the time the mortgage is said to have been executed. That the goods were sold to Floyd Artrip, who alone made the purchase, and that they were delivered to him. She denies any participation in the negotiations for the stock of goods, and avers that Floyd Artrip, her husband, had no defense to make to the suit; his object being to have the lands of respondent sold to satisfy his debt. That the 180-acre tract of land in the bill mentioned belongs to her, and is a part of a 450-acre tract that was deeded to her and her husband, Floyd Artrip, jointly in exchange of lands that belonged to her. That therefore the lands belonged to respondent, and Floyd Artrip had no interest in them. She further avers that complainants had knowledge of this fact at the time her signature was procured to the papers creating the debt, and that no effort was made to make the debt out of the personal property of Floyd Artrip; asks that the mortgage be annulled as to her; but avers that the lands will rent for enough in five years to pay the debts, if the court should be of opinion that her land is bound for the debt alleged in the bill.

In the second of the causes named above, M. T. Browning's bill, filed January, 1896, alleges that he obtained a judgment before a justice of the peace for \$25, with interest from the 26th day of July, 1895, until paid, and 80 cents costs, against Floyd Artrip; that the same had been duly docketed in the clerk's office of Buchanan county, and is a lien upon the lands owned by Floyd Artrip in Buchanan county, containing — acres; that there are other judgments against him, and the lands will not rent for enough in five years to pay these judgments. An account of liens and their priorities was asked for, ordered, and made, as Floyd Artrip made no defense to this suit.

In the third-named suit of Alice Artrip against Floyd Artrip, instituted in August, 1896, complainant alleges that she was induced by the defendant Floyd Artrip to exchange certain lands she owned in Russell county, Va., for a certain 450-acre tract in Buchanan county, owned by one J. C. Artrip; that J. C. Artrip gave Floyd Artrip \$360 to boot or difference in the exchange of the two tracts, and that a deed was made to the complainant and defendant jointly by J. C. Artrip for the 450-acre tract; that Floyd Artrip had no interest in her Russell county lands, and should not have been mentioned in the deed for the Buchanan county land as one of the grantees, but that he controlled the whole matter, and had the deed made as he desired; that he took the \$360, and used it; that at the date of the

deed, September 10, 1885, complainant was an infant, and that while yet an infant the defendant induced her to join in conveyances with him for parts of the 450-acre tract, and, after he had disposed of the timber, brought suit against her in the circuit court of Buchanan county, and obtained a decree at the May term, 1896, granting him a divorce a vinculo matrimonii; that since then he has occupied the remainder of the 450-acre tract, viz. about 180 acres, collecting the rents and receiving the benefits therefrom, etc. She prays that the defendant be compelled to convey this 180-acre tract of land to her, account to her for the \$360, and for the rents, issues, and profits of the land for the past five years, etc.; but that, if she is not entitled to this relief, then partition of the land be had between her and the defendant.

This bill the defendant Floyd Artrip answered, and, after stating that he had no defense to make to the other two suits, that the claims were just, etc., he admits as true the allegations of the bill that complainant owned the Russell county land exchanged for the Buchanan county land, but denies the other allegations of the bill generally.

Numerous depositions were taken in the first-named cause, and upon the hearing of the three causes together, on the pleadings therein, respectively, the depositions and affidavits therein, and the report of the liens against Floyd Artrip made in the second-named cause, the court confirmed the report of liens, and, ascertaining in its decree the priority and amount of the lien of complainants, J. H. Rasnake & Son, asserted in the first-named suit, decreed that the lands conveyed in the mortgage held by J. H. Rasnake & Son, with the exception of the 64-acre tract, or enough thereof, be sold by a commissioner of the court appointed for the purpose, to pay off and discharge the indebtedness shown by the decree.

The grounds of error assigned in the petition for this appeal are: (1) "The proof clearly shows that Alice Artrip was not competent to make a contract at the time Floyd and said Alice made and signed the trust deed referred to." And (2) "It was error in the court to decree a sale of the lands of Alice Artrip."

No attempt was made by appellant to sustain by proof her defense set up in her answer to the bill of J. H. Rasnake & Son, except on the issue of insanity. She had never been adjudged a lunatic; and, while there is some evidence that she was ill seven or eight months before the mortgage to J. H. Rasnake & Son was executed, and acted "queerly or strangely" at times, without saying when, it wholly fails to show a general derangement, whereby the burden was shifted to J. H. Rasnake & Son to show her legal capacity to contract when the mortgage was executed and delivered to them, if it shows at any time that she was incapable of contracting the debt. 1 Greenl. Ev. § 81; 2 Greenl. Ev. p. 336, § 371;

Fishburne v. Ferguson's Heirs, 84 Va. 107, 108, 4 S. E. 575; 2 Minor, Inst. p. 644.

On the other hand, it is not only shown that she made no sort of objection to signing the bonds or mortgage, but urged her husband to make the purchase of the stock of goods, and 16 months afterwards united in the bond given for the balance due on one of the bonds secured by the mortgage. One of the five persons present when the bonds and mortgage were executed, introduced as a witness for appellant, says that her mind was in its usual condition when she signed these papers, that witness had no impression at the time of her mind being affected, and that she did not see anything that indicated to witness that appellant was not right. The witness also says that she was employed at the house of appellant when the bonds and mortgage were signed, was there about two weeks, and during the time saw appellant often in the store waiting on people, trading, and doing business, and that she paid witness for her services in goods out of the store, making the calculation herself of what was due witness.

The other four persons present when the bonds and mortgage were signed and delivered to appellees all testify that appellant had mental capacity to contract and do important business at that time. One of them, who is wholly disinterested, and witnessed the execution of the "deed of trust," says that appellant was of sound mind; that at the time of, just before, and after, these transactions she stayed in the store, sold goods, acted as general clerk; that witness had traded with her right much, and she could calculate, keep accounts, change money, and do the general business of a clerk.

"Evidence of this character—those present at the factum of the deed—has always been held by the courts to be entitled to far more weight and importance than the opinion of witnesses based upon the erratic conduct and eccentricities of the party of whom they speak." *Beverly v. Walden*, 20 Grat. 159; *Mercer v. Kelso*, 4 Grat. 106.

Had the proof shown a general derangement of appellant's mind, thereby shifting the burden to appellees to show a lucid interval at the time of the factum, their proof, uncontradicted, as it is, clearly and conclusively proves her mental capacity to contract at the time the bonds and deed of trust or mortgage were executed.

Under the second assignment of error, it is contended that appellant and her husband, Floyd Artrip, were engaged as partners in the mercantile business, and, under section 2287 of the Code, she had no power or authority to make the contract with appellees, binding her separate estate for the debt due them for the stock of goods; and that, if they are not treated as partners, then the wife is surety for the husband, and should have been so treated, and her rights as surety respected, her lands should not have been decreed to be sold until

the property of the principal had been exhausted, and that, before a decree of sale could have been made, an account and report of the property owned by Floyd Artrip, the husband, was necessary, and his property sold first, etc.

The position that appellant and her husband were partners in the mercantile business is wholly untenable, in view of the positive statement in her answer to the contrary, wherein she says that she had no part or parcel in the profits of the business, and only acted as the servant and salesman of her husband at such times as his pleasure demanded.

It is not error to decree a sale of land under a mortgage or deed of trust, wherein parties contract for a sale, without first having a reference to a commissioner to report liens, where no question of priority of liens is raised by answer or otherwise.

Where there are conflicting claims to priority of payment out of the proceeds of land about to be sold to satisfy the liens upon it, the court, in order to prevent the danger of sacrificing the property by discouraging creditors from bidding, as they probably might if their right to satisfaction of their debts and the order in which they were to be paid out of the property were previously ascertained, should declare the order of payment before it decrees the sale to be made. *Iaeger v. Bousleux*, 15 Grat. 103.

There was, however, no conflict in the court below as to priority of liens upon the property of appellant embraced in the mortgage held by appellees, and no controversy as to amount due on the debt thereby secured, except as to the \$157 bond executed by Floyd Artrip and appellant for the balance due on one of the bonds secured by the mortgage, and upon which payments had been made. The contention, though it does not appear to have been made in the court below, is that it was error to include the balance due on this \$157 bond in the amount of the debt ascertained to be due and unpaid on the bonds secured by the mortgage.

A mortgage or deed of trust remains a lien until the debt it was given to secure is satisfied, and is not affected by a change of the note, or by giving a different instrument as evidence of the debt. *Stimpson v. Bishop*, 82 Va. 198; 2 Jones, Mortg. § 924.

The debt secured by the mortgage and unpaid being ascertained by the decree of the circuit court ordering a sale of the land, and no conflict as to priority of liens on the property conveyed in the mortgage appearing in the pleadings, or otherwise brought to the attention of the court, it was not error to decree a sale of the property, or so much thereof as might be necessary to pay this debt; and in doing so the court was merely executing the contract of the parties embraced in the mortgage. Under the decree, the judgment liens upon the lands of Floyd Artrip, reported by Commissioner Hibbitt, can only be satisfied

out of the proceeds arising from the sale of his lands, and, as to the equities of appellant and Floyd Artrip inter sese, we are not called upon to express any opinion, nor do we understand the decree as concluding them.

We are therefore of opinion that the decree of the circuit court should be affirmed.

(96 Va. 153)

SIMONS' ADM'R v. SOUTHERN RY. CO.
(Supreme Court of Appeals of Virginia. June 16, 1898.)

RAILROADS—SIGNALS AT CROSSINGS—COMPLIANCE WITH STATUTE—CONTRIBUTORY NEGLIGENCE—DEMURRERS TO EVIDENCE—CAUSAL CONNECTION.

1. The failure to sound the whistle of an approaching locomotive at least twice, sharply, not less than 300 yards before a highway crossing, as required by Acts Assem. 1893-94, p. 327, constitutes negligence; and the fact that, 484 yards from the crossing, a loud long blast was blown, which was claimed to be a more efficient warning than the two sharp blasts, cannot be said, as a matter of law, to be a sufficient substitute for the signal required by the statute.

2. Plaintiff's intestate, while driving on a dark night, approached a railway where the highway crossed it obliquely, and where the view was obstructed by the woods until within 80 feet of the center of the track. The horse had been driven some 40 miles, and was moving slowly along the highway, while intestate was looking out for the crossing and listening for trains. *Held*, that where killed while crossing the track, without warning, intestate was not guilty of contributory negligence as a matter of law.

3. On a demurrer to the evidence, the court is required to make all the presumptions that the jury might have made had not the case been withdrawn from it.

4. A railroad company on a dark night failed to blow a whistle, as required by statute, at crossings, and ran over intestate, who was slowly driving across the track and listening for trains. *Held*, that the duty of showing a causal connection between the breach of duty and the injury, in that the evidence must tend to establish such a relation between them as, according to ordinary experience, warrants the conclusion that the injury would not have happened had not the negligence occurred, was complied with.

Error to circuit court, Lunenburg county.

Action by Simons' administrator against the Southern Railway Company. From a judgment for defendant, plaintiff brings error. Reversed.

Wm. H. Mann and G. S. Wing, for plaintiff in error. B. B. Munford, for defendant in error.

KEITH, P. About 6 o'clock on the evening of December 27, 1895, W. H. Simons and Walter and John Rutledge undertook to cross the tracks of the Southern Railway Company at a point a short distance south of Meherrin Station. They were seated in an open vehicle, drawn by one horse. Simons was driving. They had traveled during the course of the day a distance of about 40 miles. They had no particular acquaintance with the road, but knew that they were approaching the point where it crossed the railway, and were driving

cautiously and carefully, and keeping a sharp lookout. It was not raining, but no stars were visible, and the night was very dark. Just as they got upon the track a passenger train coming from the south struck the vehicle, killed Simons, broke the leg of Walter Rutledge, and John Rutledge, who occupied a seat with Simons, the driver, escaped by leaping across the track in front of the engine.

This suit was brought to recover damages for the alleged negligent killing of Simons by the defendant company.

The declaration contains three counts, only one of which will be noticed. The second count states as the cause of action that "while the said W. H. Simons, without any fault on his part, was traveling along said public road or highway, and over said railroad crossing, as he had the right to do, the Southern Railway Company carelessly and negligently failed and refused to cause the whistle on its locomotive engine to be at least twice sharply sounded, not less than three hundred yards before its locomotive reached the said highway crossing, and by reason of its said negligence, in so failing to blow, or cause to be blown, the whistle of its locomotive engine three hundred yards before reaching said crossing, as it had a right to do, the said defendant negligently, carelessly, and wrongfully caused or permitted its said engine, to which was attached a train of cars, to be violently, and with very great speed, driven against and upon the said Simons, inflicting fatal injuries, on account of which said injuries, so carelessly, negligently, and wrongfully inflicted by the said defendant on the said Simons, he, the said Simons, then and there died; to the damage of the said plaintiff \$10,000."

Upon the trial the defendant demurred to the plaintiff's evidence, and the jury rendered a verdict for \$8,500, upon which verdict the circuit court entered a judgment for the defendant, and the case is before us upon a writ of error granted by one of the judges of this court.

By an act of assembly (Acts Assem. 1893-94, p. 327) it is provided "that a bell and a steam whistle shall be placed on each locomotive engine operated on any railway in this state, and said whistle shall be at least twice sharply sounded, not less than three hundred yards before a highway crossing is reached: provided, that at street crossings within the limits of incorporated cities or towns the sounding of the whistle may be omitted, unless required by the council of any such city or town, and the company shall also be liable for all damages which shall be sustained by any person by reason of such neglect."

It is conceded that this case does not come within the exceptions named in the statute; that it was the duty of the company to sound its whistle as above prescribed; and that this duty was not performed. The negligence of the defendant company being thus established, it can only escape its consequences by showing that the damages suffered by plain-

tiff's intestate were not sustained "by reason of such neglect." The defendant in error relies upon the fact that at the whistling post, 484 yards to the south of the crossing, the station signal was sounded; that this signal, which is a loud long blast, is in all respects a better and more efficient warning of approaching trains than the two sharp blasts of the whistle required by the statute. There is a discrepancy in the statement of witnesses as to the point at which the station signal was sounded, but taking the view most favorable to the defendant in error, and conceding that the whistle was blown for Meherrin Station at the whistling post, we cannot determine, as matter of law, that it was a sufficient substitute for the signal required by statute.

As was said by Judge Buchanan in *Atlantic & D. Ry. Co. v. Reiger*, 95 Va. 418, 28 S. E. 590: "The legislature had determined where the whistle was to be sounded, and it was not for the court or the jury to determine that sounding it at some other place or in some other manner was equally as good. The question which the jury had to determine was not whether one kind of warning was as good as another, but whether, under all the circumstances of the case, although the defendant may have failed to sound the whistle in the manner required by statute, the plaintiff's injury was proximately caused by the defendant's negligence."

Granting, therefore, to the defendant, that the station signal was sounded as its counsel contends, it yet remains that upon the night in question the train of the defendant company approached the scene of the accident under the imputation of negligence resulting from a failure to obey the positive mandate of the statute law. The negligence of the defendant in error being shown, the plaintiff in error was entitled to recover, unless it shall appear that Simons was guilty of contributory negligence.

The evidence shows that on the evening in question Simons and his companions passed Meherrin Station, going south, at about 6 o'clock; that as they passed along the county road, in the direction indicated, the Southern Railway track was a short distance to their left; that about one-half mile south of the station the county road turns to the left, and crosses the railway obliquely; and that on the right of the county road there was a growth of bushes upon an embankment five or six feet higher than the level of the roadway. There is evidence tending to show that the approaching train could not have been seen from the roadway, on account of the woods, until a point was reached 30 feet from the center of the track. See testimony of Walter Davis. After passing this point, the view again becomes obstructed for a distance of 10 or 15 feet, and when within about 18 feet of the track there is a space of 6 or 8 feet, through which a train approaching from the south is again visible

when within 200 feet of the crossing. The evidence shows, as has been stated, that the night was dark; that the horse driven by the plaintiff's intestate had gone a long day's journey, and was fagged out; that Simons and his companions were moving slowly along the public highway, and looking out for the crossing, which they knew to be near at hand, and listening for an approaching train. Under these circumstances, their vehicle while crossing the track was struck by the engine, and Simons was instantly killed.

There was much discussion at the bar over minor controversies suggested by the evidence, which we do not feel called upon to decide.

We do not feel qualified to discuss the laws of acoustics, and we deem it unnecessary to add to what has been said by this court upon the subject of positive and negative testimony, but are content with the views expressed upon that subject in *Railway Co. v. Bryant*, 95 Va. 212, 28 S. E. 188.

Upon a demurrer to the evidence, the court is required to make all the presumptions in favor of the verdict that a jury might have made had not the case been withdrawn from it. *Johnson v. Railroad Co.*, 91 Va. 171, 21 S. E. 238. It is true that proof of the failure on the part of the railway company to give the signal required by statute and proof of injury to the plaintiff are not, of themselves, sufficient to support a verdict against the company. On the other hand, when it is said by courts and text-books that a causal connection must be shown between the breach of duty or act of negligence and the injury, nothing more can be meant than that the evidence must tend to establish such a relation between them as, according to ordinary experience of mankind, warrants the conclusion that the injury would not have happened had not the negligence occurred. Nor will it be denied, we apprehend, that judgment upon the demurrer should have been given for the plaintiff, if there were facts before the jury from which it might have inferred that the conceded negligence caused the injury suffered.

Applying these principles to the facts, it seems to us manifest that the jury would have been well warranted in finding a verdict against the defendant in error.

We are of opinion that the circuit court should have entered judgment for the plaintiff in error.

(96 Va. 272)

HETH v. CITY OF RADFORD.

(Supreme Court of Appeals of Virginia. July 11, 1898.)

MUNICIPAL CORPORATIONS—TAXATION—ASSESSMENT—REVIEW—DUE PROCESS OF LAW.

1. Radford City Charter, § 45 (Laws 1891-92, p. 144), providing that property shall be assessed at a valuation irrespective of the value as assessed for the purposes of state taxa-

tion, and containing no provision by which the owner may have its value, as ascertained under said charter, reviewed and corrected, violates Const. U. S. 14th Amend., as depriving the owner of his property without due process of law.

2. Code, c. 28, § 444, provides for correcting excessive assessments as made throughout the state every five years, in obedience to the constitution, by assessors specially appointed by the county and corporation courts of all counties and cities. *Held*, that the "assessor" so referred to is a different officer from the commissioner of revenue mentioned in Radford City Charter, § 45 (Laws 1891-92, p. 144), which provides for assessments for taxation, and hence an assessment made under such charter is not reviewable under section 444.

3. Where lands in a city were assessed under an invalid provision of the city charter, the proper valuation to be laid by the city levies was the valuation as ascertained by the last general state assessment.

Error to circuit court, Montgomery county.

Application by one Heth to correct a valuation under an assessment for taxation by the city of Radford. The application was denied, and petitioner brings error. Reversed.

Phlegar & Johnson, for plaintiff in error. Fulkerson, Page & Hurt, for defendant in error.

RIELY, J. This was an application to the hustings court of the city of Radford, under the authority of section 571 of the Code, to correct an assessment of levies by the city of Radford on land of the plaintiff in error for the years 1892 and 1893, which were alleged to be erroneous. The judge of that court, being so situated as to render it improper, in his opinion, to try the case, removed it to the circuit court of Montgomery county.

On the hearing of the application, the facts were agreed, from which it appears that the land of the plaintiff in error, at the last assessment of lands in the state for the purposes of taxation, made in 1890, in obedience to the requirement of the constitution, and laws enacted in pursuance thereof, was valued at \$15,450, and that taxes were assessed and paid to the state according to that valuation; but that the land for the assessment of city levies was reassessed in 1892, under the authority of the charter of the city, and raised from \$15,450 to \$29,325. The application to the court was to have the city levies for the years 1892 and 1893 abated by the difference between their amounts and what they would have been if they had been based on the general assessment of lands made in 1890. The circuit court denied the application.

The writ of error allowed by this court draws in question the validity of section 45 of the city's charter, under which the value of the land was assessed for the purpose of laying the city levies. It reads as follows:

"Sec. 45. * * * The said commissioner of the revenue, in ascertaining the value of the real property taxable in said city, shall fix the same at the actual cash value of said property at the time of assessment, irrespective of the value assessed for the purposes of state

taxation, until the next general assessment, and the first assessment not later than July first, eighteen hundred and ninety two: provided also, that a board, consisting of the commissioner of the revenue and two freeholders, to be appointed by the corporation court, whose duty it shall be to assess the real estate of the city." Laws 1891-92, p. 144.

It will be observed that the section contains no provision by which the owner of the land may have its value, as ascertained by the board of assessors, reviewed and corrected, if excessive. No provision is made for a rehearing of the matter by the board upon the complaint of the owner that the land has been valued too high, nor for an appeal to any other tribunal. Its value for the assessment of city levies is finally ascertained and established without giving the owner any opportunity to appear and contest the justice of the valuation.

Imposing taxes or levies is a taking of property. The owner is entitled to be heard before the charge is fully established against him. If he is not afforded an opportunity to be heard upon the question of the assessment of his property for taxation, the tax or levy is unlawfully exacted of him; for otherwise he is deprived of his property without due process of law, in violation of the fourteenth amendment of the constitution of the United States. *Violett v. City of Alexandria*, 92 Va. 561, 23 S. E. 909; *Davidson v. New Orleans*, 96 U. S. 97; and *Hagar v. Reclamation Dist.*, 111 U. S. 701, 4 Sup. Ct. 663.

The necessity that provision be made for notice to the owner, and that he be afforded an opportunity to be heard in regard to the assessment of his property for taxation, and the laying of taxes and levies upon it, as well as the principles which control with respect to these matters, were elaborately discussed by Judge Cardwell in the case of *Violett v. City of Alexandria*, *supra*, and need not be here repeated. It is sufficient to say that where notice to the party to be affected, and an opportunity for him to be heard, is not provided for in the law under which the assessment is made, or the taxes and levies laid, the law is unconstitutional and void, and the assessment or levy is illegal.

It was argued for the defendant in error that the general statute law afforded the owner of the land an opportunity to contest the justice of the assessment, and section 444 of the Code was relied on as providing a tribunal for correcting the assessment, if the valuation was excessive, and prescribing how and when it might be done.

The whole of chapter 23 of the Code, of which section 444 forms a part, relates wholly to the general assessment of lands and lots made throughout the state in every fifth year, in obedience to the requirement of the constitution (article 10, § 6), by assessors specially appointed by the county and corporation courts of all the counties and cities of the state

to perform this duty. By section 444 provision is made by which an owner of land, who feels aggrieved by the assessment of his lands or lots which is so made, may have the assessment reviewed and fixed by the court at what, in its opinion, is the true value of the lands or lots. Notice of the application to the court for the correction of the assessment is required to be given to the assessor and the attorney for the commonwealth. The "assessor" who is referred to in the statute is the officer, who, as the appointee of the court, made the assessment, and is a distinct officer from the commissioner of the revenue. In the case before us, the assessment was not made under the general law, but was a special assessment, made under section 45 of the charter of the city, by a board consisting of the commissioner of the revenue and two freeholders appointed by the court. Section 444 has no application to the case, and afforded the plaintiff in error no means of redress against the assessment.

No provision being afforded to contest the legality, justice, and correctness of the assessment before it became final, section 45 of the charter, under which it was made, is unconstitutional and void, and the assessment illegal and erroneous. This being our conclusion, it is unnecessary to consider the other objections made to the validity of the section.

The city levies should have been laid upon the land according to its valuation as ascertained at the general assessment in 1890.

The judgment of the circuit court must be reversed, and the case remanded, in order that the levies for 1892 and 1893 may be corrected, and reduced to what they would have been if they had been based on the valuation of the land as ascertained at the last general assessment.

CARDWELL, J., absent.

(96 Va. 201)

FRANCIS v. CLINE et al.

(Supreme Court of Appeals of Virginia. July 7, 1898.)

RESULTING TRUSTS—PARENT AND CHILD—FRAUD—CONFIDENTIAL RELATIONS.

1. Where a son holding the legal title to land in trust for his mother exchanges it, with her consent, for other lands, and takes the deed in his own name, he holds such other lands on an implied trust for the use of his mother.

2. The trust arising where a trustee exchanges the trust lands for other land with the consent of the beneficiary may be established by parol evidence.

3. A mother sued her son to establish an implied trust. The son offered, by way of compromise, to make certain conveyances to her; and on his statement that he would take no advantage, and that the papers would be used simply to stop the lawsuit, she went to a justice with him, who drew up certain conveyances and the compromise. She refused to sign the same, on the ground that she wished to read, and did not have her glasses. He agreed that she could read it before he took it to be recorded, and she finally signed it. On the

following morning he gave her the papers, but before she had time to read more than a few words he took them from her, and filed the compromise, and the suit was dismissed on his motion. *Held*, that the agreement to dismiss was procured by fraud, and not binding on the mother.

Appeal from circuit court Tazewell county.

Bill by Mrs. M. E. Francis against W. G. Cline and others to compel the conveyance of certain land to plaintiff, alleged to have been held by defendants for her use. From a decree for defendants, complainant appeals. Reversed.

Henry & Graham, for appellant. Chapman & Gillespie and S. W. Williams, for appellees.

CARDWELL, J. The appellant, Mary E. Francis, has been thrice married. Her only children are two sons, William G. and J. M. Cline, of the first marriage. Under the will of her second husband, Henry Litz, who died about 1880, she acquired property to the amount of about \$2,000; and in 1883 she married her present husband, T. L. Francis, and with her means she bought a farm in Washington county, containing 102 acres (spoken of in this record as the "Washington County Land"), and it was conveyed to her husband, T. L. Francis, in trust for her sole use and benefit. They moved upon this farm in 1884, and stocked and improved it, so that in 1891 it was generally regarded as worth \$3,000. In the early part of 1891 some contentions arose between Mrs. Francis and her husband, growing, as she says, out of an idea that he had some interest in the property, and was urging her to make a conveyance of it to him, which she declined to do, because she intended that her two sons should have it. In March, 1891, she visited her son William G. Cline, who resided in Tazewell county, and conferred with him as to how the title to the property could be gotten out of her husband, and solicited him to take charge of the matter for her. Later on he visited his mother at her home in Washington county, and an agreement was reached whereby T. L. Francis was to convey the title to the Washington county land to Mrs. Francis, and she to release to him all claim to, or interest in, a small tract of eight acres of land adjoining her own belonging to T. L. Francis, and in addition thereto he was to have a portion, at least, of the stock on her place. Accordingly, on March 16, 1891, T. L. Francis made a deed conveying the land directly to Mrs. Francis, and on the same date another deed was prepared, whereby T. L. Francis and his wife were to convey the land to William G. Cline. This deed was signed and acknowledged by Mrs. Francis only, before a justice of the peace, on March 23, 1891, but neither of these deeds were ever recorded. On his way from his mother's, after the deed of March 16, 1891, from T. L. Francis to his wife had been executed and delivered to him, W. G. Cline went to see A.

J. May, a lawyer residing in Tazewell, and stated to him that he wished to get some advice for the benefit of his mother, but did not employ May as an attorney, or pay him any fee for his services. He stated to May that his mother was in some trouble with her husband; that they had separated; that his mother owned a tract of land in Washington county; that her husband was claiming that he had an interest in it, and that she had made some arrangement with him to convey his alleged interest in the land to her; in fact, as May states, he showed him a deed from the husband to his wife for his interest in the land. The advice given by May was that, while the conveyance might be good in equity, he thought that it would be better to get Francis and his wife to convey the land to him (W. G. Cline) for an alleged valuable consideration, and the sum of \$3,000 as the consideration was suggested either by May or W. G. Cline, and that Cline execute to his mother his note for that amount, with an understanding between them that he could lift it at any time thereafter by reconveying the land to her, or by selling the land, and reinvesting the proceeds in other land for her. After this interview with May, the deed already signed and acknowledged by Mrs. Francis to W. G. Cline was presented to her husband for his signature and acknowledgment, but he declined positively to execute it, because, as he says, he did not have the same confidence in W. G. Cline that Mrs. Francis seemed to have.

On May 5, 1891, another deed was written, and was signed and acknowledged by Mrs. Francis, conveying this land to W. G. Cline; but this deed was never recorded. This deed and the one dated March 16th, signed by Mrs. Francis, named \$3,000 as the consideration for the conveyance. After this last-named deed was executed by Mrs. Francis, W. G. Cline went again to his mother's home, in Washington county, advised his mother, as he admits, to separate from her husband, and obtained the consent of her husband to sign and acknowledge a deed with Mrs. Francis conveying the Washington county land to him; and these parties at once went to the law office of Mr. Humes, who prepared a deed conveying the land from Francis in his own right and as trustee for Mrs. Francis and Mrs. Francis to W. G. Cline. This deed was duly executed on May 12, 1891, acknowledged and recorded on the 13th of May of the same year; but, as Humes died shortly thereafter, what transpired in his office between these parties is not known, except from their own statements. Mrs. Francis remained on the Washington county land until the fall of 1891, when she went to the home of her son W. G. Cline, in Tazewell county, and remained for some months.

In April, 1892, by an agreement between her and W. G. Cline, the Washington county land was exchanged for 92 acres of land in Tazewell county, near W. G. Cline's land,

spoken of in this record as the "Spratt Land" or "Gravitt Creek Land." The deed from C. O. Spratt and wife, conveying this 92 acres of land to W. G. Cline, bears date April 12, 1892, but was not recorded until September 14, 1892. Shortly after this exchange of land, J. M. Cline took possession of the Spratt land, and Mrs. Francis, on learning that it was claimed by W. G. and J. M. Cline that she did not have any interest in the land, caused to be served on J. M. Cline, in December, 1892, a written notice that she would expect him to deliver possession of this land to her on the 1st of January, 1893, or pay her rent for it. J. M. Cline disregarded this notice, and remained in possession of the land, and refused to pay Mrs. Francis rent, and in June following Mrs. Francis instituted her suit in the circuit court of Tazewell county against W. G. and J. M. Cline, in which she recites the execution of the deed of May 12, 1891, by herself and husband to W. G. Cline, the exchange of the Washington county land for the Spratt land, and says that the Spratt land was conveyed to W. G. Cline upon the distinct understanding that he was to hold it upon the same trust that he had held the Washington county land; that the Washington county land was conveyed to W. G. Cline upon the condition and stipulation that he would hold the same in trust for her, and reconvey it to her at her request, or pay her the sum of \$3,000 when the land was sold; that at the time of the execution of the deed W. G. Cline executed and delivered to her a bond or note for the sum of \$3,000, in which this agreement was set forth, as she then remembered; and that this bond or note was left in the possession of J. M. Cline, her other son. She then says that she had requested W. G. Cline to convey to her the Spratt land, and had given him written notice to deliver her possession of the same, but that he refused to convey it to her, or deliver to her possession thereof.

The prayer of her bill is that J. M. Cline be required to produce and surrender to the court, or account for, the bond which he had hitherto refused to deliver to her, and that W. G. Cline be required to convey the Spratt land to her, etc.

To this bill W. G. and J. M. Cline filed their joint answer, in which they deny that W. G. Cline was to hold the Washington county land or the Spratt land in trust for the complainant, or that W. G. Cline executed the \$3,000 note to her, and then say, by way of explanation of the whole transaction, that the complainant was indebted to W. G. Cline in the sum of \$1,034, with interest since the latter part of the year 1880, being money which he advanced her just after the death of her second husband; that in the conversation between respondent W. G. Cline and his mother with reference to the trouble between her and her last husband, she told respondent that her husband had been endeavoring to induce her to convey

the land to him, but that she did not intend to do it, as she intended her land for her sons, but that she first wanted respondent W. G. Cline to be paid what she owed him out of this land; that complainant finally left her home, and came to the home of W. G. Cline, and said that she had left her husband, and would not live with him any more, and wanted W. G. Cline to have a suit brought for a divorce and a division of the property; that respondent W. G. Cline again advised her to avoid a suit, and told her that she had better agree with her husband upon a division of the property; that she then told W. G. Cline to go, and make a settlement with T. L. Francis; that she wanted the land secured, and that she intended it to go to W. G. Cline, but wanted him to provide something for J. M. Cline; that W. G. Cline then went to see Francis again, and with the advice of respondent W. G. Cline complainant and her husband agreed to live separate and apart, and make certain division of the property, in which T. L. Francis was to convey any interest which he had in the Washington county land to her, respondent W. G. Cline advising that in making the compromise Francis should convey it to complainant, thinking that he would more readily convey to her than to W. G. Cline; but W. G. Cline, having some doubts as to the validity of such a transaction, decided to confer with some lawyer about the matter, and was advised that such a deed would not be good, and that his mother and Francis had better unite in a deed conveying the property to himself or some other person in trust for his mother; that in the meantime the complainant was living at the house of W. G. Cline, and he had stated to her that the deed from Francis to her would not be sufficient, and also the further advice of counsel as to how it should be deeded. Thereupon the complainant declined to have the land conveyed to any one in trust for her, but wanted him to take the land as his own on the condition that he would assist his brother, J. M. Cline, who had been unfortunate in business, and was in financial distress. In fact, says this respondent (W. G. Cline), she stated that she wanted respondent to sell the property in Washington county, and invest the proceeds of sale in property in Tazewell county. They further say that upon this arrangement that W. G. Cline executed an obligation binding himself to make provision for his brother, J. M. Cline. The land in Washington county was conveyed to W. G. Cline, and his obligation was delivered to J. M. Cline. That after this the Washington county land, at the instance of the complainant and J. M. Cline, was exchanged for the Spratt land, in Tazewell county, which was also conveyed to W. G. Cline, but possession thereof turned over to J. M. Cline, and that it was agreed by all the parties that whenever J. M. Cline should pay W. G. Cline the sum of \$1,500 the Spratt

land was to be conveyed to him, and that pursuant to this agreement J. M. Cline had already paid the sum of \$1,085 to W. G. Cline. They further deny that complainant paid T. L. Francis \$1,000 as stated in her bill, and, after averring that respondents are, and were at all times, ready to provide liberally for their mother, and that their homes were open to her at all times, they conclude with the statement that the complainant was at the home of W. G. Cline, but without cause had left it, and respondents believe that her leaving was due to the influence of T. L. Francis, who induced her to leave, and bring this suit, with the hope that by making such a breach he might acquire the title to the land himself.

Depositions were taken by the complainant in support of her bill, including the deposition of May, the lawyer, whose advice had been obtained by W. G. Cline as to how the conveyance of the title to the Washington county land from T. L. Francis should be made.

On November 3, 1893, Mrs. Francis signed and acknowledged before J. W. Gillespie, a justice of the peace, a paper dated November 1, 1893, setting forth the pendency of her suit against W. G. and J. M. Cline; that the defendants had made full satisfaction to her of all demands made by her in her suit, and that, therefore, she thereby granted and released unto W. G. and J. M. Cline all the right, title, and interest in the land asserted by her, and also released them from all claims and demands in the suit, and acknowledged that she had received full consideration for making the release, and agreed to have her suit dismissed without any further proceedings.

At the same time—November 3, 1893—the following papers were executed and acknowledged by William G. and J. M. Cline before J. W. Gillespie, a justice of the peace in Tazewell county:

Exhibit Z, with cross bill: "This deed made and entered into on this November 3rd in the year 1893, between W. G. Cline, party of the first part, and Mrs. M. E. Francis, party of the second part, all of the county of Tazewell and state of Virginia, witnesseth that for and in consideration of the love and respect that W. G. Cline, party of the first part, has for M. E. Francis, his mother, party of the second part, the said W. G. Cline party of the first part, dos this day deeds and conveys one half in-trust of a certain tract, piece or parcel of land situated in Tazewell county and on the waters of Lyncon Share Branch none as the Harlis place, and for further references refers to deed from Mrs. Kroll to W. G. Cline; this deed is to take effect that in the event W. G. Cline, party of the first part, dies before M. E. Francis, party of the second part, a further consideration in this deed is that the said W. G. Cline reserves a right to sell or dispose of this land and reinvest its proceeds and said M. E. Francis is to hold and have the same in trust as she holds in this deed when reinvested in

other lands; the party of the first part doth covenant to and with the party of the second part that they have the right to convey to there grantee, and that they warrant generally the title to the lands hereby conveyed. Witness the following signature and seal, the year and date first above written. W. G. Cline. [Seal.]”

Exhibit Y, with cross bill: “This agreement and contract made and entered into on this November 3th, in the year 1893, between W. G. Cline, James M. Cline and Mrs. M. E. Francis, there mother, all of the county of Tazewell and state of Virginia, witnesseth, that the said W. G. and J. M. Cline dos this day agree that in the event the said W. G. Cline deeds to the said J. M. Cline the land on which the said J. M. Cline now lives, the said J. M. Cline agrees and binds himself to deed Mrs. M. E. Francis one-half intrust in said land in the event the said J. M. Cline dies before she dos and if this land is sold she is to have the same right in any other land this money is reinvested in. Witness our hands and seals this the year and date above written. W. G. Cline. [Seal.] J. M. Cline. [Seal.]”

At the April term, 1894, of the circuit court of Tazewell county a decree was made in the cause, setting forth that, it appearing from an agreement before a justice of the peace, filed with the papers in the cause, that the parties had settled and adjusted the matters involved therein, it is therefore ordered that the case be dropped from the docket. This decree, it appears, was entered as a matter of course, and was not assented to by complainant or her counsel, or the presence of either noted, so far as the decree discloses. To the same term of the circuit court of Tazewell county, N. Frank & Co. and others, creditors of J. M. Cline, filed their bill to subject an interest of J. M. Cline in the Spratt land to the payment of their judgments. To this bill W. G. and J. M. Cline and Mrs. Francis were made parties defendant.

At the August term of the court Mrs. Francis was permitted to file her cross bill against W. G. Cline and J. M. Cline in this suit of Frank et al., out of which this appeal to this court arises.

The appellant repeats in her cross bill the allegations of her original bill, and avers that when she separated from her husband her two sons offered her a home, and encouraged the separation; that the exchange for the Spratt land in the vicinity of the residence of her son W. G. Cline had not long been made before he assumed the control of the land, declaring his ownership of it; and his family, at least, made it so disagreeable to complainant that she had to leave his house, and was compelled to go from “pillar to post,” homeless, friendless, and alone, in feeble health, and illy able to care and provide for herself; that she was in a most deplorable state of mind, and in this condition she was approached for a compromise; that her counsel had set another

day to take depositions in her pending suit, and complainant came by her son's (W. G. Cline) late in October, 1893, on the way to the office of her counsel, to see to some household effects she had at her son's, when he began persistently to importune her for an adjustment of the suit; and as she was in no condition to resist anything, so importunate were her sons, it was finally agreed that there should be conveyed to complainant in fee simple an undivided half of the Spratt land, and an undivided half of another tract that W. G. Cline had purchased, known as the “Harless Land,” and her sons were to give her food and clothing, and afford her such maintenance as would keep her comfortable the balance of her life, all of which was positively agreed to by her two sons, but she wished to see her counsel who was conducting her suit, who lived four or five miles from her sons, before the agreement was consummated, and started there on foot; that W. G. Cline, who preceded her to Tazewell court house, returning, met her on the road, and, as usual, overcame her, and persuaded her to return to his house; that the walk made complainant sick, and as soon as she was able to get about she was taken by her son W. G. Cline to the house of J. W. Gillespie, a justice of the peace, and when they arrived there her son W. G. Cline requested her to sign and acknowledge a paper, which he told her was necessary before the suit could be ended, complainant all the time protesting that she should see her counsel, and her sons urging her to sign this paper; that she did not read the paper, not having her spectacles with her, nor was it read to her, but her sons assured her that this and other papers which Squire Gillespie would write were just as they had theretofore agreed; that this paper (the agreement for the dismissal of the pending suit) had already been prepared by counsel of her son W. G. Cline, and after a private talk between her son and Squire Gillespie the two papers Exhibits Y and Z (appearing in full above) were written by Gillespie, signed and acknowledged by the parties, but, although complainant wanted to take possession of the paper compromising the suit, her son W. G. Cline took it, and never would let her have it, and hastily had it recorded. Complainant protests that she never read these papers at the time they were signed at Gillespie's house, nor were they read to her when written, nor for some time after; that they do not contain the contract and agreement she made with her sons as a compromise of her pending suit; that, as the paper executed as a compromise of her suit was obtained by fraud, it is null and void; and that the action of W. G. and J. M. Cline on the 3d day of November, 1893, was a willful and deliberate fraud, for she was then and there induced to surrender land conceded to be worth \$3,000 for nothing, as the papers Y and Z, executed to her

by her two sons, amount to absolutely nothing.

The prayer of her cross bill is that the transaction of November 3, 1893, be declared null and void; that she be remitted to her rights to the Spratt land, conveyed by Spratt and wife to W. G. Cline, April 12, 1892, and that W. G. Cline be compelled to convey the Spratt land to complainant, etc.

W. G. and J. M. Cline made a joint answer to the cross bill, referring to their answer to complainant's original bill, and ask that it be treated as a part of their answer then made, and, after denying the fraud and unfair dealing alleged by complainant, say that they had at all times recognized their liability to support complainant, and were willing to execute to her any writing which would secure to her a support out of their respective estates, provided she should outlive them, but were never willing and never agreed to vest in her any present estate, for the reason that at times she was very much under the influence and control of her husband, etc., and that respondents believed that, if they vested in complainant a present estate, her husband would in some way succeed in getting control of it, and leave her to be supported by respondents. They then admit that they told their mother she could make her home with them as long as she lived, provided they outlived her, and that they would take the best care of her, and that, if she should survive them, they would make provision for her during her life; that they did not execute any writing, and complainant did not request any, showing that she was to make her home with them, and they were to take care of her, for the reason that she well knew that respondents never had and never would deny her this right, and that whenever she could not live with her husband their homes were open to her; but the writings, however, in regard to the Harless and Spratt lands were executed, so that she might have a sufficient amount for a support, provided she survived them.

The first question for our consideration is, was the Washington county land, by the deed of May 12, 1891, and a contemporaneous agreement between the parties, conveyed to W. G. Cline as a trust for the benefit of his mother, the appellant?

W. G. Cline admits that he was asked by his mother to take charge of her business, and it is clearly proved that W. G. Cline was confided in to do for her what was necessary to settle the differences between herself and her husband, and to take the legal title to the Washington county land out of her husband, so that he would have no control over it, and have no pretext for claiming an interest in it, and that it was not at first contemplated that the land would be deeded to W. G. Cline, nor that more was then intended than for the husband to convey the land directly to his wife, the appellant, though she may have frequent-

ly said that she intended her sons should have her lands,—a statement that was quite natural under the circumstances. To make sure, however, that the purpose of his mother, then in view, would be accomplished, W. G. Cline takes the deed from her husband to her of March 16, 1891, to A. J. May, a lawyer, who had theretofore been her legal adviser, and told him that his mother was in some trouble with her husband, that they had separated, that his mother owned a tract of land in Washington county, that her husband was claiming that he had an interest in it, and that his mother had made some arrangement with her husband to convey his alleged interest in the land to her; whereupon May told him that, while the conveyance of March 16, 1891, might be good in equity, he thought it would be better to get Mr. Francis and his (W. G. Cline's) mother to convey the land to him for an alleged valuable consideration. The sum of \$3,000 was suggested as the consideration, and he execute to his mother his note for that amount, with an understanding between them that he could lift his note at any time thereafter by reconveying the land to her, or by selling the land, and reinvesting the proceeds in other land for her. This much, at least, W. G. Cline admits, and May says, in addition, that some months after this conference W. G. Cline told witness that Francis and wife had conveyed the land to him, and that he had given his mother the note for \$3,000. May, however, says on cross-examination that he is not positive that W. G. Cline told him in the subsequent conversation that he had given his note to his mother for \$3,000, but he is positive that he told witness that the matter had been arranged, and made the impression upon witness that he had executed the note. The positive statement by appellant is that W. G. Cline did execute and deliver the note to her, and she turned it over at once to her son J. M. Cline, to be held as collateral for her note from him for \$500 borrowed from him when she paid for the Washington county land; and in this she is corroborated by her husband, who not only states positively that the note was given to her, and turned over to J. M. Cline, but states the contents of the note, as follows: "I promise to pay my mother, M. E. Francis, three thousand dollars for her land in Washington county when I sell or otherwise dispose of it;" and witness adds that "homestead was waived in it." She is also corroborated as to this \$3,000 note by J. W. Gillespie, J. P. Of course, W. G. and J. M. Cline deny that such a note was given, but J. M. Cline testifies that the morning after the deed of the 12th of May, 1891, was executed, his mother made W. G. Cline sign a paper agreeing to account to him (J. M. Cline) for half of the Washington county land when sold, and turned this paper over to him; while W. G. Cline says that a few days after the 12th of May, 1891, or perhaps the next day, his mother said to him that she was afraid that J. M. Cline

would think hard of her for conveying the land to him (W. G. Cline), and said "she wanted me to do right by him" (Jim), "and I told her that she had called my attention to that several times, and to tell him to come into the house, and I would give him an instrument of writing that he could make me do right; and I told her if I would take out what she owed me, with interest, there wouldn't be anything for Jim, but I intended to give him half of it, and gave him an instrument of writing to that effect, * * * and the paper stated that I was to account to Jim for one-half of whatever I could realize out of the land."

When asked to produce this paper, both W. G. and J. M. Cline say that after the Washington county land was exchanged for the Spratt land, and the latter came into possession of the Spratt land, the paper was turned over to W. G. Cline, and by him destroyed, although J. M. Cline had nothing then to show that he had an interest in the Spratt land. When asked if he claimed that he purchased the Washington county land from his mother, or that she gave it to him, W. G. Cline, after some hesitation, says: "She gave it to me, but at the same time she admitted that she owed me the money I have stated in my examination in chief."

He had before stated that his mother owed him \$1,024 for money she got for cattle he had sold as far back as 1880, and in an effort to refute the statements of his mother that she turned the \$3,000 note over to J. M. Cline as collateral security for her bond of \$500 held by him, he (W. G. Cline) had also stated that this \$500 bond had been assigned to and owed by him some time before the Washington county land was conveyed to him, whereby, according to his showing, his mother, on the 12th day of May, 1891, not only owed him \$1,024, with interest from 1880, but this \$500 bond, given in 1884, making a total of principal due him \$1,524; yet he then gives J. M. Cline a paper obligating himself to account to him for one-half of what might be realized from the Washington county land, rated at \$3,000.

In addition to the denial of his mother that she owed her son W. G. Cline anything, and the production by her of three unpaid notes or bonds of his to her,—one dated November 1, 1888, for \$85, for a wagon, horse, and cow; another, dated November 1, 1893, for \$45; and the other for \$58, dated — day of February, 1893,—the statement he makes as to her indebtedness to him and the paper executed and delivered by him to J. M. Cline does not bear upon its face the impress of truth or reason; and, moreover, it is shown that the appellant paid her son J. M. Cline a part of the \$500 bond—about half of it—after the deed of May 12, 1891, had been made, and that W. G. Cline, in 1882, after his mother became indebted to him, as he says, to the amount of \$1,024 in 1880, bought his mother's dower interest in his father's

land in Bland county, and paid her \$600 in cash for it. After admitting that the notes produced by his mother were all in his own handwriting, W. G. Cline undertakes to explain them, and as to the first claimed that he did not owe it, and his mother had never claimed payment; as to the \$45 note he says that his signature in pencil had been crossed out with a pen, and his signature written under by some one else, although his mother had stated that this was done by him when she called his attention to the fact that his signature in pencil was becoming effaced, and wanted him to give her a new note; and as to the \$58 note, dated February, 1893, he had no recollection whatever.

To explain why the appellant wanted to separate from her husband, make a deed for her land to W. G. Cline, and live with her sons, W. G. Cline and his wife and J. M. Cline testify that she was not only jealous by reason of her husband's immorality, but was afraid of him; and other witnesses tell the same story as to what the appellant had said about being afraid of her husband; that he had maltreated her, and so on, though not a witness is adduced to testify to any ill treatment by her husband, or that any of his nearest neighbors had ever heard of the alleged misconduct on his part causing his wife to become jealous. The statements of W. G. and J. M. Cline that appellant told them of cruelty to her on the part of her husband; that he slept with a razor under his pillow, or carried a pistol in his boot; had tried to smother her once or twice with a pillow or the bedclothes; had thrown a club at her, and caused her to fall over a fence, and sustain serious injury; and was leading an improper life with a woman in the neighborhood,—especially that of J. M. Cline in which he says that while he and Francis were walking out on the land once, "I was deviling him about Hop Webb's wife. He (Francis) said if it hadn't been for old Franklin telling Ma a lot of tales about Hop's wife, she would have made him a deed for the land, and that there would never have been any trouble between them,"—are not only incredible upon their face, but are in conflict with the statement of appellant that the only trouble ever existing between her and her husband grew out of some contention made by him that he had an interest in her land; and it would be difficult to believe that her two sons would have been told these things, and not only made no effort to protect their mother, but permitted her to remain with her husband nearly eight months after the deed of May 12, 1891, had been made; and the statements put into the mouth of the mother by these witnesses are wholly inconsistent with the facts shown that Francis was almost an invalid from rheumatism and nervous troubles when his wife was induced by her sons to leave him, and the treatment received by her at the hands of her husband,

who has, after she had been turned out upon the world, stripped of her property by her sons, taken her to his home, and provided for her. We might at great length review the testimony of the witnesses for appellees who have testified to declarations made by appellant that she gave her land to her sons, but it is sufficient to say that their statements, if not wholly false, vary, as is usually the case when witnesses are trying to tell the same story which is inconsistent with the truth, and for the further reason that it is by no means impossible that some of these witnesses, intending perhaps to state the truth, have distorted expressions that she intended her sons to have the land, or to give it to them, and not her husband, into declarations that she had given it to them, or it was theirs. In addition, other witnesses, wholly disinterested, testify that they heard appellant say, in the presence of W. G. Cline, after the deed for the Washington county land was made to him, that the land was hers. One of these witnesses says that he rented the farm from appellant for the year 1892, with refusal of it longer if she did not sell it, and rented it from her in the presence of W. G. Cline, in the fall of 1891; that W. G. Cline came to him, and told him that he wanted to sell him his mother's farm, and witness told him that he was not prepared to buy at that time, whereupon W. G. Cline said that she (his mother) would take witness' offer to rent the land, and witness went over to the house of appellant, where the contract for the rental of the land was written by W. G. Cline, and signed by witness. While there, appellant told witness of grass seed she wanted seeded, etc. Witness also says that W. G. Cline told him at that time that the farm belonged to his mother.

Much effort was made to show that the contract for the rental of the land by this witness was made with W. G. Cline (the contract not being produced), but, if this were shown, it is but natural that it was between witness and W. G. Cline, as the title of record was then in the latter's name.

Another witness says that W. G. Cline told him "that they were to pay an amount something like \$1,000 to get a 'sham' deed to keep Tom Francis and his stock off his mother's land," and that W. G. Cline always told witness that it was his mother's land, and said so in his mother's presence.

Still another witness says that he was sent by Mrs. Spratt, in the winter of 1891-92, to see W. G. Cline with reference to an exchange with him and his mother of the Spratt land for the Washington county land, and W. G. Cline told witness that the Washington county land was his mother's, though the deed was in him, and said the deed was so made to get rid of Mr. Francis.

The fact that W. G. Cline is a son of appellant does not of itself establish a confidential relation between them, but it is a circum-

stance to be considered in determining whether or not such relations existed when the transactions giving rise to the complaint of the mother against the son were had. He admits that his mother confided in him the transactions of her business, to a degree, at least, and the evidence shows that she executed every paper suggested to her by him as necessary to debar her husband of any possible interest in, or control over, the Washington county land, and confided to him the exchange for the Spratt land, and that he did not make the exchange without first consulting her as the owner of the Washington county land.

Notwithstanding the Spratt land was conveyed to W. G. Cline, appellant was the real and beneficial owner of it. He had undertaken, as her agent, to first get a conveyance of the legal title to the Washington county land from T. L. Francis, her husband and trustee; and, second, to exchange this land for the Spratt land; and in doing these things for her W. G. Cline in both instances took a conveyance of the legal title to the land to himself; and, these facts being shown, they establish a trust in W. G. Cline for the use and benefit of appellant, and it matters not whether it be denominated a resulting or an implied trust, as both are founded on the presumed intention of the parties, both arise by operation of law upon the transactions of the parties, and the authorities generally concur that both may be established by parol evidence. *Borst v. Nalle*, 28 Grat. 434; *Bank v. Carrington*, 7 Leigh, 566; *Phelps v. Seely*, 22 Grat. 573; 1 *Perry, Trusts*, § 124.

Wherefore the same trust resting upon W. G. Cline with reference to the Washington county land when exchanged for the Spratt land attached to the last-named property when the exchange was made, and he held it in trust for the benefit of appellant.

It only remains to be determined whether or not the agreement to dismiss and the decree dismissing appellant's first suit were procured by fraud.

It is earnestly urged by counsel for appellees that the decree of the court dismissing the suit upon the exhibition of the writing given by her November 8, 1893, had binding effect upon appellant as a confirmation of what had gone before, but, as was said by Keith, P., concurring in the opinion of Railroad Co. v. Mills, 91 Va. 641, 22 S. E. 556: "There is no instrument so solemn, there is no judgment or decree so binding, but that, if fraud in its procurement be alleged and proved, it ceases to protect the wrongdoer, or to obstruct the injured in the assertion of their rights."

When a person assents that fiduciary relations be established between him and another, the law imposes upon him the duty of so dealing with the trust subject that his conduct and transactions will stand the test of the closest scrutiny. "Loyalty to his trust is the most important duty which the agent

owes to his principal. Reliance upon his integrity, fidelity, and ability is the main consideration in the selection of agents; and so careful is the law in guarding this fiduciary relation that it will not allow an agent to act for himself and his principal, nor to act for two principals on opposite sides, in the same transaction. All such transactions are voidable, and may be repudiated by the principal, without showing that he was injured. In such cases the amount of consideration, the absence of undue advantage, and other like features, are wholly immaterial. Nothing will defeat the principal's right of remedy, except his own confirmation, after full knowledge of all the facts. Actual injury is not the principle upon which the law holds such transactions voidable. The chief object of the principle is not to compel restitution where actual fraud has been committed, or unjust advantage gained; but it is to prevent the agent from putting himself in a position 'in which to be honest must be a strain on him,' and to elevate him 'to a position where he cannot be tempted to betray his principal.'" A confirmation must be a solemn and deliberate act. When the original transaction is infected with fraud, the confirmation of it is so inconsistent with justice, and so likely to be accompanied with imposition, that the courts watch it with the utmost strictness, and do not allow it to stand but on the clearest evidence.

If a party's right to impeach the transaction be concealed from him, or a free disclosure be not made to him of every circumstance which it is material for him to know, or if the act takes place under pressure or constraint, or by the exercise of undue influence, or under the delusive opinion that the original transaction is binding on him, or if it be merely a continuation of the original transaction, the confirmation operates as nothing; or, as stated in the latter part of section 961, 2 Pom. Eq. Jur., if "the original undue influence still remains, or if the act is simply a continuation of the former transaction, or * * * if he has not full knowledge of all the material facts and of his own rights, no act of confirmation, however formal, is effectual; the voidable nature of the transaction is unaltered." *Ferguson v. Gooch* (Va.) 26 S. E. 397; *Kerr, Fraud & M.* 296-298; *Coal Co. v. Sherman*, 20 Md. 117; *Hoge v. Hoge*, 1 Watts, 168; *Michoud v. Girod*, 4 How. 508; and *Broddus v. McCall*, 3 Call, 548.

In the light of the foregoing well-recognized rules of law, let us examine the evidence as to how the agreement of compromise, and the decree dismissing appellant's first suit, were procured. It will be observed, in the first place, that in the agreement or compromise appellant is made to say, "And does hereby acknowledge that she has received a full consideration for making this release." By concession she got nothing in the way of a consideration for the release of her

rights and the dismissal of her suit except what is provided for her in the papers Y and Z, copied above. The reservations in Z, signed by W. G. Cline, are such as to work no change of title to the property referred to in him. He says in the paper that it is made in consideration of love and respect for his mother, but claims in his answer that it is in consideration of the dismissal of the suit. He pretends to convey to his mother "one half intrust" in a certain piece of land which he owned, known as the "Harlis Place," but it was not to take effect if he outlived his mother. She has no rights in it while he lives, and it is shown that there was a vendor's lien on the land for \$1,000 and more, November 3, 1893, which has never been paid.

Y, signed by both of the Clines, is to the effect only that they will convey to appellant "one-half intrust" in the Spratt land, conditioned upon two events: First, if W. G. Cline should deed it to J. M. Cline; and, second, if J. M. Cline dies before his mother. J. M. Cline at that time, if he ever did, held no written obligation of W. G. Cline for a conveyance of the land to him; and it is conceded that J. M. Cline was a bankrupt, as W. G. Cline had said that J. M. Cline could own no property in his own name on account of debts against him.

These papers, upon their face, when read in the light of the fact shown that it was strenuously urged upon appellant by the Clines, when executed, that there was no reason for them to be recorded, if this was not, in fact, imposed as a condition upon their delivery to her, amount to nothing more than a sham and a delusion.

The appellant tells how the agreement of compromise was obtained, as follows: "I was at Graham, and got notice that W. G. Cline would take depositions on the 28th of October. I came up a few days before, and went to Gordon's [W. G. Cline's] house, to see after some bedding and other things I had there. I walked to town on the day appointed, but all the depositions were not taken; the balance were postponed until the next week. I was fixing to go to town, and Gordon told me that we had better settle this matter ourselves; that it was a disgrace, and that he was ashamed of it. He says: 'Ma, I will do right, if you will. I think the trade we first talked about would be best for you. I will give you a half interest in the Harless place and a half interest in the Spratt place. I would rather do that, for Jim won't want to move. I will pay the taxes, and be at all expense, and pay you \$50 a year rent for your half of the Harless place. I don't know what would be right for Jim to pay, as he has been clearing on the Spratt land, but I will see him to-morrow. I know he will do right in this matter.' I remained over night at Gordon's house. Next morning he started away early, and directly I started to town on foot, and * * * I met him coming back.

He seemed to be excited, and said, 'Ma, where are you going?' I told him I was going to see Mr. Alderson [her lawyer]. He said, 'There is no need for that;' he had seen Jim, and the offer he had made me was all right with Jim. He says, 'Ma, I will deed you the land, and pay the cost of the suit, and pay you rent,' and begged and talked with me so I agreed to take the offer, and told him I would come on to town, and get Mr. Alderson to write the deed. He said, 'There is no use of that;' he didn't want me to see Alderson; he could write as good a deed as Alderson; that we could go to Squire Gillespie's, and fix up the papers, where it would cost nothing. After hearing his talk, I thought he would do right. He wanted me to go to Mr. Gillespie's, but I was sick from my recent walk, and I told him I wasn't able to go. One morning he said I must go. I was still sick, but went. I asked him if his wife was not going to sign the deeds, and he said, 'No,' it was not necessary. 'I will make you a good deed, and that is all you need to want. I will rent your lands a couple of years, and then buy it back. Want you to keep your deeds private. It will be an expense for nothing to record them.' On the way to the squire's he told me he had a paper for me to sign. I told him that I would not sign it without seeing my lawyer. He said: 'Ma, I wouldn't take no advantage of you. The paper is just simply to stop the lawsuit. It don't bind you to do anything.' We got to the squire's. I went into the house, and he went to the meadow, where the squire was. After a while they both came in. The squire commenced writing. I was quite sick, feeling very bad. I was in and out of the house several times during the writing. Jim came in during the time, and wrote something on a paper, as if to write his name. The squire held the paper to the fire to dry, and said that he would read it. Gordon took it out of his hand; said he could read it. He commenced reading, and read where the land lay, etc., and said it was a good deed. He didn't read anything about his dying before the deed took effect. He asked me to sign the paper of dismissal of the suit. I told him I couldn't, for I didn't have my glasses, and he said I could certainly write my name. I then told him I wouldn't sign it without reading it, and he said he would read it. He picked it up, and read a few words of it, and said it read thus and so. He said, 'Sign it, and you can read it before I take it to town.' He took the paper, and we left the squire's house, and went home. In a morning or so, he was going to go to town. I asked him for the papers. He gave them to me, and I took the paper of dismissal, and stepped into my room to read it. I hadn't read but a few words of it, before he came in, and said, 'Ma, I want that paper; I am ready to go.' I told him that I would just keep the paper till I could see my lawyer, and have the papers and those deeds ex-

amined. He says, 'Damn you and your lawyer,' and grabbed the paper out of my hands, and went out of the room. This treatment from my doted son was mortifying to me, and I was almost frantic over it. To make sure of my deeds, I hid them away, and took a cry. I hid them away, and forgot where I hid them for a long time. I went to see my sister in a short time, and when I came back Gordon told me to ask Bettie, his wife, if I could stay there. I did, and she said it didn't suit her for me to stay. I told him what she said. He told me to go and hunt me a place somewhere. I went, and succeeded in getting to stay with Mrs. Dr. Easley, Bluefield, W. Va. I contracted cold from my exposure, and was taken down sick in a few days. Was confined to my bed. Dr. Easley gave me some medicine. As soon as I got better, I came up to Five Oaks. Mr. Jones helped me to get to Gordon's house. I was there, sick, for some time. As soon as I got able to ride, I went to keep house for Jimmy. I asked Gordon time after time for his note for the rent of those lands, as he promised me. He always put me off, and finally told me that he would not give them to me at all, and in the spring or early part of the summer Jimmy spoke of homesteading the Spratt place. I told him that he could only homestead half of it. He said that I had no half there. Then I began to think about my deeds. I went to Gordon's house to hunt for them, where I had left them. I hunted for them, but did not find them. Then I went again, and found them where I had hid them away. I showed them to a friend of mine, and he told me they were no account. I was no judge of a deed myself, and did not know how they should read [and she is shown to be very illiterate, unable to read writing unless plain]. I sent them to Mr. Alderson to see what he thought of them. I wanted Gordon to make the deeds good, and he said he wouldn't. I told him I would sue him if he didn't."

J. W. Gillespie, who wrote Y and Z, and before whom they and the dismissal agreement were signed and acknowledged November 3, 1893, makes the statement in his deposition that the day these papers were prepared W. G. Cline and his mother came to his house together; that he was out in a pasture near the house; that W. G. Cline came out to where he was, and while there, and before they reached the house, and in the absence of appellant, W. G. Cline told him what kind of papers he wanted prepared; that without any consultation after he reached the house he prepared them; that he never read either of these papers to appellant; that his recollection was that when he announced that the papers were ready he remarked: "I had better read them, if I could read my own handwrite; and Gord (W. G. C.) said he thought he could read it.' About that time somebody hollered to me from the fence, and I went out of the house;"

that they were never read to her in his presence; she did not have her glasses, and asked him (Squire Gillespie) to sign her name for her.

Thus it will be seen that the justice, the only person present totally disinterested, corroborates appellant as to the manner in which these papers were prepared and executed, and as to the deception practiced upon her by W. G. Cline in securing her signature to the agreement to dismiss her pending suit, and in fact in every material statement made by appellant as to what occurred on that occasion.

A witness who had busied himself in getting up testimony for the Clines in this case made a persistent effort to get Squire Gillespie to say that the papers were read to appellant, and she understood them, and this witness and another testify that Gillespie said in their presence that appellant heard the papers read, and understood them; but Gillespie adheres steadfastly to his statement above given.

The record discloses that W. G. Cline was continually approaching witnesses who testified in favor of appellant while they were in attendance before the commissioner. In one breath he and his witnesses would have us believe that his mother left his house to go to West Virginia to obtain a divorce from her husband, and in the next that she was entirely satisfied with the papers prepared November 3, 1893, and the provision thereby made for her, but, being under the influence and control of her husband, was induced by him to bring this suit. The defense he makes is an admission that his mother got nothing for her Washington county land in the shape of a valuable consideration. It is drawn out of both him and J. M. Cline that the papers Y and Z do not make such provision for their mother that was intended, or that she expected, when she agreed to dismiss her suit, but say that they are bound to take care of her, and would do so anyhow. The production of these papers in the course of the depositions confessedly excited both of the Clines, if they did not produce consternation, as they doubtless had relied on their being lost or destroyed; and their production may have given rise to statements by both of the Clines in glaring conflict with the statements made by them in the first suit.

The defense rests wholly on W. G. Cline's original claim to the Washington county land, though doubtless it occurred to him along with the afterthought to claim this land that the further he was removed from this transaction the securer his title was; and hence, after the exchange for the Spratt land, he and his brother are emboldened to deny their mother's right to it, although she released none of her rights by this exchange. Denial is made that he executed the \$3,000 note to his mother, when the evidence is almost overwhelming showing facts and cir-

cumstances contradicting him. It is admitted that papers were destroyed after the exchange for the Spratt land that might have thrown light on his transactions, and perhaps this gave rise to the significant remark made by W. G. Cline, according to his own witness, when notice was served on J. M. Cline to give his mother possession of the Gravitt land or pay her rent: "I have been driving cut nails, but now I am driving wire nails, and clinching them on both sides."

Courts of equity delight to follow property which has been the subject of a trust into whatsoever guilty hand it may go. There are no innocent purchasers involved in this litigation, and, fraud in the procurement of the agreement from appellant to dismiss her former suit having been proved, we are of opinion that the decree appealed from must be reversed, and this court will enter such decree as the court below should have entered, requiring W. G. Cline to forthwith execute and deliver to appellant a good and sufficient deed conveying to her in fee simple, as her sole and separate estate, the 92 acres of land known in this record as the "Spratt Land," and he and J. M. Cline to pay the costs of this suit; and the cause will be remanded that the circuit court may make such further decree therein as may become necessary to carry into effect the opinion of this court, or, if need be, to appoint a commissioner of the court for the purpose, to convey the Spratt land to appellant.

(36 Va. 228)

OSBORNE et al. v. KAMMER et al.
(Supreme Court of Appeals of Virginia. July 7, 1898.)

MANDAMUS AGAINST CITY COUNCIL—WRIT OF ERROR.

A writ of mandamus was granted against members of a city council, as such, to levy a tax. *Held*, that they could not prosecute a writ of error thereto as individuals, or representatives of wards, but only as members of the council in its corporate capacity.

Error to circuit court, Montgomery county.

Application for mandamus by William Kammer against the city of Radford and John G. Osborne and others, composing its city council. The writ was granted, and certain members of the council bring error. Dismissed.

W. R. Wharton, for plaintiffs in error.
Phlegar & Johnson, for defendants in error.

BUCHANAN, J. William Kammer filed in the hustings court of the city of Radford his petition, which was afterwards removed to the circuit court for Montgomery county, praying for a writ of mandamus to compel the city of Radford and its council (naming the persons who composed the council) to levy taxes, and make an appropriation therefrom to pay interest due on certain bonds of the city held by him.

The city did not answer the petition. The

members of the council filed two answers; those in the east ward uniting in one, and those living in the west ward in the other.

Upon the hearing of the cause, the court was of opinion that the answers were insufficient, and awarded a peremptory mandamus directed to the persons composing the council, commanding them, and each of them, as members of the council, to levy a tax on all taxable property, real and personal, in the city, at a uniform rate, sufficient to pay the petitioner's interest.

To that judgment this writ of error was awarded, upon the petition of 5 of the 12 members of the city council.

The plaintiffs in error were not parties to the proceeding in the circuit court, except as members of the city council in its corporate capacity. The mandamus was directed to them, and each of them, as members of the city council, and not to them individually, or as representatives of the wards of the city. The duty to be performed was a corporate duty. The city council was the body created and organized for the express purpose of doing the duty, among others, which the creditor sought to have done. If the members of the council failed to obey the court, those who were guilty of the disobedience could have been punished for the contempt; but it was none the less an order to the city council in its corporate capacity. *Commissioners v. Sellew*, 99 U. S. 624; 2 Dill. Mun. Corp. (4th Ed.) § 961.

If the members of the council were not satisfied with the action of the circuit court, and desired to have its judgment reviewed by this court, they could do so by applying for and prosecuting their writ of error in their corporate capacity, but not in their individual capacity, nor as the representatives of either ward of the city; for in those capacities they were not parties to the action. To entitle any person to a writ of error or an appeal, he must be a party to the cause, and must be aggrieved by the judgment or decree. Code, § 8454; *Board v. Gorrell*, 20 Grat. 484.

The writ of error must be dismissed, as improvidently awarded.

CARDWELL, J., absent.

(96 Va. 270)

WHITE et al. v. VALLEY BLDG. & INV. CO.

(Supreme Court of Appeals of Virginia. July 7, 1898.)

APPELLATE JURISDICTION—DISMISSAL.

In an action against a corporation to enforce a lien against its property, the stockholders of the corporation filed a petition as co-petitioners to be subrogated to a senior lien against the corporation, which they had previously paid. From a judgment adverse to them, they appealed. *Held* that, since each appellant made a separate and distinct loan for less than \$500 on his own account to the company to discharge the lien, and there was no joint interest or community of interest among them, the court was without jurisdiction.

Appeal from hustings court of Roanoke.

Bill by Valley Building & Investment Company against the Powell Real-Estate Investment Company to ascertain the amount of its lien on defendant's property, and to sell it in satisfaction thereof. In this suit E. White and others filed their petition to be subrogated to a lien senior to the lien held by complainant. From a judgment adverse to them, petitioners appeal. Appeal dismissed.

Hardaway & Payne and R. R. Hicks, for appellants. John M. Hart and Scott & Staples, for appellee.

HARRISON, J. We are met at the threshold of this case by a question of jurisdiction.

It appears that the Powell Real-Estate Investment Company is the owner of a parcel of land in the city of Roanoke upon which rested two liens, the first being for about \$1,000 in favor of Stewart & Palmer. The property being advertised for sale to satisfy this lien, a number of the stockholders of the debtor company, who are the appellants here, came forward, and advanced to the company \$100 each with which to pay off the debt. By this means the Stewart & Palmer lien was paid, and subsequently released of record. Afterwards the holder of the remaining unpaid lien filed a bill to ascertain the amount thereof, and to sell the property for its satisfaction. In this suit appellants filed a petition, alleging that, as stockholders of the Powell Real-Estate Investment Company, they had, in order to protect their interests, agreed that each should pay 10 per cent. over and above his subscription, for the purpose of discharging the balance due on the Stewart & Palmer debt; and that, having paid the several sums agreed upon, they are entitled to be subrogated to the lien held by Stewart & Palmer, and to have the same enforced to the extent of the several amounts advanced by them.

The court below having held adversely to this pretension, appellants are here to have its decree reviewed.

It clearly appears from the record that each of the appellants made a separate and distinct loan on his own account to the company; that there was no joint interest or community of interest among them; that their respective claims each had for its foundation an independent contract, which each had the right to enforce, without regard to the other. Appellants have filed their petition in the court below as co-petitioners. This, however, was merely a measure of convenience, and in no way affected or changed the distinct character of their several demands, which remained as independent of each other as if they were enforcing their respective rights in different and independent proceedings.

Under these circumstances, the claim of each appellant being for a sum less than \$500, this court is without jurisdiction in

the premises. *Umbarger v. Watts*, 25 Grat. 167.

For these reasons, the appeal must be dismissed as improvidently awarded.

CARDWELL, J., absent.

(96 Va. 254)

BROWN v. CHRISTIAN.

(Supreme Court of Appeals of Virginia. July 7, 1898.)

TAXATION—SALE—REDEMPTION—PENALTIES.

Act Feb. 11, 1898, in relation to delinquent lands purchased in the name of the auditor, provides "that if no person who has a right to redeem at the time of the service of the copies" of an application to purchase shall "appear within four months after such copies have been served * * *, and redeem said real estate by paying to the clerk of * * * court all of the taxes, penalties and costs therewith connected, as well as all fees and costs attending the proceeding under this section, including a penalty of five dollars which shall be paid to the applicant, then the person who made the application shall have a right to purchase." *Held*, that the penalties attach as soon as the application to purchase is filed, irrespective of whether copies are served or not.

Application for mandamus by J. Thompson Brown and another against Walter Christian, clerk of the hustings court of the city of Richmond. Writ denied.

Willoughby Newton, Jr., for plaintiff. D. C. Richardson, for defendant.

HARRISON, J. This petition for a mandamus involves a construction of an act of the legislature approved February 11, 1898, in relation to delinquent lands purchased in the name of the auditor.

After setting forth the mode of procedure, what the application to purchase delinquent land must contain, how, when, and upon whom copies of the application must be served, the act proceeds as follows:

"If no person who has a right to redeem at the time of the service of the copies, or of the completion of the order of publication as aforesaid, appear within four months after such copies have been served as aforesaid, or within four months after the completion of the order of publication, when there is a publication, and redeem said real estate by paying to the clerk of the county or corporation court all of the taxes, penalties and costs therewith connected, as well as all fees and costs attending the proceeding under this section, including a penalty of five dollars which shall be paid to the applicant, then the person who made the application shall have a right to purchase the real estate within five days from the expiration of the four months as aforesaid, by paying to the clerk all taxes, penalties, fees and costs."

The controverted question is as to the time

when the right of the applicant to the \$5 penalty attaches.

The petitioners insist that the right to this \$5 penalty does not arise until a copy of the application has been served upon the persons named therein. On the other hand, the defendant contends that the right attaches immediately upon the filing of the application to purchase; that when the application has been filed, although no copy thereof has been issued or served upon any of the persons mentioned therein, it becomes the duty of those interested, in order to redeem, to pay him the costs of the proceeding, together with the penalty of \$5 for the applicant.

The court is of opinion that the act is susceptible of no other reasonable construction than that placed upon it by the defendant.

It must be borne in mind that the tax in question has been due and unpaid for more than two years, that the land against which it was assessed has been forfeited, and belongs to the commonwealth, and that it is only by her favor that it can be redeemed. It is manifest that the object of the statute was twofold—First, to induce those interested to reclaim the land by promptly paying the delinquent taxes; and, second, to encourage others to come forward, and buy the property from the state for the taxes due thereon. After the application has been filed, another opportunity is given those interested to reclaim the land, upon condition, however, that the costs incident to filing the application, and a penalty of \$5 to the applicant, are paid. The penalty of \$5 was doubtless intended to reimburse the applicant for his trouble in offering, at the invitation of the state, to become the purchaser. This final opportunity to redeem is at any time within four months from the date of the service of the copies of the application, or the completion of the order of publication, if there be one, and the language of the statute "if no person who has a right to redeem at the time of the service of the copies, or the completion of the order of publication as aforesaid appear within four months after such copies have been served," etc., was intended to fix the date of the service of the copies, etc., as the time from which the redemption period of four months should begin to run, and had no reference to the conditions imposed upon the privilege of redeeming. Those penalties attached as soon as the application to purchase was filed.

The construction contended for by petitioners would defeat the object of the law, and make it worthless; for no one would take the trouble to prepare his application and pay officer's fees if the delinquent taxpayer could come forward and reclaim the land by paying to the clerk the tax and interest.

For these reasons, the writ prayed for must be denied.

(96 Va. 197)

FENNELL v. ZIMMERMAN.

(Supreme Court of Appeals of Virginia. June 30, 1898.)

LIFE INSURANCE POLICY—ACTION ON PREMIUM NOTE—DEFENSE.

Where an assured accepted and retained a policy for nearly two years after it was delivered without examining it, to see whether the secretary of the insurance company had signed a slip attached to the policy, setting forth the options assured was entitled to exercise, and without offering to rescind the policy, or complaining to the company or its agent for the omission, his delay is unreasonable, and the omission is no defense to an action on his premium note.

Appeal from circuit court, Tazewell county.

Action by G. M. Fennell against George H. Zimmerman. Judgment for defendant, and the plaintiff appeals. Reversed.

Henry & Graham, for appellant. Chapman & Gillespie, for appellee.

RIELY, J. This action was brought upon a note for \$250, given to the plaintiff, as agent for the Mutual Life Insurance Company of New York, in part payment of the first year's premium on a policy of life insurance issued to the defendant by the said company. The whole premium was \$517, and another note for \$267 was given in payment of the balance of the premium, which the defendant had paid.

The defendant set up the defense that the plaintiff agreed and bound himself to furnish to the defendant a policy of insurance on his life of the said company for \$10,000 on the endowment plan, maturing in 20 years, with a certain printed slip to be attached thereto, and signed by the secretary of the company, so as to make the provisions thereof binding on the company, in which printed slip were set forth the several options the defendant would be entitled to exercise if he lived until the maturity of the policy; that the policy issued to the defendant did not have the said slip thereto attached and signed by the secretary; and that, it not being so signed and attached, he had never accepted the policy. The defense was set forth in two special pleas, averring fraud in the procurement of the notes, and claiming damages to the amount of \$517, which the defendant offered to set off against the plaintiff's demand.

After the evidence was all in, the plaintiff demurred thereto, and, the jury having found a verdict in the alternative for the plaintiff or defendant, subject to the judgment of the court upon the demurrer, the court was of opinion that the law was for the defendant, and gave judgment in his favor for the amount of the set-off, in accordance with the alternative verdict of the jury.

There was no conflict in the evidence, and it appears therefrom that a policy of insurance for \$10,000 on the life of the defendant was issued by the said company on December 20, 1894, and received by the defendant between

that date and the end of the month. Along with the policy was inclosed the printed slip referred to, but not signed by the secretary of the company. Upon the receipt of the policy, the defendant, without observing that the slip was not signed, or looking to see that it was signed, accepted the policy at the time without examining it, and took it to the bank, and put it in the safe, where he had a box, and did not become aware that the slip was not signed until after this action was brought, about 20 months after his receipt of the policy. In the meantime he had paid the note for \$267, and also made two small payments, aggregating \$25, upon the note sued on, besides writing to the plaintiff several letters, in which he promised to pay the balance due on the note. Never at any time prior to the institution of this action did he offer to rescind the contract because the printed slip was not signed, or make any complaint either to the company or to the plaintiff of the omission to do so.

It was the imperative duty of the defendant, upon the receipt of the policy, to examine it promptly, and see if the printed slip was attached thereto and signed by the secretary of the company, if he meant to claim that this was a part of the contract, and, if not so signed, to return the policy and the slip within a reasonable time to the company or to the plaintiff, that it might be so signed and attached; and, if not done, to demand that the contract be rescinded, and his notes returned to him. *Plympton v. Dunn*, 148 Mass. 523, 20 N. E. 180, and *Leigh v. Brown* (Ga.) 25 S. E. 621. In cases of this nature great diligence is required of the parties, and the delay for 20 months to examine if the printed slip was signed, as he testified that he had specially stipulated should be done, cannot be sanctioned. His negligence was inexcusable; the delay unreasonable. He began to receive the benefit of the policy from the day of its date, and every day that he delayed to notify the company of the omission now complained of after he discovered it, or by the exercise of due diligence might have discovered it, was a wrong to the company, if his plea that the policy "was never accepted by him as a compliance with the contract, or in lieu thereof," were allowed to prevail. The company kept his life insured, and carried the risk, during the entire year for which he gave his notes for the premium, and furnished a consideration that cannot be restored. By his silence he left the company bound, so far as it knew, and if he had died, it might have paid the policy without a suspicion that the defendant claimed that there was no binding contract. By his acts and unreasonable delay, he lost the right to rescind the contract, to avoid the note sued upon, and to recover back what he had paid, which was the only damage attempted to be proved.

The judgment of the circuit court must be reversed, and such judgment entered here for the plaintiff as should have been entered by the circuit court upon the verdict of the jury.

(96 Va. 188)

**IRON BELT BUILDING & LOAN ASS'N
v. GROVES et al.**

(Supreme Court of Appeals of Virginia. June 23, 1898.)

ACKNOWLEDGMENT—VALIDITY—NOTICE.

1. The recordation of a trust deed acknowledged before one of the three trustees named therein is not constructive notice to subsequent judgment creditors, and this though the officer taking the acknowledgment did not know he was named as a trustee, and on learning it refused to serve.

2. A grantee in a deed is incapable of taking or certifying an acknowledgment of it for recordation.

Appeal from circuit court, Pulaski county.

Suit by J. S. Groves and others against the Iron Belt Building & Loan Association and others. There was a decree for complainants, and the Building & Loan Association appeals. Affirmed.

A. A. Phlegar and C. A. McHugh, for appellant. Robert L. Gardner and D. D. Hull, Jr., for appellees.

BUCHANAN, J. On the 12th day of May, 1892, F. M. Jones and E. S. Jones and his wife conveyed a parcel of land in Pulaski county to three trustees, to secure the payment of money borrowed by the grantors from the Iron Belt Building & Loan Association of the city of Roanoke. The grantors acknowledged the deed before one of the trustees named in it, and, upon his certificate of acknowledgment the clerk of the county court admitted the deed to record. Subsequently the appellees obtained judgments against the grantors in the deed, and in September, 1896, filed their bill to subject the land conveyed to the payment of their judgments; charging among other things, that the recordation of the deed of trust was not constructive notice to them of its existence, because the acknowledgment of the grantors before an officer who was one of the grantees in the deed did not authorize it to be put upon record, and that they had priority over the lien created by the deed of trust. The court upon the hearing of the cause so decided, and from that decree this appeal was taken.

It is the settled law of this state that the grantee in a deed, or a beneficiary under it, is not authorized as an officer to take an acknowledgment of the deed with a view to its registration, and that the certificate of such acknowledgment furnishes no authority for admitting the deed to record; and hence a recordation based upon it is without effect as notice by construction under the registry laws. *Davis v. Beasley*, 75 Va. 491, 495; *Veneer Co. v. Kurth*, 90 Va. 737, 19 S. E. 878; *Nicholson v. Charity School*, 93 Va. 101-105, 24 S. E. 899, and cases cited.

Counsel of the appellant do not, as we understand them, controvert this as a general proposition, but insist that the rule has no application where the grantee, when he took the acknowledgment, did not know that he

was a party to the deed, and refused to accept the trust as soon as he learned that he was named as one of the trustees.

The fact that the trustee who took the acknowledgment may not have known that he was a grantee in the deed at that time, and that he afterwards, upon ascertaining the fact, refused to accept the trust, does not, in our opinion, change the rule which is based upon the fundamental principle that no man ought to be a judge in his own cause, or a ministerial officer in his own behalf.

Although a judge may not know that he is a party to a cause when he decides it, or may afterwards, when he learns of his interest, release it, the judgment is none the less defective. Its validity must be determined by the facts as they existed when the judgment was rendered.

The object of the registry laws is to secure titles and to prevent frauds. The certificate of acknowledgment is required to perfect the deed for recordation. As the record when made is constructive notice to subsequent purchasers and lienors, public policy requires that it should impart as near absolute verity as is consistent with a due regard to the rights of the parties interested. It would open the door to great abuse and gross frauds to make the validity of the registration of a deed depend upon the recollection or the subsequent conduct of the party who took the acknowledgment.

It can work no hardship to adhere inflexibly to the rule heretofore announced by this court, and by most of the courts of this country, that a grantee in a deed, or beneficiary under it, is incapable of taking or certifying an acknowledgment of it for recordation. Many of the cases upon the subject are cited in notes to *Cooper v. Association* (Tenn. Sup.) 56 Am. St. Rep. 795, 796 et seq. (s. c. 37 S. W. 12), and *Havemeyer v. Dahn* (Neb.) 33 Lawy. Rep. Ann. 332 et seq. (s. c. 67 N. W. 489). See, also, case of *Rothschild v. Daugher* (Tex. Sup.) 20 S. W. 142.

We are of opinion that there is no error in the decree complained of, and that it must be affirmed.

(102 Ga. 399)

FLANNAGAN v. SCOTT.

(Supreme Court of Georgia. March 22, 1897.)

**APPEAL IN FORMA PAUPERIS—AFFIDAVIT—SCOFF-
CIENCY—BILL OF EXCEPTIONS—INSTRUC-
TIONS—APPEAL—REVIEW.**

1. It is not essential to the legal sufficiency of an affidavit made for the purpose of carrying a case to the supreme court in forma pauperis that it should contain a statement that the affiant's "counsel has advised him that he has good cause for a writ of error." If such affidavit, either literally or in substance, clearly states that the affiant, because of poverty, is unable to pay the costs in the case, without adding, conjunctively, that he is unable to do anything else, it so far meets the requirements of the statute and of the rule of this court as to relieve the plaintiff in error from the payment of the costs.

2. The official report following the headnote announced by this court in *De Loach v. Richards*, 19 S. E. 717, 94 Ga. 730, is erroneous and misleading, in that it fails to state the contents of the pauper affidavit with which the court in that case actually dealt. That affidavit averred that the plaintiff in error was "unable, from his poverty, to pay the cost and give the security for the eventual condemnation money." The affidavit referred to in the report was filed too late for consideration, and therefore did not form the basis of the court's decision.

3. Though a bill of exceptions does not "contain" any evidence, but, on the contrary, "specifies" a brief of evidence which had been duly approved and made a part of the record, this court will not dismiss the writ of error merely because the certificate to the bill of exceptions states that it "contains" all of the evidence material to a clear understanding of the errors complained of, instead of stating, as would be more accurate, that it "specifies" all of such evidence.

4. Refusing to give in charge to the jury a request which contains such an expression or intimation of opinion as is forbidden by section 4834 of the Civil Code, or a request not fairly and accurately adjusted to the evidence bearing upon the point to which such request relates, is not cause for a new trial.

5. The evidence as a whole did not warrant the verdict rendered, and the ends of justice require another hearing.

(Syllabus by the Court.)

Error from superior court, Bibb county; *W. H. Felton*, Judge.

Action by *G. D. Scott* against *John Flanagan*. Judgment for plaintiff. Defendant appeals. Reversed.

M. G. Bayne, for plaintiff in error. *Smith & Jones*, for defendant in error.

FISH, J. There was a motion made in this case to dismiss the writ of error, upon two grounds. The first ground was that the writ of error ought to be dismissed, unless the plaintiff in error paid the costs in the case, upon the call of the same, in its order, for argument, because the plaintiff in error, who had filed in the court below a pauper affidavit to avoid the payment of costs, failed to state in his affidavit "that his counsel has advised him that he has good cause for a writ of error." In his affidavit the plaintiff in error simply states that, because of his poverty, he is unable to pay the costs in this case. This motion was evidently based upon rule 15 of this court (Civ. Code, § 5614), which provides that "no case in which cost is due will be heard (except by special order of the court) until the cost is paid; and if not paid when the case is called, the clerk shall so inform the court, whereupon the case will be dismissed." Was the cost due in this case? Unpaid costs in this court are due in all cases, "save where the pauper affidavit is filed in the clerk's office of the court below, and a certified copy thereof is transmitted to this court with and as a part of the transcript of the record, or, if no transcript is required, with the bill of exceptions." Rule 14 of the supreme court (Civ. Code, § 5613). What kind of a pauper affidavit does the rule refer to? The answer to this question

is contained in these words of rule 14, which immediately follow the above quotation: "This oath, to be effectual, must assert that the plaintiff in error is, because of his poverty, unable to pay the costs, and must not add conjunctively that he is unable to do anything else." This is in accordance with the act of 1881. See Acts 1880-81, p. 120. There is nothing in the rules of this court or in the statutes of the state which requires that a pauper affidavit, which is made simply for the purpose of obtaining a hearing of a case in the supreme court, without the payment of the costs in this court, should contain an allegation that the counsel for the plaintiff in error has advised him that he has good cause for a writ of error. If such affidavit, either literally or in substance, clearly states that the affiant, because of poverty, is unable to pay the costs in the case, without adding conjunctively that he is unable to do anything else, it so far meets the requirement of the statute and of the rule of this court as to relieve the plaintiff in error from the payment of the costs. In order for a bill of exceptions to operate as a supersedeas to the judgment in the court below, it is necessary for the plaintiff in error to comply with certain conditions prescribed by the statute. One way in which he may obtain such supersedeas is by filing an affidavit with the clerk of that court, "stating that he is unable, from his poverty, to pay the costs or give the security for the eventual condemnation money, and that his counsel has advised him that he has good cause for a writ of error. Civ. Code, § 5552. If no supersedeas is sought, it is neither necessary for him to state in his affidavit that he is unable, from his poverty, to give the security for the eventual condemnation money, nor to allege that his counsel has advised him that he has good cause for a writ of error.

2. In support of his motion to dismiss the writ of error, the defendant in error cites the ruling in the case of *De Loach v. Richards*, 94 Ga. 730, 19 S. E. 717. The headnote in that case is: "The plaintiff in error not having paid the costs in this court, and the affidavit sent up with the record not conforming in terms to the act of September 27, 1881 (Code, § 4263), and counsel not having appeared in person when the case was called for argument, and not having sent up money with which to pay the costs, the writ of error is dismissed." Applying this headnote to the brief statement of the facts of that case made by the reporter of this court, the confidence with which the defendant in error cites that decision seems to be well founded. The official report following the headnote is, however, erroneous and misleading, in that it fails to state all the contents of the pauper affidavit with which the court in that case actually dealt. From the report it appears that the material portion of the affidavit of the plaintiff in error which the

court had under consideration was "that because of his poverty he is unable to pay the cost in the above-stated case"; whereas the truth is that the affidavit which was before the court was one which averred that he was "unable, from his poverty, to pay the cost and give the security for the eventual condemnation money." The affidavit referred to in the report was one that attempted to correct the fault in this affidavit; but it was filed too late for consideration, and therefore did not form the basis for the court's decision.

3. The second ground of the motion to dismiss the writ of error was: "because the bill of exceptions contains no evidence at all, and the judge's certificate does not state that it 'specifies all the evidence,' etc. The judge certifies that the bill of exceptions is true, and 'contains' all the evidence material to a clear understanding of the errors complained of. The bill of exceptions really contains no evidence whatever, but it contains a specification of a brief of evidence, which had been duly approved and made a part of the record. In this sense only is the evidence material to a clear understanding of the errors complained of contained in the bill of exceptions. It is evident, therefore, that the word 'contains,' in the certificate, was simply used (probably by mere inadvertence) in the place of the more accurate word 'specifies.' As the meaning of the certificate, taken in connection with the bill of exceptions, is clear and unambiguous, this court will not dismiss the writ of error for a mere verbal inaccuracy therein.

4. There was no error in refusing to charge the written requests of the defendant in the court below. The request set out in the fourth ground of the motion for a new trial was: "If the plaintiff looked to both Dennis and John Flannagan to pay the debt after the promise of John Flannagan to answer for Dennis' debt, if any promise was made, then he could not recover of John Flannagan." John Flannagan contended that he made no promise at all to the plaintiff, while the plaintiff contended that John Flannagan agreed to pay for whatever goods Dennis Flannagan, his son, might purchase from the plaintiff, and that John's promise so to do was an original undertaking on his part, and not a promise to answer for the debt of another, and therefore did not have to be in writing in order to bind him. This request assumed that, if any promise was made to the plaintiff by John Flannagan, it was "to answer for Dennis' debt," and therefore contained such an expression or intimation of opinion as is forbidden by section 4384 of the Civil Code. Besides, if it had been given in charge, it would have excluded from the consideration of the jury the contention of the plaintiff that John Flannagan did promise to pay for such goods as Dennis might purchase from the plaintiff, and that such promise was an original undertaking on his part; in

other words, that the promise of John Flannagan was to answer for his own debt, and not the debt of Dennis. The request to charge set out in the fifth ground of the motion for a new trial was not fairly and accurately adjusted to the evidence bearing upon the point to which it relates.

5. After a careful consideration of the evidence in the case, we are of opinion that, taken as a whole, it did not warrant the verdict rendered, and the ends of justice require another hearing. Granting that the evidence of the plaintiff was sufficient to authorize the jury to find that John Flannagan had made a verbal promise to the plaintiff to pay for whatever goods Dennis Flannagan might buy (upon which question we express no opinion whatever), it is very doubtful from this evidence whether all the items which go to make up the account sued on were purchased after this alleged promise. Certainly, John Flannagan in no view of the case is responsible for the price of goods which Dennis purchased prior to this alleged promise. The copy of account attached to the petition is headed, "John Flannagan & Son, Account," and the first item thereon is, "July 10. Brought forward from old book, \$19.85." The account, which is composed of very many items, runs from that date up to, and includes, the 15th of the following January. The evidence is silent as to the time when the promise of John Flannagan was made. From portions of the plaintiff's testimony it seems not unlikely that some of the goods charged for on the account may have been purchased by Dennis previous to the time when the conversation occurred between Bazemore, then the partner of the plaintiff, and John Flannagan, in which it is alleged the promise by John Flannagan to pay for what goods Dennis might buy was made. Judgment reversed.

(104 Ga. 776)

TOOLE v. EDMONDSON et al.

(Supreme Court of Georgia. July 19, 1898.)

CERTIORARI TO JUSTICE—QUESTION OF LAW.

This being a case tried in a justice's court, and there being no contested issue of fact,—the determination of the case depending entirely upon the question whether or not, conceding as true all of the evidence introduced by the claimant, his wages were exempt from the process of garnishment,—a judgment rendered by the justice in the case was reviewable by certiorari, and it was error to dismiss a certiorari sued out by the losing party.

(Syllabus by the Court.)

Error from superior court, Fulton county; J. H. Lumpkin, Judge.

Action by Edmondson & Seay Bros., against J. E. Toole. The Atlanta Consolidated Street-Railway Company was garnished. From a judgment against the garnishee, Toole brings error. Reversed.

Maddox & Terrell, for plaintiff in error. O. E. & M. O. Horton and E. T. Moon, for defendants in error.

COBB, J. A claim to a fund sought to be reached by the process of garnishment was tried in a justice's court; it being set up that the sum of \$34.60 held up by the garnishment was exempt because earned by the defendant as a laborer in the capacity of a conductor for the garnishee, a street-railway company. On the trial the sole witness introduced was the conductor, who testified as follows: "I am the claimant. I work for the Atlanta Consolidated Street-Railway Company. I am a conductor. A conductor, before he becomes such, goes through a course of training in the shops of the company in order to understand the working of the machinery and motive power of the cars, so as that he may be able to assist in repairing cars in case of an accident. This I did. Among my duties required by the rules of the company are the following: To assist passengers on and off the cars; put on and off brakes on the rear of the car; to change the trolley at the end of each run; turn the seats on open cars; and hold the trolley around curves. To do these last-named things requires a man of some weight and strength, and it is really very hard work. I collect the fares, and give the signal to start and to stop. However, it is as much the duty of the motorman to see that the schedule is made as it is mine; and, if we fail to make the schedule, we would both be suspended. The character of the work which I do is very laborious,—so much so that the insides of my hands are rougher and harder than they were when I worked on a farm, years ago. The work which I do is very tiresome. I work about twelve to fifteen hours per day. If the car should run off the track, it is my duty to assist in putting it back, as any laborer would. It is my duty to repair or assist in repairing the car when an accident happens, if the injury is of such a character that I can do so. I am paid monthly at the rate of 12 cents per hour for my work." Upon this state of facts the magistrate rendered a judgment dismissing the claim and finding the fund subject; and the claimant took the case to the superior court by certiorari, assigning error upon this judgment. The judge of that court dismissed the petition for certiorari on the ground that the case involved questions of fact, and should have been appealed to a jury in the justice's court. The plaintiff in certiorari excepted.

The question whether or not the claimant is a laborer, within the meaning of section 4732 of the Civil Code, is not before us; the sole question which we are called upon to decide being whether, under the facts of this case, certiorari would lie to review the judgment of the magistrate holding the fund subject to the process of garnishment. It is thoroughly well settled that, where only a question of law is involved in the judgment of the magistrate, certiorari is a proper mode of having his decision reviewed by the superior court, and, where there is a dispute as to the facts, the remedy is by appeal to a jury in the justice's court, or direct to the superior court, as the

case may be. Some slight confusion has arisen in the application of this doctrine, and some of the decisions of this court are not entirely in harmony. As will have been observed, the exact question to be determined in the present case is whether, where all the facts are conceded, either in an agreed statement, or by a failure of one party to contest the truth of the evidence of the other, and the justice is left to determine the law of the case on the facts thus conceded, certiorari or appeal is the remedy of the losing party. We can readily conceive of cases tried on an agreed statement of facts, or on the testimony of a single witness, where disputed questions of fact might be involved. In all cases where issues of fact are raised, whether by contradictory testimony of different witnesses, or by inconsistent testimony of a single witness, and the amount involved is less than \$50, the losing party must appeal to a jury in the justice's court, if he desires to test the correctness of the judgment of the magistrate. If, however, the amount involved be more than \$50, then the right of appeal to the superior court exists in all cases, without regard to whether questions of law or of fact, or both, are to be determined. As stated above, the decisions of this court are conflicting as to the application of the general rule as to when certiorari and when appeal is proper. It is our purpose to consider all of those decisions, and endeavor to formulate some rules that will be applicable to all cases. Such of those cases as are not inconsistent with the ruling announced in this case will be but briefly referred to, while those that seem to be in conflict will be treated more at length.

In *Witkowski v. Skalowski*, 46 Ga. 41, the general rule is stated. In *Wright v. Rutledge*, 51 Ga. 194, it was held that, where the amount claimed in the justice's court did not exceed \$50, certiorari was the proper remedy. In *Wynn v. Knight*, 53 Ga. 568, there were issues of fact, and appeal was held to be the remedy. So, also, in *McDonald v. Dickens*, 58 Ga. 77. In the case of *Dexter v. Glover*, 62 Ga. 312, the ruling was that in a case where the suit was for an amount exceeding \$50, but only questions of law were involved, certiorari could be resorted to. In *Small v. Sparks*, 69 Ga. 745, exception to the judgment of the county court sustaining a demurrer was held to be properly taken by certiorari. This was, of course, purely a question of law. In *Boroughs v. White*, 69 Ga. 841, the case was tried in the justice's court on an agreed statement of facts. From the decision of the magistrate, certiorari was sued out to the superior court, where it was dismissed on the ground that appeal was the proper remedy. While it does not appear in the statement of the case, Chief Justice Jackson says in his opinion that the parties did not rest on the statement of facts, but introduced evidence "allunde that agreement." The opinion of the chief justice rather seems to indicate that, but for this fact, certiorari would have been

proper. In *Railroad Co. v. Dyar*, 70 Ga. 723, a ruling was invoked on a petition for certiorari upon the sufficiency of the evidence introduced in the primary court, and the court held that this could only be done by an appeal to a jury in the justice's court, where the amount in litigation was less than \$50. We see no conflict between the case of *Cruse v. Express Co.*, 72 Ga. 184, and the cases previously referred to. In that case the answer of the garnishee was not traversed, and the facts on which the case was tried were conceded. The issue raised was purely one of law, and so the court held that certiorari was proper.

The case of *Miller v. Dugas*, 77 Ga. 386, involved the question whether or not the wages of a conductor on passenger and freight trains were exempt from process of garnishment. But one witness (the conductor) testified. The justice held the fund subject. The case was taken to the superior court by certiorari, and there a motion was made to dismiss the petition because the case was not one for certiorari, but for appeal. This motion was refused. This court reversed the judgment of the court below in sustaining the certiorari, on the ground that the justice properly held the fund subject to the payment of the debt, but no ruling was made on the motion in the superior court to dismiss the certiorari. In *Shirley v. Rounsaville*, 78 Ga. 708, 3 S. E. 660, there was a contest as to the facts, and appeal was properly held to be the remedy. In the case of *Railroad Co. v. Pitts*, 79 Ga. 532, 4 S. E. 921, it was held that certiorari was the remedy because no question as to the facts was made; it being urged simply that the verdict was contrary to law for several named reasons. The questions involved were all purely legal questions. True, in the opinion of the court this language is used: "Had it been desired to re-examine the facts in the light of the evidence, this should have been done, not by certiorari, but by appeal." But this can only mean that where there are disputed questions of fact they could only be re-examined by appeal. Where the facts are not contested, no necessity will arise for a review of the evidence. But even if the language quoted is susceptible of a construction which means that appeal must be had in all cases where facts are involved, whether they be contested or not, it is obiter, as no such question was made in that case. In *Bostick v. Palmer*, 79 Ga. 680, 4 S. E. 319, the court expressly adjudicated that the question involved was one of law, and hence that certiorari alone would lie in that case. The case of *Wynne v. Darden*, 80 Ga. 730, 6 S. E. 470, states the general rule, and is not in conflict with anything ruled in the present case. In the case of *Thompson v. Dodd*, 84 Ga. 264, 10 S. E. 739, issues of fact were raised on the trial; and it was ruled by this court that "appeal to a jury in [the justice's] court, and not certiorari, was the remedy,

the facts being contested." In the case of *Brooks v. Baker*, 85 Ga. 515, 11 S. E. 840, it was held that questions both of law and fact were involved, and hence that there should have been an appeal. In *Railroad Co. v. White*, 86 Ga. 202, 12 S. E. 365, the parties were directly at issue as to the facts, and appeal to a jury in the justice's court was held to be the remedy; the amount involved being under \$50. The case of *Greenwood v. Furniture Factory*, Id. 582, 13 S. E. 128, was a claim case. The plaintiff admitted that the facts as testified to by claimant's witness were true. Certiorari was sued out to the superior court from the judgment of the magistrate, where a motion was made to dismiss the petition on the ground that the case was one for appeal. This motion was refused; the court holding that there was no disputed questions of fact, and that certiorari was the proper method of testing the correctness of the magistrate's judgment. This judgment was affirmed by this court. The true distinction between certioraris and appeals is laid down in the opinion of the court in this case as follows: "Is there any disputed question of fact to be settled by a jury? If so, then there should be an appeal." Otherwise certiorari is the proper remedy. In the case of *Johnson v. Cummings*, 88 Ga. 12, 13 S. E. 819, it was ruled that there was a question of fact involved, and that, therefore, appeal was the remedy. In the case of *Railroad Co. v. Spullock*, 88 Ga. 283, 14 S. E. 478, a nonsuit was granted. The court held that a purely legal question was involved, and that the remedy by certiorari was available. The case of *Brown v. Robinson*, 91 Ga. 275, 18 S. E. 156, is not in conflict with the ruling made in the present case. In that case the amount involved was more than \$50, and the court ruled simply that the losing party in the county court was entitled to appeal to the superior court. The question whether or not certiorari would lie was not made, and any expressions in the opinion of the court which indicate that the writ of certiorari would not be available are merely obiter. We may add, however, that, were the question before us, we would hold that the case was one for certiorari, if the losing party elected to use that remedy. There was, in our opinion, no disputed question of fact in that case, and consequently the superior court could have reviewed the case by certiorari. In *Samuels v. Briscoe*, 94 Ga. 425, 19 S. E. 245, appeal was held to be the remedy, because the "parties [were] at issue in a justice's court on matters of fact." In the case of *Brice v. Chapman*, 95 Ga. 799, 22 S. E. 525, there were disputed questions of fact, and appeal was properly held to be the remedy. Another case in perfect accord with the decision made in the present case is *Royal v. McPhail*, 97 Ga. 458, 25 S. E. 512. In that case suit was brought in a county court upon an open account. Upon the trial of the case the plaintiff proved

such facts as would satisfactorily establish the indebtedness of the defendant to him. There was no contested issue of fact, but the case rested solely upon the legal sufficiency of the evidence offered by the plaintiff. This court held that the judgment in favor of the plaintiff was reviewable by certiorari. This decision is utterly at variance with the dictum in *Brown v. Robinson*, supra. In *Benton v. Hynes*, 100 Ga. 95, 28 S. E. 469, there were disputed questions of fact, and therefore appeal was proper. In *Maddox v. Witte*, 100 Ga. 316, 27 S. E. 163, no question of fact was involved, and the remedy was by certiorari. In *Humphries v. Blalock*, 100 Ga. 404, 28 S. E. 165, it was held that, when the effect of the ruling by the magistrate was to dismiss the plaintiff's case, certiorari was the exclusive remedy, and that appeal would not lie. This ruling was placed upon the ground that after such dismissal there was no case in court to appeal. In *Helmly v. Davis*, 100 Ga. 493, 28 S. E. 231, it was held that where suit was brought in the county court for a sum exceeding \$50, which resulted upon the trial in a judgment for the plaintiff, the defendant might enter an appeal to the superior court, although the defenses interposed by the defendant in the county court were stricken upon demurrer.

The distinction between the two cases last cited is that in the first the effect of the ruling was to take the case entirely out of court, while in the last the case was still pending in court after the defendant's pleas were stricken on demurrer. But how stands the present case? The point to be decided by the magistrate was whether or not the plaintiff in error was a laborer. In the case of *Oliver v. Hardware Co.*, 98 Ga. 249, 25 S. E. 403, this court has declared what is meant by the term "laborer," as used in section 4732 of the Civil Code. The following language is used in the first headnote: "If the contract of employment contemplated that the clerk's services were to consist mainly of work requiring mental skill or business capacity, and involving the exercise of his intellectual faculties, rather than work, the doing of which properly would depend upon a mere physical power to perform ordinary manual labor, he would not be a laborer. If, on the other hand, the work which the contract required the clerk to do was, in the main, to be the performance of such labor as that last above indicated, he would be a laborer." The question, therefore, whether or not a man is a laborer, within the meaning of the section exempting from garnishment the wages of laborers, is a question of law, and not of fact. The only question of fact involved in the present case was: What does the conductor do? What is the character of his employment? On this point there was absolutely no contest. Had there been evidence tending to show that the conductor did not do the things which he testified that he did, then there would have been an issue of fact; but as it was the justice was left to make his

decision from an established state of facts, as to whether or not the witness was a laborer. Upon this state of facts the magistrate found that the witness' work did not consist mainly of manual labor, and that hence he was not a laborer, and the fund was subject. To correct the error thus alleged to have been committed, certiorari was available as a remedy.

We have formulated certain rules which we believe may be of some benefit to any one who has to deal with this question:

Rules to Determine Whether Certiorari or Appeal is the Proper Remedy.

When the Case is Pending in the Justice's Court.

(1) If the amount in controversy is \$50 or less, and only questions of law are involved, there may be either an appeal to a jury in the justice's court, or a certiorari to the superior court.

(2) If the amount in controversy is \$50 or less, and there is a dispute about the facts, there must be an appeal to a jury in the justice's court before the case can be carried by certiorari to the superior court.

(3) If the amount in controversy exceeds \$50, and only a question of law is involved, and the effect of the ruling complained of is such as not to dismiss the case, the losing party may select one of three remedies: An appeal to a jury in the justice's court, an appeal to the superior court, or certiorari.

(4) If only a question of law is involved, the losing party may take the case to the superior court, by certiorari, without regard to the amount involved.

(5) If at the trial questions both of law and fact are raised, but the petition for certiorari only complains of the rulings which involve the questions of law, thus waiving the right to complain of the rulings upon disputed facts, certiorari is available as a remedy.

(6) When the effect of the ruling is to dismiss the case or entire proceeding, the exclusive remedy is certiorari, without regard to the amount involved.

(7) There may be an appeal to a jury in the justice's court in all cases, without regard to the amount in controversy or the questions involved, whether they be of law or fact, or both, except in cases where the effect of the magistrate's ruling is to dismiss the case.

(8) If the amount involved exceeds \$50, an appeal to the superior court may be had in all cases, whether the questions be of law or fact, except in cases where the effect of the magistrate's ruling is to dismiss the case, thus leaving no case to appeal.

(9) After a verdict has been rendered on appeal in the justice's court, certiorari is available in all cases, without reference to the character of the questions involved.

When the Case is Pending in the County Court.

(1) If the amount involved exceeds \$50, there may be an appeal to the superior court in all

cases without regard to the character of the questions involved, except in cases where the case has been dismissed by the county judge, thus leaving no case to appeal.

(2) If the amount in controversy exceeds \$50, and questions of law only are involved, the losing party may either appeal or certiorari, except when the effect of the ruling is to dismiss the case, when the exclusive remedy is certiorari.

(3) If the amount involved exceeds \$50, and there is a dispute about the facts, appeal is the exclusive remedy.

(4) If the amount involved does not exceed \$50, certiorari is the exclusive remedy.

(5) Rules 4, 5, and 6 for justices' courts are also applicable to county courts.

To determine whether the case involves a question of law or one of fact, the following suggestions are offered:

(1) If, upon considering the entire evidence, whether it be derived from an agreed statement of facts, oral testimony, documents, or other source, it would be proper, if the case was on trial in the superior court, for the judge to direct a verdict, a question of law only would be involved.

(2) If, upon a similar review of the entire evidence, there should appear conflicts of evidence between witness and witness, between statements of the same witness, between witness and written statements, between different clauses in a written statement, between witness and documents, between document and document, or in any other way, questions of fact would be involved. In other words, if the case presented is such that it would be improper to direct a verdict, questions of fact are certainly involved.

(3) When the effect of the ruling is to dismiss the case or pending proceeding, a question of law is involved. Rulings of this character are such as those which sustain a demurrer, dismiss a levy or claim in a claim case, sustain a motion for nonsuit, and the like.

In the present case, under the undisputed evidence, the wages of the defendant were either exempt, or they were not. The question thus arising was one of law. If the case had been on trial in the superior court, it would have been proper for the judge to have directed a verdict in accordance with the law. The judgment is reversed, and the case sent back, to allow the judge to decide the case made by the certiorari on its merits. Judgment reversed. All the justices concurring.

of its assets, and subsequently the petitioners and the receivers unite in an amendment to the petition in the nature of a supplemental bill, which amendment seeks, among other things, the marshaling of the assets of the corporation, the ascertainment of the rights and liabilities of various stockholders, and the final distribution of the assets, and where, in such amendment, all of the members of the association, including those who have received loans or advancements upon their stock as well as those who are "nonborrowers," are made parties defendant, such amendment is not demurrable upon the ground of misjoinder of parties plaintiff or defendant or on account of multifariousness.

2. A member of a building and loan association who has received a loan or advance upon his stock, and who has hypothecated the stock as security for the loan, by an absolute transfer of the same to the company, does not thereby lose his membership in the association.

3. The court in which the original petition was filed and the receivers appointed has jurisdiction to entertain the proceedings instituted by the amendment above described, especially where some of the defendants against whom substantial relief is prayed reside in the county where the original suit was brought.

(Syllabus by the Court.)

Error from superior court, Fulton county; J. H. Lumpkin, Judge.

Action by Roby Robinson and others, praying for an injunction and appointment of a receiver for the Southern Mutual Building & Loan Association. J. S. Boyd was made one of the defendants, and demurred to the amendment of petitioners. From a judgment overruling the demurrer, he brings error. Affirmed.

The following is the official report:

Robinson and others, stockholders of the Southern Mutual Building & Loan Association, a corporation having its principal office in Fulton county, brought to the superior court of that county their petition against the association, alleging that it was insolvent, and praying for the appointment of a receiver to take charge of the assets and property of the association, and to wind up the association, pay its debts, and distribute the balance of its funds pro rata among the stockholders, according to their interest therein, etc. Subsequently the petitioners filed an amendment to their petition, in which amendment they alleged that the Union Loan & Trust Company and others, who were thereby made parties defendant, had in their possession certain assets of the association, which came into their possession fraudulently, and were held in violation of the rights of the petitioners, and it was prayed that these defendants be required to turn over to the receiver such assets of the association as were alleged to be in their hands. The court granted an injunction, and appointed Anderson and O'Byrne receivers, and in the order of appointment authorized and directed them to collect all sums due to the association, and authorized them to institute or become parties to such suits as they might deem advisable in order to accomplish this purpose, and to make themselves parties to any suit to which the association might be a party, and to take such proceed-

(104 Ga. 783)

BOYD v. ROBINSON et al.

(Supreme Court of Georgia. July 19, 1898.)

BUILDING AND LOAN ASSOCIATION—MARSHALING ASSETS—PARTIES—MEMBERSHIP—JURISDICTION.

1. Where the property of a building and loan association, upon petition of some of its stockholders, has been placed in the hands of receivers, among whose duties is the collecting

ings therein as in their judgment might be necessary for the protection or collection of the assets or interests of the corporation. The petitioners then filed a supplemental petition, the receivers joining therein, in which such of the stockholders of the association as were indebted to it for money advanced or loaned by it on their stock were made parties defendant, one of whom was James S. Boyd, who, as appeared from the petition, was a resident of Dekalb county, and had conveyed to the association, as security for the loan made to him, certain land situated in Fulton county. Boyd filed a demurrer on the following grounds: (1) The petition shows that the superior court of Fulton county has no jurisdiction of him; (2) there is a misjoinder of parties plaintiff; (3) there is a misjoinder of parties defendant; (4) the petition is multifarious; (5) the facts set forth in the petition show that the petitioners are not entitled to the relief prayed for, or to any other relief, as against this defendant. The demurrer was overruled, and Boyd excepted.

The supplemental petition alleged, in substance: The defendant company is a building and loan association, and its income was derived largely from the dues, premiums, interest, and fines paid by its members or stockholders. Its stockholders are divided into two different classes: One, those who have simply paid in the dues on their stock, as provided by the charter and the by-laws, and who might, for convenience, be called "investment stockholders"; the other, those who have been advanced or have gotten money on their stock from the association, called, for convenience, "advanced members,"—the two classes being generally, though inaccurately, distinguished as "nonborrowers" and "borrowers." These two classes are subdivided in minor classes, the association having issued at different times, and concurrently, different classes of stock, known as classes A, B, C, D, E, and F, under which classes, while the amounts to be paid and the time of maturity and other details were more or less different, the general scope and plan were practically the same (as shown by the charter and by-laws of the association, copies of which are exhibited), and all stockholders in all of these classes were mutually interested in the profits, and the expenses and losses, of the business. At the time the receiver was appointed, there were outstanding 32,607 $\frac{1}{4}$ shares of stock of the association issued to and held by the members or stockholders, divided among the various classes mentioned, of which number 23,406 $\frac{13}{30}$ shares had not been advanced or borrowed upon. The remaining shares had been advanced or borrowed upon by the members holding the same. From the time these shares were issued to the holders they became members or stockholders of the association, and, on account of their shares, entitled, under the by-laws of the association, to share in the profits, and

were correspondingly liable to bear the expenses and losses of the association. After setting out the receipts of the association, the amounts paid out by it during its existence, and the assets which the receivers were able to find, and alleging that losses in amounts stated had been sustained by the association by reason of the disappearance of a portion of the assets which could not be traced, the depreciation in value of real estate held by it, etc., the petition alleged that each and every share of stock is liable to bear its pro rata share of these losses, and that, to find the amount to which each share is entitled in the distribution of the assets, it is necessary that each and all of these losses and expenses be accurately ascertained, and that each and all of the stockholders should be before the court for these purposes. With the exception of a comparatively small amount of property heretofore bought in by the association, and the few thousand dollars collected by the receivers, the bulk of the assets consists in the money advanced or loaned to certain of the members of the association, and for which their bonds, notes, mortgages, and other evidences of indebtedness are held. In order to realize on the assets of the association, so as to equitably distribute them, it is necessary to call in and collect these various indebtednesses due by the members or stockholders, and to do so in such a way and on such a plan that each member, and each share of stock held by him, whether advanced to or not, shall prorate with every other share its proportion of the losses and expenses. This being a mutual company, any other plan would be unjust and inequitable. As a large part of the fund for final distribution must arise from the amounts collected from the stockholders who have received advances, and as on account of the insolvency of the association, for causes stated, it would be inequitable to make them bear alone the whole burden of all these losses and expenses which would probably result to each of them if they were sued separately on the contract, it is equitable and just that the burden of these losses and expenses should be borne by non-advanced stockholders as well as those to whom advances have been made. It is also necessary that all stockholders who have received advances should be made parties to one suit, in order that a single and uniform rule as to the proportion of the losses and expenses which all of them should bear may be laid down, and that a proper rule of apportionment thereof and contribution thereto may be decreed, as well as an ascertainment of a uniform value of each character of stock, according to the true amount paid in on each share, and the proper credits which should be allowed to borrowers for what they have paid in, as well as for the value of their shares, may be fixed by one rule applicable to all in the same condition alike, all of which is impossible if separate suits are instituted against each, or unless all such persons are

made parties to one suit, and subject to a common accounting and marshaling of assets in one court, where one decree can fix all of the rights and liabilities equitably to all of those mutually interested in these losses and expenses and in the fund to be distributed. The court of equity which has taken and holds jurisdiction of the case is the only court that can do complete justice between all of these conflicting rights and interests, and it can only do so by having all the parties interested in this common fund, both those who are to contribute to the fund and those who are to share in this distribution, before it, so that each and all shall be represented, and may be forced to bear their fair proportion of the losses and expenses of this insolvent association, in which losses and expenses each and every stockholder and every share is mutually interested. The petition then sets out a list of members owning stock in the association, to whom advances or loans have been made on their stock, with the amounts received and the amounts due, from which it appears that there are 290 persons residing in numerous counties of the state, more than 30 of whom reside in Fulton county, who have borrowed on stock. A list is also given of the respective pieces of property conveyed to secure the indebtedness. In a list of "advanced" members residing in DeKalb county, who are indebted as such, and who have given real estate security for the advances, appears the name of James S. Boyd, and it appears that the land conveyed by him as security is in Fulton county. A copy of the form of bond and deed given by each of these stockholders to whom loans were made is attached to the petition as Exhibit A. The petition shows that certain of the borrowing stockholders have given as security their shares of stock only. All of the real-estate loans set forth, it is alleged, were made to members holding old class A stock, except where specifically stated otherwise, and those are on class F stock. Where advances are made on real estate, both on class A and class F stock, the stock, as well as real estate, is pledged and held by the association as security. All of these stockholders are made parties defendant.

Waiving discovery, the petitioners pray (1) that process issue to each of the persons named as parties defendant; (2) that judgment be had against each and all of them for the amounts found due by them respectively; (3) that the judgment be so molded that it shall be a special judgment against the real estate or the property given as security for the indebtedness, and that the same be decreed to be first lien on the property, and that the judgment likewise be a general judgment against them, respectively, for the amounts due, respectively, to be first levied on the property given as security for the same; (4) that the court ascertain the value of the respective shares of stock, and what proportions thereof should be allowed as credit on

loans or on the indebtedness of the advanced members, or borrowers, provided any of them should see fit to pay off their indebtedness, and that the court, by provisional decree, order at what amount stock, either advanced or not advanced upon, may be used in the settlement of the indebtedness of such members, the allowance so made not to be a final cancellation of the stock, but to be indorsed thereon, and accounted for in the final decree; (5) that on final decree the rights of each and all of the stockholders and members be fixed, and that on the final distribution the court ascertain the losses and expenses, and apportion them, as to it may seem proper, among the stockholders and members; (6) for general relief.

J. Howell Green, for plaintiff in error. Lumpkin & Burnett, King & Spalding, Dorsey, Brewster & Howell, and W. H. & E. R. Black, for defendants in error.

SIMMONS, C. J. It will be seen from the official report that the Southern Mutual Building & Loan Association became insolvent, and that certain of its stockholders filed in the superior court of Fulton county, the county of the residence of the corporation, an equitable petition, which alleged various acts of fraud and collusion between some of the officers of the corporation and certain other parties, and prayed an injunction and the appointment of a receiver. These prayers were granted by the court, and receivers were appointed to collect and to take charge of the assets of the corporation. The original petitioners and the receivers then filed an amendment, in the nature of a supplemental bill or a petition ancillary to the original petition, making various allegations, and setting out the reasons why it was necessary to make all the members of the association parties to the action, naming as parties both those members who had received advances and those who had not, and alleging that there were 290 of the former class. Among those named as having received advances was Boyd, the plaintiff in error here. He, in his own behalf, demurred to the amendment on the grounds that there was a misjoinder of parties plaintiff, misjoinder of parties defendant, multifariousness, want of jurisdiction in the court over defendant Boyd, and that the amendment set out no cause of action against him.

1. While we think it was not necessary for the original petitioners to have joined as parties plaintiff in this amendment in order to collect the assets of the association, still, as they were the original parties plaintiff to the petition and interested in the collection of the assets, they may properly have been parties plaintiff to the amendment. When the assets of the corporation were placed in the hands of receivers, these receivers represented the corporation, and, under the order of the court, could have filed this ancillary petition

without joining as parties plaintiff therein the original plaintiffs. If the receivers had a cause of action, the court did not err in refusing to dismiss the petition on the ground that these other parties plaintiff had joined therein.

a. Under the facts alleged in the amended petition, there was no error in overruling the demurrer setting up a misjoinder of parties defendant. The association was a corporation having many members. While the liability of the members may have been different as to amounts and degree, yet all the members were mutually interested in the final decree to be had under the original petition. The amendment shows that there were five classes of stockholders in the association, some of whom had received advances and some who had not. In order to do exact and complete justice to each member, it was necessary to have all made parties to the proceeding, so that all would be bound by the final decree to be taken at the termination of the litigation. "A court of equity has jurisdiction, at the suit of shareholders, of unredeemed shares in a building association, to call the redeemed shareholders to account, enforce payment of what they respectively owe, distribute the fund among the unredeemed shareholders, and wind up the concern; and, where suit is brought to wind up the affairs of such an association, all the shareholders should be made parties, and, if any have been illegally released, their liabilities should be enforced." 2 Lawson, Rights, Rem. & Prac. § 593. "All persons who are directly or consequentially interested in the event of the suit are properly made parties to a bill in equity, so as to prevent a multiplicity of suits by or against parties at once or successively affected by the original case." *Blaisdell v. Bohr*, 68 Ga. 56. See, also, *Goodrich v. Association*, 54 Ga. 98, 101.

b. It is contended by counsel for plaintiff in error that several distinct and independent matters were joined in the petition against several defendants, and that the court should have sustained the demurrer because of multifariousness. In our opinion, the court committed no error in overruling the demurrer on this ground. The subject-matter of the petition was the winding up of the affairs of the association so as to do exact and complete justice among its many members. The decree finally to be rendered may subject some of the members and release others. "To sustain a bill against the charge of multifariousness, it is not indispensable that all the parties should have an interest in all the matters contained in the suit. It is sufficient if each party has an interest in some matter in the suit, which is common to all, and they are connected with others." *Worthy v. Johnson*, 8 Ga. 236, quoted with approval in *Blaisdell v. Bohr*, supra. In the proceeding now under consideration all the members of the association can be heard, all of their rights and liabilities can be determined, and the whole

matter fully and finally adjudicated. *Bowden v. Achor*, 95 Ga. 243, 22 S. E. 254.

2. The plaintiff in error contended that, if the foregoing is true, it does not apply to the facts of this case, because, when he secured the advance and assigned his stock absolutely to the association, he ceased to be a member of the association, and that, therefore, the plaintiffs in the court below had no right to join him as one of the defendants; that, if he owed the association anything, it was upon a separate and independent contract, and there was no community of interest between him and the association or its members. He relied upon *White v. Association*, 22 Grat. 233, *Pabst v. Association*, 1 MacArthur, 385, and other cases from the same courts. These cases seem to sustain his contention, but, as far as we can ascertain, they have not been followed by any other courts. The great preponderance of authority is to the effect that a member who borrows from the association and hypothecates his stock as collateral for the debt does not on that account cease to be a member of the association. Mr. Endlich, in his treatise on Building Associations (2d Ed. § 121 et seq.), combats the views of the supreme court of Virginia as expressed in *White v. Association*, and as to that case says, in a footnote: "Observe the inconsistency: He has lost his membership, but is bound, as a member, to the duties of membership, and has even put himself under bonds to be a good member." In section 122, after discussing the only method by which a member can cease to be a member, he says: "But, upon any other plan, the borrower, undertaking to continue his payments until, having gone into the general fund, they, with the other contributories, have swelled it to a certain magnitude, distinctly retains his interest in, his right to benefit by, his privilege to participate in, the profits derived from all those various sources. It cannot, therefore, upon any logical principle, be said that he has one particle less interest in the common fund of the association than before he became a borrower; that the whole scheme is in the slightest degree less mutual, as to him, than it was before; that the management of the society's business, and the proper administration of its affairs, are of any less moment to him as a borrower than they were to him as an investor. In the latter character, he was anxious to see it prosper for the sake of speedily realizing the prospective cash value of his share; in the former, having anticipated that cash value, subject to a heavy discount, he is equally, nay, more, concerned to hasten the period of his discharge,—for, in addition to his stock payments, which he has obligated himself to make equally as if he were an investor only, and as to which he has surrendered the right of withdrawal, he is obliged to pay interest upon the money he has received. Now, if he retains all the interests of membership in the building association, which are, at all times, the basis of its rights,

he certainly retains all of the latter. In other words, a borrower continues, in every sense of the word, a member of the association." After citing decisions from various courts to sustain this doctrine, and among them those of this court, he says: "And it may be safely stated that the doctrine has forced its own recognition upon the courts of nearly every state in the Union as well as England." This doctrine was adopted by this court in the case of *Parker v. Association*, 46 Ga. 166, and in that of *Pattison v. Association*, 63 Ga. 378. In both of these cases, and indeed, so far as we know, in every Georgia case which has dealt with the winding up of these associations where borrowers' rights were in issue, this court has treated borrowers as being members of the association. In *Thomp. Bldg. Ass'n*, p. 71, § 19, the same principle is recognized and various authorities cited to sustain it.

3. Having shown that Boyd was still a member of the association, and that he was, consequently, interested in the distribution of the assets and the payment of the losses, it necessarily follows that he was a necessary party, in order that his rights and liabilities may be adjusted in winding up the affairs of the association. A court of equity, having jurisdiction of the subject-matter and having seized the assets of the corporation, has power to make all necessary parties, and to bring them within its jurisdiction, whether they reside in the county where the petition was filed or in another. Unless this could be done, it would be folly for any court to undertake to wind up the affairs of an association of this character. The 290 advanced members of the association may reside in 50 different counties of the state. To bring suits against them separately, each in the county of his residence, would be a source of great expense and litigation, and needlessly exhaust the assets of the association. Such a course would give rise to a multiplicity of suits, in which, perhaps, a jury in one county would find one way as to the liability of a member, and a jury in another county in a different way as to a member whose liability should be the same. One trial judge might take one view of a member's liability, and another judge quite a different view. It is far preferable to have all the claims and all the litigation brought before one court and decided, and a final decree made adjudicating the rights and liabilities of all parties. In the case of *Railroad Co. v. McDaniel*, 56 Ga. 191, this very question was decided by this court. The railroad company, it seems, had become insolvent. McDaniel had obtained judgment against it, on which an execution had been issued, and a return of nulla bona made on the execution. McDaniel filed a bill against the subscribers to the stock of the company to compel them to pay in a sufficient amount to satisfy his claims. The subscribers lived in different counties. A demurrer was filed to the bill upon the ground that it did not

appear that any of the defendants resided in Whitfield county, where the bill was filed, nor in what county they did reside. The demurrer was overruled, and, on a writ of error to this court, this, with other rulings of the trial judge, was affirmed. Jackson, J., in delivering the opinion of the court, said: "The remedy by bill in equity is easier and more complete. With its power to appoint an auditor or master in chancery to audit the amount of the debts of the corporation in gross and the debt due to each creditor, to ascertain the number of stockholders solvent and insolvent, the per cent. necessary to be paid by each stockholder in proportion to his stock, it is perfectly clear that complete justice can be better administered to every creditor and to each solvent stockholder by a court of equity than by any other form of procedure. It will prevent a multiplicity of suits, save costs, and give speedy and effectual relief. Principle, therefore, and sound reason, accord with authority that equity will grant relief in all such cases." In the case of *Lavender v. Thomas*, 18 Ga. 668, Benning, J., in discussing this question, said (page 678): "There may, however, be equity cases in which it will be impossible to observe the maxim, as cases in which more parties than one are necessary to any decree, and those parties some of whom reside in one county and some in another. And this case is such a one; for in this case no decree, disposing of the fund in the hands of the sheriff, can be rendered, unless the case in which it shall be rendered shall be such a case as shall bring some one or more of the persons interested in the fund out of his county into the county of some other of the persons interested in it. That being so, the best county in which to bring this suit was the county in which the suit was brought. In that county resided the person who had the funds in his hands, and who was sheriff of the county, and who, as sheriff of the county, held the fund." In *Brobston v. Downing*, 95 Ga. 505, 22 S. E. 277, certain depositors and creditors of a bank brought suit against the stockholders of the bank. One of these stockholders resided in Chatham county, while the suit was brought in the county of Glynn. This court held that "where the corporation is insolvent, and has no assets applicable to the payment of its unsecured creditors, one or more of these creditors may bring suit, in behalf of themselves and all others who may choose to come in and be made parties, against all of the stockholders, to enforce their statutory liability, and apportion the amount which each should contribute to discharge the claims of the various creditors." In the case now under consideration the home of the corporation was in Fulton county, a large part of the assets were seized by the court in Fulton county, and quite a number of the defendants against whom substantial relief was prayed resided in Fulton county. The court, therefore, had jurisdiction of this plaintiff in error, and did

not err in overruling his demurrer on this ground. Judgment affirmed. All the justices concurring, except COBB, J., disqualified.

(102 Ga. 453)

LYON v. LYON.

(Supreme Court of Georgia. Aug. 4, 1897.)

INJUNCTION PENDING DIVORCE—EVIDENCE.

1. An injunction will, in a meritorious case, lie, at the instance of a wife who is suing her husband for a divorce on the grounds of cruel treatment and habitual intoxication, to restrain him, not only from interfering with her property, but also from going into her dwelling house, and eating and sleeping therein, over her protest and against her consent.

2. In the present case the court committed, at the interlocutory hearing, numerous errors, in admitting in evidence against the plaintiff testimony which was palpably hearsay, which consisted of mere conclusions of the witness, and which was otherwise irrelevant and inadmissible.

(Syllabus by the Court.)

Error from superior court, Bartow county; A. W. Fite, Judge.

Bill by Lula T. Lyon against Thomas J. Lyon for divorce. From an order refusing an injunction, plaintiff brings error. Reversed.

The following is the official report:

Mrs. Lula T. Lyon brought her petition against Thomas J. Lyon for divorce, and prayed also that the defendant be enjoined and restrained from remaining or coming upon her property, on which she resided, or into her house, from eating and sleeping there, from attempting any control over the tenants upon the place, or the proceeds, income, rents, issues, and profits thereof; from taking, using, possessing, or interfering with her personal property; and from exercising any control or direction over their two minor children, or interfering with her custody thereof; and for general relief. Upon the hearing of the application for the restraining order the court ordered that the defendant be restrained and enjoined from interfering in any way with the laborers or tenants of the petitioner until the further order of the court, and that all the other prayers for injunction or restraint be refused. To this refusal, and to other rulings hereafter set out, the plaintiff excepted. She alleged that defendant treated her with great cruelty, and had done so for some time past, in the following, besides other, ways: By cursing, abusing, and unkindly and harshly speaking of and to her without excuse; by using profane, obscene, and vulgar language and allusions to and of her in the presence of herself and others; by cursing, abusing, and harshly and unkindly speaking of and to his and her children, threatening with violence the persons of herself and their children, and threatening the life of their minor son and attempting to kill him without excuse or justification; by violent conduct in the home where they have been living; by drinking in-

toxicating liquors to such an extent as to make him violent, unpleasant, and disagreeable, and his company and association dangerous to the peace, persons, and lives of herself and their children; by unjust, untrue, unkind, and humiliating remarks and insinuations about herself and her conduct; by interfering with and mistreating her tenants. Defendant, though ablebodied and strong, failed and refused, and has for years past, to support herself and their children, two of whom are minors without estate. Defendant has no property, income, or occupation. Petitioner received in advance and by inheritance from her father, who has been dead many years, a large estate, all of which is gone except the home where she lives, a small amount of vacant town property, which is worth very little, and brings no income, and some wild lots, small in value, and yielding no revenue. The place where she lives was deeded to herself for life, with remainder to her children. It consists of about 200 acres of cultivated land, and the fee simple title is worth about \$7,000, and the yearly income will be hardly sufficient to comfortably support herself and children and educate her youngest child, now six years old. Her father was very wealthy, and she was accustomed from infancy to the kindest treatment and the best of living as to food, clothes, and servants, and the necessaries and luxuries of life. She is now living in reduced circumstances, and compelled to economize as never before. The farm on which she lives is rented out to tenants, and from these rents she gets what she uses for the support of herself and children. Defendant not only does not aid in the support of herself and children, but has for some time been supported from the proceeds of this farm entirely. With the aid of her son, she has looked after this farm and the work of the tenants thereon, and the defendant is of no aid or assistance to her in this respect. On the contrary, he interferes with the tenants, and cannot get along with them; and some of them are now threatening to leave the place if he stays there, and continues to act as he has. He has been a drinking man for some years, and within the last few years has drank more at home than he formerly did, and is more easily and dangerously affected thereby. He insists on keeping whisky, against her entreaties, and sometimes is under its influence for several days at a time. During these drinking spells he becomes violent, dangerous, abusive, profane, and threatening. Neither her life nor that of her two sons is safe at these times. Such occasions have occurred frequently within the last few months, and are liable to occur at any time. He feels intense bitterness and hatred towards their eldest son, and has several times threatened and attempted his life. This boy is 20 years old. His father beats him with his walking stick, cowhides him with the buggy whip, and has drawn deadly weapons upon him, threatening to kill him. She has told defendant of her intention to

apply for a divorce, and has endeavored to effect a peaceable and quiet separation, knowing the impossibility of their living peaceably together, on account of his violence to herself and children. This he refuses. He declares his intention to remain in her house, and refuses to go elsewhere. He has no right, title, interest, or equity in the home wherein or the place whereon she resides, and she has made no contract to support him. She and defendant have not lived together as man and wife for some time, notwithstanding which he insists on coming to and staying at her house, and eating and sleeping there, and using the same as his own property, and has announced his intention to continue to do so. Ordinary remedies by action for damages, ejectment, trespass, etc., are wholly inadequate to her protection, and a resort thereto would involve a multiplicity of suits. For the reasons stated, the defendant is not the proper custodian for their minor children, both of whom prefer her custody to his.

The defendant answered, denying the allegations of the petition as to his conduct towards petitioner and her children or tenants, as to drunkenness at his home, and as to his failure and refusal to support petitioner and her children; and denied that there was cause for divorce or for an injunction. The evidence at the hearing was conflicting. The following testimony from affidavits offered by the defendant was admitted in evidence over specified objections of plaintiff: From affidavit of W. E. Puckett: "On last Saturday I met, on the street, here in Cartersville, Roxie Beaman, with her daughter Fionnie Jackson. I asked Roxie who was to blame for all that trouble at the Lyon home,—was it Captain or Mrs. Lyon? She said: 'I am a negro, but I will tell you the truth. Mr. Puckett, before God, Miss Lula is to blame for it all.' She spoke in the kindest terms of Capt. Lyon, saying he had 'always been good to me and my family.' Also: 'I have always heard his (Capt. Lyon's) renters speak in the highest terms of him, saying he was a good landlord, and good to his renters and laborers.' Also: 'Roxie Beaman told me that she had talked to Miss Lula, and tried to get her to stop all this trouble, but she wouldn't do it.' From affidavit of Nathan Beaman: "As much as I know the parties, I do not know of any reason for a separation or trouble between them." From affidavit of Mrs. A. E. Jordan: "I had heard of some trouble between Capt. Lyon and his wife last fall, and asked Roxie Beaman, at my house, who was to blame for it.—Capt. Lyon or his wife; and she told me then and there that Mrs. Lyon was to blame for it all, that she (Roxie) told Mrs. Lyon she would have to quit it before she died. She said at the time that Capt. Lyon was treated like a dog, and it was a shame and a scandal before God the way his family treated him." From affidavit of N. M. Adams: "I met young Tom Lyon on Saturday, the 27th of February. He told me in the presence of Elisha Glenn that

his mother had employed Judge Akin to file suit. I told him that perhaps he was the cause of the trouble, and that, if he would go off, and go to work, it would all be settled. He replied, 'We can't afford to be furnishing him in tobacco and clothes, and him doing nothing.'" From affidavit of N. M. Adams: "Dave Mann told me that when he was driving Mrs. Lyon to town one day, soon after her daughter's marriage, that she told him that she was glad Cora had married so well, and, if Capt. Lyon was to die, or get out of the way, she would marry some rich old fellow herself." From affidavit of J. W. Yarbrough: "I have every reason to know that Mrs. Lyon is a very disagreeable and high-tempered woman." From affidavit of N. M. Adams: "The time I heard Capt. Lyon call Tom a coward was when he was telling me of the way he bluffed Tom with a gun that Tom knew was not loaded. And then he only said, laughing, that he knew the coward would run." From affidavit of defendant: "Each of them [referring to Roxie Beaman, Nathan Beaman, and Fionnie Jackson] said to Mr. Griffin, the sheriff, and myself, that they had never seen me drunk, and never heard me speak ill of my wife in their lives." From affidavit of R. L. Griffin: "I personally saw each of the following witnesses, and heard them say that day that they had never heard Capt. Lyon curse or abuse his wife or daughter in their lives, and they were summoned as witnesses for Capt. Lyon. The witnesses whom I heard say that are as follows: Roxie Beaman, Fionnie Jackson, Bill Jackson, Nathan Beaman, Wade Carson. They all told me they knew nothing about the troubles between Capt. Lyon and his wife." From affidavit of R. L. Griffin, after detailing what the witnesses had said to him in Capt. Lyon's presence: "Capt. Lyon told each of them that he only wanted the truth told." Plaintiff proposed to examine Roxie Beaman, Nathan Beaman, George Henry Beaman, and Wade Carson, affidavits from whom, more or less conflicting, were read by each side, and to show by these witnesses that their affidavits read by the plaintiff contained what they really meant to swear. Defendant's counsel consented to this, but the court refused to allow the examination and evidence.

John W. Akin and A. S. Johnson, for plaintiff in error. J. W. Harris, for defendant in error.

FISH, J. 1. While courts of equity are reluctant to interpose in controversies growing out of merely personal or domestic relations, and will ordinarily leave the parties to pursue the remedies open to them in the courts of common law, still, when "property rights or questions concerning property arise between husband and wife, parent and child, [or] guardian and ward," jurisdiction will be taken, in a proper case, in order that full and adequate relief may be granted to the injured

party. See 1 Pom. Eq. Jur. (2d Ed.) § 99. Thus, "where a husband, by a postnuptial deed, settles a house and business to the separate use of his wife, to be managed by her, for the benefit of herself, as if a feme sole, he can be restrained from in any way interfering with the business, and even from entering the house." 10 Am. & Eng. Enc. Law, 984, citing *Wood v. Wood*, 19 Wkly. Rep. 1049. "The aid of equity by injunction is most frequently sought, as between husband and wife, in cases of application for divorce from the bonds of matrimony; and it may be stated as a general rule that pending proceedings for divorce, a proper case of emergency being shown, the husband may be enjoined from interfering with the custody of the children, or of property in possession of the wife." 2 High, Inj. (2d Ed.) § 1393, citing *Wilson v. Wilson*, *Wright*, 129, and *Edwards v. Edwards*, Id. 308. See, also, in this connection, *Holmes v. Holmes*, 4 Barb. 295, in which *Barcule, J.*, on page 297, said: "The rule of the court of equity in such cases follows that of natural justice: The husband, by his violation of the marriage contract, forfeits all equitable right to the wife's property. Even when the property has belonged to her before the separation, and has been reduced into actual possession by the husband, courts of equity will restore it to the wife. Much more, in a case like the present, when the property falls to the wife after the separation, should the equitable power of the court be interposed to prevent the husband from receiving it by virtue of that relation which he himself has disregarded and violated. It would be difficult to conceive of a more plain and palpable outrage upon justice than to permit this old lady to be deprived of her whole share of her father's estate by an exercise of his marital rights on the part of a husband whose cruelty has driven her from an honorable home, and occasioned a permanent suspension of the marriage contract. The authorities are full on this subject;" citing *Van Duzer v. Van Duzer*, 6 Paige, 366; *Fry v. Fry*, 7 Paige, 461; *Renwick v. Renwick*, 10 Paige, 420. This same equitable doctrine is recognized and enforced in the English courts of chancery. See *Symonds v. Hallett*, 24 Ch. Div. 346, 53 Law J. Ch. 60, and 49 Law T. (N. S.) 380. There it appeared that: "On a marriage a leasehold house was settled upon the usual trusts for the wife for life, for her separate use, and the husband and wife continued to reside in the house. Differences arose between them, they ceased to cohabit, and the wife instituted proceedings for divorce or judicial separation. The husband claimed the right to go to and use the house when and as he thought fit,—not for the purpose of consorting with his wife, but for his own purposes. In an action by the wife against the trustees and her husband, claiming administration of the trusts of the settlement, and an injunction to restrain the husband from entering the house, [it was] held that under the circumstances the wife

was entitled to an interim injunction." When, pending a libel for divorce instituted by the wife, she is living in a state of separation from her husband, it may be said that the latter's marital rights are for the time being suspended, as he is not at liberty to interfere either with her person or her property. "One carrying on a suit for any form of divorce cannot be cohabiting with the defendant; for thus he would condone the offense, or affirm the marriage sought to be set aside, or otherwise contravene in pais his act in court." 1 Bish. Mar., Div. & Sep. § 1757. It is not only the privilege, but the duty, of a wife to live apart from her husband, when he has been guilty of conduct entitling her to a divorce, which she has not condoned. *Harper v. Harper*, 29 Mo. 301; *Burns v. Burns*, 60 Ind. 259; *Sykes v. Halstead*, 1 Sandf. 483. For "a regard for public decency, as well as the settled usage of the court, requires that under such circumstances the parties should not live together." *Marsh v. Marsh*, 14 N. J. Eq. 815. It must oftentimes prove a hardship upon the wife to leave her husband's house and seek an asylum elsewhere. To compel her to give up a home which she herself has provided with her own separate means would amount to intolerable injustice. So, in such a case, the husband having by his own gross misconduct forced the wife to bring about a separation, it must follow that he, and not she, must go forth into the world, leaving the home they had previously shared in common to the enjoyment of its rightful owner. To protect the wife, under such circumstances, against unlawful interference on the part of the husband, during the pendency of a libel for divorce brought against him, would seem to be peculiarly within the province of a court exercising equity jurisdiction. Under the practice which obtains in this state, a prayer for the requisite equitable relief may be joined with the wife's application for divorce, in one and the same petition. In Georgia, since the passage of the married woman's act of 1866, the husband has absolutely no interest, legal or equitable, in property belonging to a wife's separate estate. She is not now—indeed, she has never been—under any legal duty to provide for her husband's support. *Ainsworth v. Ainsworth*, 37 Ga. 627, 634. Upon what pretense, then, can a husband who has cruelly wronged his wife, and thus relieved her of even any moral obligation to provide for him, claim the right to occupy with her premises, of which she is the sole and undisputed owner, during the pendency of proceedings whereby she seeks a total divorce?

2. In the present case it appears that much evidence which was clearly inadmissible was admitted over proper objections thereto urged by the plaintiff. The reporter's statement sets forth the evidence alluded to, much of which was palpably hearsay, and a portion of which consisted of mere conclusions on the part of the witnesses, and was otherwise objectionable. The error thus committed demands that

the case should undergo another investigation, which should be conducted in the light of the law as above announced. Judgment reversed.

(102 Ga. 502)

PERRYMAN v. POPE.

(Supreme Court of Georgia. Aug. 10, 1897.)

APPEAL—REVIEW—RULINGS ON EVIDENCE—ATTACHMENT—EVIDENCE—ADMISSIONS.

1. This court cannot undertake to determine whether or not error was committed in refusing to allow a witness to answer certain questions, it not appearing what the answers thereto would have been had they been admitted.

2. Where the trial judge concluded, after reflection, to allow certain testimony which had been ruled out to be considered as again in evidence, and so informed one of the attorneys, at whose instance the same had been originally introduced, but did not give like information to an associate attorney who was then opening the argument to the jury on their side, or announce to the jurors the change in his ruling, this was not good practice. (a) The irregularity thus committed in the present case does not, however, afford sufficient cause for granting a new trial.

3. There was no error, in the trial of a traverse to an attachment sued out on the ground that the defendant was about to remove beyond the limits of the county, in rejecting evidence of his declarations that he had no intention of removing, the same having been made after he knew the attachment had been issued, and evidently with a view to the litigation thereby begun; but his admissions tending to show that he was about to remove from the county at the time the attachment was sued out were admissible in behalf of the plaintiff.

4. It was not essential for the plaintiff in such trial to show that the defendant was about to remove from the county on the very day upon which the affidavit to obtain the attachment was made. Proof that the intention to remove then existed, and was presently to be carried into effect, was sufficient. (a) Accordingly, the following instructions to the jury, taken all together, were substantially correct: "Whether the plaintiff . . . was authorized to sue out the attachment on [the day it was issued] depends on the fact whether the acts and conduct of the defendant showed that it was his purpose and intention at or about [that date] to remove without the limits of the county." "If the defendant was near to the performance of the act of removal, if he entertained the purpose of removal, and was making preparations to remove, then [the plaintiff] would have been entitled to sue out the attachment." "Nor is it necessary for it to appear that the defendant intended to remove on the very day the attachment was sued out. If the evidence shows that the design to remove existed, and his conduct indicated or showed that it was his purpose to carry the design of removal into execution at or about the time the attachment was sued out, you should find the issue on the traverse in favor of the plaintiff."

5. The material questions of law involved in this case are covered by the foregoing, and the evidence warranted the verdict. There was no error in denying a new trial.

(Syllabus by the Court.)

Error from superior court, Carroll county; S. W. Harris, Judge.

Action by J. N. Pope against J. D. Perryman, administrator. Judgment for plaintiff. Defendant brings error. Affirmed.

S. Holderness, S. E. Grow, and Oscar Reese, for plaintiff in error. Adamson & Jackson and C. P. Gordon, for defendant in error.

FISH, J. 1. One of the grounds of the motion for a new trial filed by the defendant below was: "Because the court committed error in this: The defendant offered to prove by Oscar Reese, S. E. Grow, and L. C. Mandeville, witnesses in his behalf, that W. D. Dickson, defendant's intestate, on the former trial of this case in said court, at its April term, 1893, swore in said case, when placed upon the witness stand in his own behalf, then and there in response to questions as follows, asked him by Oscar Reese, then his counsel, to wit: 'What effort or declaration had he made at any time of his intention to remove beyond, or being about to remove beyond, the limits of Carroll county, Georgia, on the 18th of December, 1889? What was his intention then as to being about to remove beyond the limits of the county?' Plaintiff objected to this testimony as illegal, and the court sustained the objection as to each witness, notwithstanding defendant offered to prove by each of the aforesaid witnesses that they were present at said trial, and remembered the whole of said W. D. Dickson's testimony in substance, and that said Dickson was now dead." The above quotation comprises all the information afforded to this court concerning the nature of the evidence excluded. No attempt whatever is made by counsel in the bill of exceptions brought to this court either to set forth the answers given by the deceased witness to the questions propounded to him, or to state what, in substance, counsel expected to prove by the witnesses in defendant's behalf who professed to remember what the deceased had sworn as a witness on the former trial. Obviously, such an assignment of error cannot be considered. *Telegraph Co. v. Michelson*, 94 Ga. 436, 21 S. E. 169; *Hamilton v. Williford*, 90 Ga. 210, 15 S. E. 753; *Benton v. Baxley*, 90 Ga. 296, 15 S. E. 820; *Valentine v. State*, 77 Ga. 470; *Gray v. McDaniel*, 73 Ga. 118.

2. It appears that, during the examination of a witness introduced in behalf of the defense, a portion of his testimony was objected to by the plaintiff, and ruled out by the court. Upon reflection, the trial judge concluded to recall this ruling, and to allow the testimony to go before the jury. He made known this change in his former ruling to one of the defendant's attorneys, at whose instance this evidence had originally been introduced, but did not also notify associate counsel for the defense who was then proceeding with his argument before the jury. Indeed, no public announcement was made before them that the testimony in question was to be considered as again in evidence. While still another attorney was making the concluding argument for the defense, he was so informed; but, when proceeding to

discuss this evidence, the court called his attention to the fact that his time had expired. He "stated he knew nothing of the ruling until just then, when the court informed him that he had announced the same to defendant's counsel an hour before, and his time was out." The attorney to whom this announcement was made did not himself participate in the argument of the case before the jury. We cannot approve, as sound practice, the course pursued by the trial judge in the present case in regard to this matter. On the contrary, we think he should have made a formal announcement of his final ruling in the presence and within the hearing of the jury, so that they and the parties litigant and their counsel might be fully informed that the previous ruling was to be disregarded, and the evidence then excluded was to be considered as again before the jury. At the same time, it would seem that the attorney to whom the court announced his change of ruling was under a duty to his client to see that the latter got the benefit thereof before the jury. This attorney did not himself argue the case; but he had full opportunity, if he so desired, to inform his associates, who did make arguments before the jury, that they were at liberty to comment on this particular testimony, as the court had informed him of a subsequent ruling to that effect. At any rate, the irregularity complained of is not, under the facts disclosed by the record before us, sufficient cause for granting a new trial. The testimony ruled out related to a conversation between the witness and the defendant's intestate, occurring long after the attachment against him was issued, and consisted of a declaration in his favor to the effect that, after removing to a designated county, he still claimed the place at which he had previously resided "as his home." We therefore think the judge very properly excluded this testimony in the first instance, and should not have recalled his ruling that it was inadmissible.

8. Evidence as to a number of similar declarations was excluded by the court, and of this the plaintiff in error complains. Clearly, where, on the trial of a traverse to an attachment sued out by a creditor, the issue is whether or not the debtor was about to remove beyond the limits of the county when the attachment issued, statements by him to the effect that he had no intention of removing are of no probative value, when made after he had received notice of the issuing of the attachment, and evidently with a view to the litigation thereby begun. Statements by a defendant in attachment under such circumstances, tending to show that he was about to remove from the county, are admissible in evidence as admissions against interest; but all statements amounting to declarations in his own favor should be carefully excluded from consideration by the jury. Only such declarations as accompany

an act, or are "so nearly connected therewith in time as to be free from all suspicion of device or afterthought, are admissible in evidence as part of the *res gestæ*." Civ. Code, § 5179. To be competent as evidence, statements by a debtor negating his intention to remove must have been made contemporaneously with, and not after, the issuance of attachment sued out against him. See *Brady v. Parker*, 67 Ga. 636.

4. Our statute provides that an attachment may issue whenever a debtor "is actually removing, or about to remove, without the limits of the county." Civ. Code, § 4510. Construing this statute, it was early decided by this court that it is not essential that the plaintiff in attachment show that the debtor was "about to remove" from the county on the very day upon which the affidavit to obtain the attachment was made, but that proof that an intention to remove then existed, and was presently to be carried into effect, is sufficient. *Stix v. Pump*, 36 Ga. 526. Complaint is made that the trial judge, in this connection, gave to the jury the instructions set forth in the fourth headnote. We think these instructions were substantially correct.

5. The foregoing discussion covers all the material questions of law presented for our determination. The evidence warranted the verdict; and, for aught that appears, the trial judge properly held that the movant was not entitled to a new trial. Judgment affirmed.

ATKINSON, J., absent, for providential cause.

(105 Ga. 51)

SMITH v. FERRARIO.

(Supreme Court of Georgia. July 22, 1898.)

DEPOSITIONS—REFUSAL TO TESTIFY—POWER OF COURT.

Where depositions are sought under the provisions of section 5315 et seq. of the Civil Code, the judge of the court in which the case is pending has no jurisdiction to entertain a petition for attachment against the witness for not appearing or for refusing to testify before the commissioner appointed under the provisions of the law to take such testimony. The power to compel the witness to attend and to testify in such cases is vested by the statute in the commissioner.

(Syllabus by the Court.)

Error from city court of Atlanta; H. M. Reid, Judge.

Action by G. Ferrario against H. H. Smith. The defendant, being summoned to testify by deposition, refused, and was found guilty of contempt by the court, and from the judgment brings error. Reversed.

Ouyler Smith and Glenn & Rountree, for plaintiff in error. Glenn, Slaton & Phillips, for defendant in error.

SIMMONS, C. J. Section 5315 of the Civil Code provides that, "in all counties of this

state of twenty thousand inhabitants and upwards, either party litigant in any court of record in any such county may, without any order or commission, take the depositions of any witness or witnesses in said case, whether resident in the county or not, upon giving the opposite party five days' notice of the time and place with the names of the witnesses." The Code also provides that such depositions may be taken before any of the commissioners appointed by the judge of the superior court. After providing that all motions and all objections to the witnesses or the proceedings should be made to the commissioner, filed, and returned, and prescribing how the examination should proceed and how the depositions should be returned, the Code (section 5321) declares: "The commissioner shall have the same power and authority to summon witnesses, and compel their attendance to testify before him, as are now conferred upon justices of the peace in this state to compel witnesses to appear and testify in justices' courts." From the record it appears that Ferrario applied, under these sections, to the commissioner appointed by the judge of the superior court to take the testimony of Smith in a case then pending in the city court of Atlanta. Smith appeared in obedience to the subpoena issued to him by the commissioner, but, for various reasons not now necessary to mention, refused to testify. Counsel for Ferrario filed a petition to the judge of the city court of Atlanta stating that there was a case pending in his court, that they desired the testimony of Smith (the defendant) in the case, and that Smith refused to testify. These facts were also certified to the judge by the commissioner. A rule nisi was issued by the judge, calling on Smith to show cause why he should not be attached for contempt of court. Smith appeared in answer to the rule, and showed cause by filing a demurrer, and an answer, on various grounds not necessary here to set out. After argument by counsel, the judge held that Smith was in contempt of court, and assessed against him a fine of \$100, which he might discharge by appearing before the commissioner within a certain time, and testifying in the case. To this judgment Smith excepted, and brings the case here for review.

The learned counsel for the plaintiff in error based the refusal of his client to testify mainly upon the ground that, under the above-cited sections of the Code, the commissioner had no power to take the testimony of a party to a case pending; that those sections of the Code did not contemplate that a plaintiff or defendant should be compelled to testify; that parties to a cause are not, in the strict sense of the term, witnesses. When the case came on for consideration by this court, we discovered that the Code gives no jurisdiction to the judges of the city or superior courts to attach

a witness for contempt for refusing to testify under this particular proceeding, but that the power and authority to do so is, in express terms, given to the commissioners, as will be seen by reference to section 5321, above quoted. That section gives the commissioner the same power to compel witnesses to appear and testify as is now conferred upon justices of the peace in their courts. A justice of the peace, under Civ. Code, § 4164, has power to fine a witness, who has been duly served with subpoena, and who fails to appear in obedience thereto, not more than \$10. If a witness refuse to testify, the justice, under Civ. Code, § 4082, can fine him not more than \$5, and imprison him not more than five hours, as for a contempt of court. This is the only power given to the commissioner, and it is given to him exclusively. If the Code did not prescribe that the commissioner should have the power to compel a witness to appear and testify, perhaps the judge of the court where the case was pending might assume it under a general power that courts possess of compelling witnesses to appear and testify, on the ground that the testimony was to be used in the trial of a case pending in his court; but even this view of the matter is, in our opinion, exceedingly doubtful, inasmuch as the subpoena to the witness is issued, not from the court, but by the commissioner, and the contempt in the refusal to appear or testify is not to the court, but to the commissioner appointed, under the law, by the judge of the superior court. Nor does section 5305 authorize the judge of the court where the case is pending to attach a witness for contempt in a proceeding like the one in the present case. That section relates to taking testimony by interrogatories sued out and commission issued by authority of the court, which is quite a different proceeding from that resorted to in this case. We are therefore of the opinion that the judge of the city court of Atlanta had no jurisdiction to issue the attachment for contempt. It appears from the supplemental record brought up by the defendant in error that this case was referred to the judge of the city court by consent of both parties, in order, as it was stated, to have the question determined. The case was argued here without any motion to dismiss for want of jurisdiction. Consent of parties, however, cannot give a court jurisdiction of a subject-matter when it has none by law; and when this court discovers from the record that a judgment has been rendered by a court having no jurisdiction of the subject-matter, and the case is brought here for review upon the writ of error, this court will of its own motion reverse the judgment. If the judge has refused to entertain the motion, and that ruling has been excepted to and brought here for review, this court will, on motion or ex mero motu, dismiss the writ of error. *Pope v. Jones*, 79 Ga. 487, 4 S. E. 860. Judgment reversed. All the justices concurring.

(105 Ga. 506)

CO-OPERATIVE MFG. CO. v. ANDREWS.

(Supreme Court of Georgia. July 22, 1898.)

NEW TRIAL—BRIEF OF EVIDENCE—APPROVAL—AMENDMENT.

1. Where, by an order duly passed in term, the movant in a motion for a new trial was given until a designated date in vacation within which to file a brief of evidence, there being no limitation in the order as to the time of approving such brief, and a brief was actually filed, but not approved within the prescribed time, it was in the discretion of the judge to approve it afterwards, or to refuse to do so, and it was error for him to hold that he had no such discretion. *Anderson v. McLean*, 94 Ga. 798, 22 S. E. 302.

2. In such a case it was competent for the judge, at the hearing of the motion, to allow the document thus filed to be amended, even though the amendment might consist in substituting therefor a more condensed statement of its material contents. See *Lewis v. Mortgage Co.*, 84 Ga. 574, 21 S. E. 224; *Hood v. Culver*, 95 Ga. 120, 22 S. E. 123.

(Syllabus by the Court.)

Error from superior court, Monroe county; *M. W. Beck*, Judge.

Action between the Co-operative Manufacturing Company and J. H. Andrews. There was a judgment in favor of the latter, and the former brings error. Reversed.

R. L. Maynard, for plaintiff in error. *Jas. S. Boynton* and *Julian B. Williamson*, for defendant in error.

PER CURIAM. Judgment reversed.

(105 Ga. 86)

GUTHRIE v. GUTHRIE.

(Supreme Court of Georgia. July 22, 1898.)

CONSTRUCTION OF INSTRUMENT—DEED OR WILL.

1. Applying the test laid down in *White v. Hopkins*, 80 Ga. 154, 4 S. E. 863, and following the reasoning which this court employed in that case and those there cited, and to which it has adhered in *Owen v. Smith*, 91 Ga. 584, 18 S. E. 627, and *Goff v. Davenport*, 96 Ga. 423, 23 S. E. 395, the instrument before the court in the present case is a deed, and passed to the grantee therein named the legal title in presenti, with the right of possession and enjoyment postponed to the death of the grantor.

2. The evidence warranted the verdict, and there was no abuse of discretion in denying a new trial.

(Syllabus by the Court.)

Error from superior court, Gwinnett county; *N. L. Hutchins*, Judge.

Action between J. B. Guthrie, administrator, and A. F. Guthrie. From the judgment, the administrator brings error. Affirmed.

C. H. Brand and *Juhan & McDonald*, for plaintiff in error. *R. W. Peeples* and *T. M. Peeples*, for defendant in error.

LUMPKIN, P. J. Two issues were involved in the present case,—one of law, and the other of fact.

1. The first was whether a certain instrument was testamentary in its character, or passed an interest in presenti to the person

claiming thereunder. That instrument was in the following words:

"Georgia, Gwinnett County: This indenture, made and entered into this, the 4th day of April, in the year eighteen hundred and ninety-six, between H. J. B. Guthrie, of the first part, of the county and state aforesaid, and Alonzo F. Guthrie, of the second part, of the county and state aforesaid, witnesses: That the said party of the first part, for and in consideration of being well cared for, board and attention in time of sickness and at all other times that he may need attention, agrees to give to the said party of the second part all that tract or parcel of land known as the 'M. C. Mewburn Place,' lying and being in the Seventh (7) district of Gwinnett county, containing sixty-three (63) acres, more or less, off the northeast corner of land lot seventy-nine (79); also about two (2) acres that was exchanged by Agariah Noel to John Daniel, number not known, the original deed having been destroyed by fire, said land bounded as follows: North by lands of Henry P. Wynn, west by lands of G. J. Weathers, south by lands of M. C. Mewburn, east by lands of J. J. Harwell; said land to remain in the possession of the said H. J. B. Guthrie during his lifetime, and the rents and proceeds of said [land] to belong to the said H. J. B. Guthrie during his life. After the death of the said H. J. B. Guthrie, the said Alonzo F. Guthrie is to come into possession of said tract or parcel of land. To have and to hold the said tract or parcel of land, with all and singular the right and members and appurtenances thereof to the same being, belonging, or in any wise appertaining, to the only proper use, benefit, and behoof of the said Alonzo F. Guthrie, his heirs and assigns, forever in fee simple, after the death of the said H. J. B. Guthrie; and the heirs, executors, and administrators will warrant and forever defend the right and title of the above-described property unto the said Alonzo F. Guthrie, his heirs and assigns, against the claims of all persons whosoever. In witness whereof, the said H. J. B. Guthrie has hereunto set his hand and seal, the day and year above written.

"[Signed]

H. J. B. Guthrie.

"Signed, sealed, and delivered in presence of:

H. Strickland, Jr.

"G. H. Barker, J. P.

"The word 'clothing' erased before signing.

H. Strickland, Jr.

"G. H. Barker, J. P."

Following the decisions of this court cited in the first headnote and the cases to which they refer, we have reached the conclusion that this instrument was at the trial properly treated as a deed.

2. The other issue was whether or not H. J. B. Guthrie was, at the time of executing this instrument, mentally capable of making a valid contract. Upon this question, the evidence, though conflicting, warranted the jury in finding that he was capable of con-

tracting; and, the trial judge having approved the verdict, this court will allow the same to stand. Judgment affirmed. All the justices concurring.

(105 Ga. 129)

SUTTLES v. SEWELL.

(Supreme Court of Georgia. July 23, 1898.)

EXECUTION SALE—RIGHTS OF PURCHASER—FORECLOSURE—REDEMPTION.

1. Where a sale of land is had by a levying officer under process issued from a court of competent jurisdiction, regular on its face, and after proper levy and due advertisement within the legal hours of sale on a regular sale day, the purchaser at such sale is entitled to the possession of the property; and an order of the superior court directing the sheriff to dispossess the defendant in *fi. fa.*, and to put such purchaser in possession, was legal and proper.

2. Neither the defendant in *fi. fa.* nor any person representing him has a right to redeem property sold at a mortgage foreclosure sale.

3. Viewing the present case in the light of the entire evidence admitted, as well as the evidence which was offered and rejected, the judgment directing the sheriff to put the purchaser in possession was the only proper judgment that could have been rendered.

(Syllabus by the Court.)

Error from superior court, Fulton county; J. H. Lumpkin, Judge.

Petition between James S Sewell to be put in possession of certain land of Lovie L. Suttles, sold at judicial sale, and purchased by petitioner. From the judgment, respondent brings error. Affirmed.

R. B. Blackburn, for plaintiff in error. Simmons & Corrigan and Oscar Parker, for defendant in error.

COBB, J. Sewell filed his petition to the superior court of Fulton county, praying that the sheriff be required to put him in possession of certain lands, a deed to which had been executed to him by the sheriff in pursuance of a sale made under a mortgage *fi. fa.* in favor of Mrs. Powell against Mrs. Suttles, the property having been bid off by the plaintiff in execution, and the bid afterwards transferred for a valuable consideration to the petitioner. The judge issued a rule nisi calling upon the sheriff and Mrs. Suttles to show cause why the application should not be granted. The sheriff filed no answer. Mrs. Suttles answered that Sewell had no title to the property, and was not entitled to possession, and alleged that she was in possession under a deed from one Gammage, and had on May 11, 1897, filed in the superior court her suit attacking the title under which Sewell claims, and praying for a cancellation of the deed and transfer under which he was seeking to dispossess her, and that an injunction had been granted in her favor restraining Sewell and the sheriff from interfering with her possession. She contended that, until the issues of fact raised in that suit had been adjudicated, no writ of possession should be granted to the plaintiff. At the hearing, Sewell introduced

evidence showing that the sale was had under a mortgage *fi. fa.* issued from a court of competent jurisdiction; also the sheriff's deed and the written transfer to him by Mrs. Powell, and other evidence showing the regularity of the sale. There was also evidence that he had purchased from Mrs. Powell the mortgage *fi. fa.* against Mrs. Suttles for a consideration of \$3,300. The defendant read her answer, and also the petition in the suit referred to in the answer, in which it was set up that the property was sold by the sheriff to Gammage for a sum sufficient to discharge the debt; that on the same day, without notice to the defendant, and without failure on the part of Gammage to comply with the terms of the sale, the sheriff caused the property to be resold, and at a second sale Mrs. Powell became the purchaser at a grossly inadequate price, subsequently transferring her bid to Sewell; that Sewell had actual notice of the facts alleged; that the sale to Mrs. Powell took place after the regular sales for the day had been concluded. She claimed that the sale to Mrs. Powell was void, and that the conveyance growing out of the same should be canceled. There was no evidence that any injunction had been granted on this petition. She then tendered in evidence the petition of Gammage against Mrs. Powell, containing allegations similar to those contained in her petition above referred to. This evidence was excluded. She tendered in evidence her affidavit, as well as the affidavit of E. P. Suttles, her husband, both of which the court excluded. The affidavit of Mrs. Suttles set up that she was in possession of the property; that Mrs. Powell foreclosed the mortgage upon the property levied upon, and sold it on the first Tuesday in January, 1897, for the purpose of satisfying the mortgage; that, because of certain irregularities in certain suits now pending, it is contended that no title passed to the purchaser (one of the suits referred to is her suit to which reference has been heretofore made); that, after the sale to Mrs. Powell and the transfers to Sewell, she tendered him the full amount due on the mortgage in favor of Mrs. Powell, and demanded its cancellation and surrender, which Sewell refused to do. The affidavit of E. P. Suttles stated that he was present when the property was sold to Gammage, for \$3,605. He attended the sale for the purpose of making the property bring enough to pay the debt to Mrs. Powell. He did not know that the sheriff would disregard the sale to Gammage, or that Gammage would fail to comply with his bid. He did not know of the sale to Powell, and was not present when the sale took place. He went to the court house a little past 3 o'clock on the day of the sale, and there was no crowd near the court house, nor was any sale being conducted at that time. He heard his wife tell Sewell that he had bought a

lawsuit, and with full knowledge of her claim; and Sewell made no denial, but, on the contrary, stated that he proposed to stand by his rights. He saw his wife tender Sewell a sum sufficient to satisfy the mortgage in full, and demand cancellation of the debt, and Sewell refused to accept this money and surrender the mortgage *fi. fa.* The court passed an order directing the sheriff to place Sewell in possession of the property, and Mrs. Suttles excepted.

1. This application was made under section 5469 of the Civil Code, which provides that, if the purchaser of real estate at a sheriff's sale fails to make application for possession until the next term of the superior court after the sale takes place, possession can only be obtained under an order of the superior court. If possession is applied for by the purchaser at once, and a term of the superior court is not allowed to pass, then the officer is authorized, under section 5468 of the Civil Code, to place the purchaser in possession, and, to that end, he may turn out the defendant in *fi. fa.* If Mrs. Powell, therefore, had made application to the sheriff for possession before a term of the superior court had passed, the only questions which the sheriff would have been required to answer in order to determine whether it was his duty to place her in possession would have been: Has the sale been made under a process issued on a judgment regular on its face, and rendered by a court of competent jurisdiction? Has there been a proper levy and due advertisement of the property, as required by law, and did the sale take place on a regular sale day within the legal hours of sale, and was the property knocked off to the purchaser as the highest bidder for the same? Has he complied with his bid, and does he hold a title from the sheriff to the property? If these questions are all answered in the affirmative, the sheriff's duty, under the statute, is plain. He is required to dispossess the defendant in *fi. fa.*, and place the purchaser in possession. If the judgment is irregular and voidable for any reason not appearing upon the face of the record, the sheriff is not required to investigate or decide these questions. If the purchaser delays, however, until a term of the superior court has passed, the law prohibits the sheriff from placing him in possession on his own responsibility, but requires him to receive his instructions from the court of which he is a ministerial officer. When application, therefore, is made to the court for an order for the sheriff to do that which he would have had authority to do without an order before the term of the superior court had passed, the only questions which the judge is required to pass upon are those which the sheriff would be required to decide if application had been made to him at a time when he could have placed the purchaser in possession without an order. It follows, therefore, that the order passed by the judge requiring the sheriff to put Sewell in possession

of the property was the only proper order which could have been passed in the case.

2, 3. Even if this were not true, we do not think any sufficient reason was set up by Mrs. Suttles in her answer, or in the evidence offered which was received, or in that offered and rejected, for refusing to pass an order to put the purchaser in possession. She acquired no right against Sewell by her tender of the amount due on the debt after Sewell had obtained title under the sheriff's sale. A mortgagor in this state cannot redeem after a sale has been had under a foreclosure judgment. The mere pendency of a suit by Mrs. Suttles to set aside the sale and conveyance, no injunction having been granted, nor any order or decree entered inconsistent with the order for possession granted in the present case, did not furnish any sufficient reason for refusing to put Sewell, the purchaser, in possession. If, for any reason not appearing on the face of the record, the deed executed by the sheriff failed to convey title to the purchaser, Mrs. Suttles is remitted to her proper remedy at law or in equity, as the case may be, to set aside the sale; and she can do this as well after as before possession has been given by the sheriff. From an examination of the record it would appear that the judge of the superior court viewed the case in the same light that we do, and that he simply inquired into the regularity of the judgment and the sale, and declined to go further into an investigation. We think this was the proper direction to give it. If Mrs. Suttles had offered evidence in support of her answer, and the court had allowed all of her evidence, and had distinctly passed upon every question which she raised in her answer and in her evidence, it might be that she would be concluded by the judgment rendered in this case as to all questions raised at the hearing. See *Williamson v. White* (Ga.) 28 S. E. 846. But as the record clearly indicates that the judge did not pass upon these questions, but declined to go into them, and the judgment does not show that he passed upon them in any way, the record in this case would not conclude her from setting up whatever rights she may have against Sewell, either in her pending proceedings, or in such as she may see fit to institute in the future. So that, viewing the case either in the light of the evidence admitted, or all of the evidence, both that admitted and that rejected, the judgment directing the sheriff to put the purchaser in possession was proper and legal. Judgment affirmed. All the justices concurring.

(104 Ga. 809)

AMOS v. ATLANTA RY. CO.

(Supreme Court of Georgia. July 19, 1898.)

INJURY TO MINOR—ACTION BY PARENT—ABANDONMENT BY FATHER—RIGHTS OF MOTHER.

1. A tortious act which deprives a minor of his ability to render valuable services will give the parent a right of action against the wrong-

doer; although such tort may result in the death of the minor, and although at the time of the injury he may be serving, for a violation of a penal law, a term in the chain gang, which expires in a short time, and before his majority.

2. A mother has a right of action for such a tort when the father has abandoned his family and all custody and control of the minor. The allegation in this petition of such abandonment by the father is sufficient as against a general demurrer.

(Syllabus by the Court.)

Error from city court of Atlanta; H. M. Reid, Judge.

Action by Anna Amos against the Atlanta Railway Company. Judgment for defendant. Plaintiff brings error. Reversed.

Arnold & Arnold, for plaintiff in error. L. A. Dean and King & Spalding, for defendant in error.

LEWIS, J. Anna Amos brought suit in the city court of Atlanta against the Atlanta Railway Company for a tort committed upon her minor son on October 18, 1895, alleging in her petition substantially as follows: At the time mentioned, the minor son was 13 years of age, and was engaged at work in the county chain gang, near the city limits, serving there a sentence of six months, which would have expired in 77 days from the date of the injury. The injury resulted in the immediate death of her son, and was caused by the negligence of the defendant company, and without fault on the part of the deceased. The boy's services at the time were of the value of \$10 per month. "Plaintiff was his only parent (his father having deserted plaintiff long ago), and she received the same [his services], and the boy lived with her before his confinement, and his services were at said time of the value aforesaid; and plaintiff alleges that she was entitled to the same, subject, of course, to the right of the state to temporarily confine him as a convict." The petition sets forth the nature of the services the boy was capable of rendering, and which he did render to plaintiff prior to his incarceration, and further alleges that subsequent to the confinement he would have continued to render such services and contribute to her his earnings. The suit was brought for the lost services of the son to which the plaintiff would have been entitled up to the boy's majority had he not been killed. To this petition the defendant demurred, upon the grounds (1) that there is no cause of action set forth in plaintiff's petition against this defendant; (2) by the statements in plaintiff's petition it is clearly shown that the son of plaintiff was not at the time of the alleged injury rendering or capable of rendering any service to plaintiff. This demurrer was sustained by the court, and the plaintiff excepted.

1. The action in this case is founded upon the common-law right embodied in section 3816 of the Civil Code, which declares: "Every person may recover for torts com-

mitted to himself, or his wife, or his child, or his ward, or his servant." The prevailing rule in England is that, if a tort upon a child results in its immediate death, there can be no right of action for lost services. This doctrine, as laid down in the case of *Osborn v. Gillett*, 8 L. R. Exch. 88, has not only been adhered to in England, but has been adopted by several of the courts in America. It is certainly an anomaly in law to hold that, because death results from an injury, the parent cannot recover damages for such a wrong, whereas, if death had not resulted, the right of action would lie. The rule denies any remedy where the injury is more aggravated, and the damages sustained greater. On account of its absurdity, this court, as well as some others in the United States, has entirely ignored it, and has held that, although death results from the tort, an action for lost services can be maintained by the parent. *Shields v. Yonge*, 15 Ga. 349; *Chick v. Railroad Co.*, 57 Ga. 357; *McDowell v. Railroad Co.*, 60 Ga. 320. But it is insisted by the defendant that, inasmuch as the injury to the child occurred at a time when its services could not be commanded by the parent, there can be no recovery, and the decision of this court in the case of *Smith v. Hatcher*, 29 S. E. 162, is relied on to sustain this position. In that case the suit was for the homicide of the child, based upon a new right given by statute to the parent which did not exist at common law. Under the statute (Civ. Code, § 3828), the right is founded upon the dependency of the parent on the child at the time of the injury, and, further, upon the fact that the child was contributing to the support of the parent. The decision of the court is expressly founded on the use in the statute of the words "is" and "contributes," in the present tense, the court simply ruling that, under the statute as construed, the parent must at the very time of the injury be dependent upon the child, and the child at such time must be actually contributing to the parent's support. See opinion of Presiding Justice Lumpkin in that case. The action in the case now under review, however, is not founded upon this statute, but upon principles of the common law, and hence the decision above cited in no wise conflicts with the principles herein announced. Nor is the decision in the case of *Allen v. Railroad Co.*, 54 Ga. 508, in point. That was an action by a father for damages on account of the homicide of his infant child, and the decision was based upon the idea that the child, on account of its infancy, was at the time incapable of rendering any service. There is sound reason for that rule. It would be a matter of mere speculation as to when an infant, if ever, would reach an age when it could render service; and, even if it should reach that period in its life when it would be old enough to work, the value of such services would depend upon the con-

tingencies of mental and physical development, which could not be foreseen. In order to maintain this action, it is necessary that the child at the time of its injury should be actually capable of rendering service to the plaintiff. The contrary rule seems also to have prevailed in England, but in this country the decisions have been more liberal to the parent, and it is enough that the parent retains the right to claim the services of the child. 17 Am. & Eng. Enc. Law, pp. 385, 386. In the case of *Shields v. Yonge*, 15 Ga. 356, Benning, J. says: "May a father treat his minor son as his servant, and sue for an injury to the son, as for an injury to a servant? If the son be old enough to render service, the father may." To use an illustration presented in the argument of counsel for plaintiff in error: Suppose a child 18 years of age is attending college, and is a positive expense to his parent, and renders no service whatever; we apprehend it would not be seriously contended that there could be no recovery by the parent for an injury to him. Or suppose the child should have a spell of illness for several months, and while in that condition should receive an injury, when at the time it was unable to render service on account of sickness; certainly this condition could not operate as a bar to the parent's right of action. Neither would it affect the right of a parent to have redress for such injuries because the child is at the time temporarily engaged in the service of another. In 1 Jagg. Torts, pp. 451, 452, the rule is expressed in the following language: "It is not necessary to show that the child rendered valuable services. Pouring tea or milking cows has been held to be an act of service. Services may continue, notwithstanding a temporary absence. Even a married daughter living apart from her husband may, in this sense, render services to her father. Proof of actual service of an infant is unnecessary. Right to service is enough. If the child is of age, there must have been loss of service to entitle the parent to recover. The legal right of the parent at the time to command the service of the child, though she resides and is temporarily employed elsewhere, is sufficient. It rests on his legal obligation to provide for her support and education, and his consequent right to the profits of her labor. This fiction of service as the basis of the right of parent to sue for wrongs done the child is generally recognized in America, although much criticised." In the case of *Boyd v. Byrd*, 8 Blackf. 118, it was held that a father could maintain a suit for the seduction of his unmarried daughter under 21 years of age, though she had previous to the seduction left her father's house with his consent, without intending to return, and with his license to appropriate her time and services

to her own use. It is true that was a case of seduction, but it will be seen from the opinion delivered by Dewey, J., that the action was founded on the supposed relation of master and servant between the father and daughter, and his right to reclaim the service of such daughter. From authority then, as well as reason, we think that when the parent has not lost dominion or control over the child, but still has the power to claim its services during minority, he can recover for lost services resulting from a tort committed at a time when the child had the ability or capacity to render service. If the contention of the defendant in error be correct, then it matters not how short a time the parent may be temporarily deprived of the services of his child, he cannot recover for its injury committed during such time. If, for instance, a boy of sixteen years of age should be for one day imprisoned for a violation of some petty city ordinance, and an injury should be perpetrated upon him during his incarceration, resulting in his immediate death, the parent could not recover, although he would have had the right to reclaim the services of the child within a few hours after the infliction of the injury. We do not know that this exact question has ever before been decided by this court, but it seems to us that to hold otherwise than is herein ruled would be a construction of this common-law right as absurd and unreasonable as the old rule mentioned in the first part of this opinion, from which this court departed; namely, that there can be no recovery for lost services if death results from the tort.

2. It is further insisted by counsel for defendant in error that the declaration in this case does not sufficiently show that the mother, instead of the father, had a right of action for this injury to her son. Under section 2475 of the Civil Code, it is declared that, "if the wife is living separate from the husband, she may sue for such torts, and also torts to her children, and recover the same to her use." The petition alleges that the father had deserted the mother long ago; that, before the injury to her child, she had received his services, and would have continued to receive them had he not been injured. This allegation, under the statute, is certainly sufficient, in the absence of a special demurrer. The statute only requires the wife to be living separate from the husband in order to give her the right of action; and we see no other construction that can be reasonably put upon the words of the petition except that the pleader meant this state of separation existed at the time of the commission of the tort and the bringing of the action. *Railway Co. v. Smith*, 98 Ga. 742, 21 S. E. 157. Judgment reversed. All the justices concurring.

(105 Ga. 104)

MORGAN v. KISER et al.

(Supreme Court of Georgia. July 22, 1898.)

ACTION ON NOTE—ATTORNEYS' FEES—JURISDICTION OF JUSTICE.

1. When a promissory note contains an agreement to pay "all costs of collection, including 10 per cent. attorneys' fees," the attorneys' fees so provided for amount to 10 per cent. on the principal and interest of the note.

2. It follows from the foregoing that a note for the sum of \$90 principal, which contains a stipulation of the character above mentioned, is not within the jurisdiction of the justice's court, when the principal and attorneys' fees claimed in the summons exceeded the sum of \$100.

(Syllabus by the Court.)

Error from superior court, Haralson county; C. G. Janes, Judge.

Action by M. C. & J. F. Kiser & Co. against B. F. Morgan, on a note. Plaintiff had judgment, and levied execution, and B. F. Morgan interposed an affidavit of illegality. Judgment for plaintiff. Claimant brings error. Reversed.

Price Edwards, for plaintiff in error. McBride & Craven, for defendant in error.

COBB, J. On June 20, 1898, suit was brought in a justice's court upon a promissory note dated October 10, 1891, and due one day after date, for \$90 principal, with interest at 8 per cent. per annum after maturity, and "all costs of collection, including ten per cent. attorneys' fees and exchange." Judgment was rendered in favor of the plaintiff on July 5, 1898, for \$90 as principal and \$12.60 as interest, with interest on the principal sum from that date, and costs. Execution issued and was levied. Defendant interposed an affidavit of illegality, on the ground that the justice's court had no jurisdiction to entertain the suit or to render the judgment. This was overruled, and defendant excepted.

1, 2. The amount of principal and interest due on the note at the time suit was brought, exclusive of attorneys' fees, was \$102.20. The question for our consideration is whether the 10 per cent. attorneys' fees should be computed on the original principal of \$90, or on both principal and interest. If the latter be the correct rule, the justice's court in the present case would have no jurisdiction, for the principal sum claimed at the time of the suit would be \$100.20. This sum is made up by adding to the principal (\$90) 10 per cent. of the principal and interest due at the date the suit was filed. It is evident that the plaintiff intended to claim attorneys' fees from the way in which the suit was brought, the note stipulating for such fees being simply attached to the summons, and there being nothing in the summons indicating an intention not to claim the fees. *Peoples v. Strickland*, 101 Ga. 829, 29 S. E. 22. It is true that the note was given after the passage of the act of July 22, 1891 (Acts 1890-91, p. 221), providing that stipulations for attorneys' fees in notes are

void unless the defendant file a plea to the action and fail to sustain the same; but it has been held since the passage of this act that the plaintiff may at the time of bringing his suit claim the attorneys' fees which would accrue to him upon the happening of the condition provided for in the act, and that when such claim was made, and the amount of the attorneys' fees thus claimed added to the principal made a sum exceeding \$100, the justice's court would have no jurisdiction in the case. *Rimes v. Williams*, 99 Ga. 281, 25 S. E. 685. That attorneys' fees constitute a part of the principal debt is too well settled in this state to admit of discussion. *Ashworth v. Harper*, 95 Ga. 660, 22 S. E. 970, and cases cited; *Almand v. Almand*, 95 Ga. 204, 22 S. E. 213, and cases cited. An examination of all the cases where the question of the jurisdiction of the justice's court was involved, growing out of the stipulation for attorneys' fees, will show that in all except *Almand v. Almand*, cited supra, 10 per cent. of the principal of the note added to the principal made a sum exceeding \$100; and, in the case just referred to, it was necessary that 10 per cent. of the interest should be added to the principal and 10 per cent. of the principal, to make a sum exceeding \$100. In that case there was a stipulation in the note that attorneys' fees should be calculated on interest as well as principal. It has never been decided by this court whether a stipulation providing generally for 10 per cent. attorneys' fees required that they should be calculated on the interest as well as on the principal.

Attorneys' fees will be calculated upon both principal and interest where it is clear from the terms of the instrument that such was the intention of the parties. Where the note provides, as in the present case, that "all costs of collection, including ten per cent. attorneys' fees," will be paid by the maker, it is evident that the intention of the parties was to provide for the cost of collecting the interest as well as the principal. In such a contract, following the ruling made in the case of *Almand v. Almand*, cited supra, the attorneys' fees on the interest as well as on the principal became a part of the principal debt. Applying this rule to the facts of the present case, and treating the suit as one claiming attorneys' fees, the principal sum sued for was \$100.20; and, this amount being beyond the jurisdiction of the justice's court, no legal judgment could be rendered in favor of the plaintiff on such suit, and the judgment so rendered was void. Judgment reversed.

(105 Ga. 400)

MALLARD et al. v. MOODY et al.

(Supreme Court of Georgia. July 21, 1898.)

BUILDING CONTRACT—CONSTRUCTION—POWER OF ARCHITECT—PAYMENT—EVIDENCE.

1. Where an owner and a contractor entered into a contract whereby the latter agreed to

build an hotel for the former, and the articles of agreement referred to certain drawings and specifications as a part of the contract; and where the specifications contained a clause requiring the contractor to put in the hotel a certain heating apparatus, and afterwards the parties differed as to whether it was the duty of the contractor to put in such apparatus; and where the contract contained a clause as follows: "Should any difference of opinion arise respecting the true construction or meaning of the drawings or specifications, the same shall be decided by the architect, and his decision shall be final and conclusive,"—this clause did not authorize the architect to decide that the contractor was not bound by the contract to put in the heating apparatus; nor did the architect's certificate thereafter, that the work had been completed according to contract, bind the parties as to this matter, the contractor not having put in the heating apparatus.

2. Where a defendant insists upon certain payments made by him upon the contract sued upon, which payments are evidenced by receipts given by the plaintiff, such receipts are prima facie evidence of payment; and whether the plaintiff has successfully carried the burden of proving the contrary is a question for the jury. The court therefore erred in not submitting this question to the jury.

3. In the trial of a suit upon a contract, where the material issue involved is whether the contract has been completed by the plaintiff, it is error to admit, over the objection of defendant's counsel, the testimony of a witness introduced by the plaintiff to the effect that the architect had said to him (the witness) that the contract had been completed, the defendant not being present when this conversation occurred.

(Syllabus by the Court.)

Error from city court of Atlanta; H. M. Reid, Judge.

Action by Moody & Brewster against Mallard, Stacy & Co. Judgment for plaintiffs. Defendants bring error. Reversed.

Anderson, Felder & Davis, for plaintiffs in error. Rosser & Carter and Arnold & Arnold, for defendants in error.

SIMMONS, C. J. 1. Mallard, Stacy & Co., the owners of a lot of land in the city of Atlanta, entered into a contract with the George H. Holiday Lumber Company, whereby the latter agreed, for a certain consideration, to build for the former an hotel to be known as the "Alhambra." The articles of agreement mentioned certain drawings and specifications as a part of the contract, and also contained the following stipulation: "Should any difference of opinion arise respecting the true construction or meaning of the drawings or specifications, the same shall be decided by the architect, and his decision shall be final and conclusive." The hotel was to be completed by September 18, 1895. The lumber company claimed that they had completed the building according to contract, and that the owners were indebted to them in a certain amount. Shortly after the completion of their work, the lumber company filed and recorded its lien for this amount. The lien was transferred by the contractor to Moody & Brewster, who brought suit upon it against Mallard, Stacy & Co. The defend-

ants filed certain pleas; among them, one to the effect that the contractor had not completed the hotel according to the contract, having failed to put in a certain heating apparatus required by the specifications, to wit: "Furnace. The same to be furnished and set up at the designated place, a number 14 Mott furnace, with the usual fixtures, furnished with cold-air ducts, etc., for general heating of all the halls, café, offices, parlor, and other parts, as per the plans prepared for heating. The furnace to be set up in the best possible manner, and so arranged as to give the best possible results, and on the floors the requisite warm-air registers as marked, the registers to be not less than 12 by 14, and to have an independent line for each register." Moody & Brewster replied that no specifications were ever signed by the contracting parties, and that, if such specifications had been signed, under the stipulations above cited, the architect had decided that the contractor was not bound by the contract to put in any sort of heating apparatus.

The trial judge, in his charge to the jury, instructed them to ascertain whether the specifications had been signed by the parties, and that if the specifications had been signed by the parties, and had become a part of the contract, and a difference had arisen as to the true construction or meaning of the clause in regard to heating, and the architect, under the authority given him by the contract, decided that it did not include an obligation on the part of the lumber company to put in heating apparatus, there would be no obligation on the part of the contractor to put in this heating apparatus under this clause, and the defendants could not set up a failure to do so as any reason why they could decline to pay any part of the contract price. We think the learned judge of the court below misconstrued the meaning of the clause of the contract in relation to the power and authority of the architect. The architect had power under this clause simply to pass upon the meaning and construction of the drawings and specifications. He had the power to decide whether the work done was of the character or quality mentioned in the specifications. The specifications called for one Mott furnace, with usual fixtures, etc. The architect had power to decide, had the contractor put in the furnace, whether it was the furnace required, and whether the usual fixtures, cold-air ducts, etc., were furnished according to the specifications, whether the apparatus heated the halls, café, offices, etc., and whether it was in accordance with "other parts as per the plans prepared for heating." He had also power to decide as to the materials used, and as to whether the furnace and fixtures were put up in a workmanlike manner. If the specification as to the heating apparatus was agreed upon by the parties, it became a part of the contract, and there is nothing in the clause relative to the

decision of the architect which gave him power to decide that a part of the contract between the parties is not binding. To give him such power would be to allow him to make a new contract for the parties. He could construe the contract, and decide what it meant, or determine the nature and character of the work or materials required, but he could not eliminate or abrogate any of its terms. If the parties did agree upon these specifications, and the clause requiring the heating apparatus was a part of them, the decision of the architect, to the effect that the contractor was not bound to put in heating apparatus, entirely eliminated this clause, and to that extent varied the contract made by the parties.

The certificate of the architect, upon the completion of the work, that the contract had been fully complied with, cannot aid the plaintiffs as to their failure to put in the heating apparatus. If a contractor agree to put in a heating apparatus, and fail entirely to comply with this agreement, or if he agree to build a house of stone, and in fact build it of wood, the certificate of the architect that the work had been completed according to contract would not bind the owner. In the case of *Bond v. Mayor, etc.*, 19 N. J. Eq. 376, it was held: "The certificate of a superintendent surveyor or architect, who, by the contract for any work, is to superintend its performance, and whose approval is required before any payment is due, cannot dispense with the performance of any substantial part of the contract, but may be binding as to the fact whether the work certified to was done in a workmanlike manner or of proper materials of the kind required. But such certificate would not make building a brick house a compliance with a contract to build one of marble. Nor would the fact that a house built of brick is substantially, and for service, as good or better than one of marble, make such a building a performance of the contract, upon being certified to be so." In the case of *Woodruff v. Railroad Co.*, 108 N. Y. 39, 14 N. E. 832, Earl, J., in speaking on this subject, said in relation to the power of engineers in accepting work done on a railroad: "But they had no power to alter or vary the terms of the contract, or to create obligations binding upon the defendant not embraced in the contract;" citing many cases. Wait, in his work on *Engineering and Architectural Jurisprudence*, in speaking of the powers of architects and engineers, says (section 371): "The engineer is an agent with special powers, simply to do the engineering and to superintend and direct the work. Unless specially conferred, he has no power to contract or to vary the terms of the parties' agreement. He can create no new obligations not embraced by the contract." And in section 402 he says: "It is usual to constitute the engineer a referee as to the meaning of the plans and specifications which are his own invention and handiwork, a certain con-

struction of which is necessary to the proper erection and completion of the works. His powers cannot be enlarged by implication, but they will be confined strictly within the terms of the contract." In 2 Am. & Eng. Enc. Law (2d Ed.), p. 820, it is said: "An architect superintending the erection of a building has no authority generally to make alterations in the plans and specifications, and bind his employer for extra work, or to make any changes in the original contract." "He cannot bind the employer by accepting a class of work inferior to or different from that called for by the contract." In *Glacius v. Black*, 50 N. Y. 145, it was held: "The acceptance by the architect did not relieve the contractors from their agreement to perform the work according to the plans and specifications; nor did his acceptance of a different class of work or inferior materials from those contracted for bind the owner to pay for them." In the case of *Adlard v. Muldoon*, 45 Ill. 193, it was held, in an action by the contractor for the balance claimed to be due upon the contract, that the architect could not, unless specially authorized, change the terms of the contract, and that there could be no recovery unless the specifications were complied with. Numerous other cases could be cited announcing the same principle, but these are, in our opinion, sufficient to establish the doctrine that an architect has no power to change, alter, or modify the contract between the parties, and that his certificate, after he has so changed or modified the contract, that the work has been completed according to the contract, will not bind the parties. According to the charge of the court, if the jury had found that the specifications above alluded to had been signed and had become a part of the contract, the decision of the architect that the contract did not require that heating apparatus should be put in the hotel would have been final and conclusive, and the jury obliged to find for the plaintiffs. Indeed, the court so instructed them. We do not, of course, decide whether or not the specifications were a part of the contract. That is a question for the jury. We only announce the above principles in dealing with the charge of the court below.

2. In the progress of the trial, the defendants put in evidence two receipts, for \$500 each, given by the lumber company, and bearing date as of the same day. It was claimed by the defendants that they had not been given credit for the amount of one of these receipts. The plaintiffs claimed that both receipts were given for one and the same payment of \$500. Receipts for money are prima facie evidence that the person signing the receipt has received the amount specified. This can be rebutted by testimony. The plaintiffs in this case introduced evidence to explain the receipts, and to show that the two receipts were given for one and the same payment. This made an issue

of fact, which should properly have been determined by the jury. The court failed to submit it to the jury, but assumed in his charge that the plaintiffs' evidence sufficiently explained the giving of the two receipts. This question should have been submitted to the jury.

3. It appears from the record that the final certificate of the architect as to the completion of the building was lost. The plaintiffs undertook to prove its contents. A witness was allowed, over the objection of the defendants, to testify as to conversations between him and the architect. He was allowed to testify as to sayings or declarations of the architect, which did not occur in the presence of the defendants. This, in our opinion, was error. The witness could have testified to the fact that he saw the architect sign the certificate, and to the contents of such certificate after it had been signed, but declarations of the architect leading up to the signing of the certificate were inadmissible. Judgment reversed. All the justices concurring.

(105 Ga. 57)

**WHEELER & WILSON MFG. CO. v.
IRISH-AMERICAN DIME
SAV. BANK et al.**

(Supreme Court of Georgia. July 22, 1898.)

**CONDITIONAL SALE—PASSING OF TITLE—VALIDITY
OF RESERVATION.**

Where a purchaser agrees to pay for goods on delivery, either in cash at a named discount, or by note due in six months, the contract of sale is conditional, and the payment of the cash or the giving of the note is a condition precedent to the passing of title. Where, however, the goods are delivered by the seller, and left for some time in the possession of the purchaser, no steps for their reclamation being taken by the seller, and the purchaser mortgages them to an innocent third party, such conduct may amount to a waiver of the condition, and operate to pass the title to the goods into the purchaser. (a) Even if, in this case, the condition was not waived, still, under the provisions of our Code, the reservation of title was not valid as against a third party without notice, the conditional contract of sale having been neither executed and attested nor recorded as provided by law.

(Syllabus by the Court.)

Error from superior court, Richmond county; E. H. Callaway, Judge.

Action by the Wheeler & Wilson Manufacturing Company against the Irish-American Dime Savings Bank and others. Judgment for defendants. Plaintiff brings error. Affirmed.

Fleming & Alexander, for plaintiff in error. O. H. Cohen and W. K. Miller, for defendants in error.

SIMMONS, C. J. It appears from the record that on February 12, 1897, the Southern Cycle & Sporting Goods Company gave to Puckett, an agent of the Wheeler & Wilson Manufacturing Company, the following order: "We hereby order through your salesman, Mr.

C. M. Puckett, subject to your approval, the following Wheeler & Wilson sewing machines, to be shipped from Bridgeport, Conn., free on board, released [describing machines], for which we agree to pay you the sum of five hundred and eighty-seven ⁰⁰/₁₀₀ dollars on the following terms: Note at six months or cash on receipt of machines, less 10% from above. Plenty of advertising matter. The above is exact statement of terms agreed on as per above order; and it is fully understood and agreed that no claim or demands on account of any promise, either verbal or written, or any agreement of any kind whatever, outside of this order, will or can be made, the undersigned agreeing to be bound strictly by the terms and conditions above named." In pursuance of this order, the machines were shipped to the vendee, which received them on March 1, 1897. On March 16th following, the vendor wrote to the vendee asking that it send check for the amount of the purchase, less discount, or sign and return a note which was inclosed with the letter. On March 30, 1897, the vendor wrote vendee another letter, asking for either the cash or the note. On April 17th and on April 21st, the vendor wrote again asking for a settlement under the terms of the contract. The vendee did not send either the cash or the note. On April 2, 1897, the vendee applied to a bank for a loan of money. The cashier of the bank went to the vendee's place of business, examined the machines, and took a mortgage on them to secure the loan, which he agreed to make. The vendee represented that the machines belonged to it, and the bank loaned the money and took the mortgage without any notice or knowledge of the conditional contract under which it is claimed the vendee held the machines. The mortgage was duly recorded. On April 17th the vendee failed. The bank commenced proceedings to foreclose its mortgage. A creditors' bill was filed, and the assets of the vendee placed by the court in the hands of a receiver. On May 11th, after the appointment of the receiver, the vendor filed its intervention, claiming that the contract of sale of the machines to the vendee was a conditional one; that the vendee had failed to comply with the condition (give its note or pay the cash); and that, therefore, the title to the machines was in the vendor, and could not be subjected to the debts of the vendee or to the mortgage given by it upon the machines. The bank claimed that it had loaned its money, and taken the mortgage in good faith, without any notice or knowledge of the conditions of the contract of sale, and that the intervener, by its unconditional delivery of the machines, had waived its right to insist upon the conditions precedent in the contract; that it was guilty of laches in not insisting within reasonable time upon the performance of the condition by the vendee, and in foregoing to retake the goods upon the vendee's failure to perform. It also claimed that the sale of the machines,

being conditional, in effect reserving the title in the vendor until compliance with the conditions, had become absolute as to third persons, because the contract was not executed and recorded as required by the statutes of this state, and that, the bank being an innocent purchaser without notice, its title would prevail over that of the vendor. The case was submitted to the judge without the intervention of a jury, and he held that the title to the goods in question was not in the intervenor, and that the goods were subject to the mortgage of the bank. He directed the receiver to sell the machines, and pay over the proceeds to the bank. The intervenor moved for a new trial, and to the overruling of this motion it excepted.

1. The general rule is that in conditional contracts of sale, where the vendee is to perform some act which is a condition precedent to the completion of the sale, the title does not pass until this act is performed. Treating the instrument above set out as a conditional contract of sale, it was a condition precedent to the passing of title that the vendee should either give its note payable at six months, or pay the cash with the discount named. This condition was not complied with in the present case, and, according to the great weight of authority, title as between the vendor and vendee did not pass. But a vendor may waive the condition so as to pass the title, and in some cases the law will presume a waiver on the part of the vendor where, by reason of his conduct, rights of innocent third persons have intervened. An absolute and unconditional delivery of the goods may waive the reservation of title, and a vendor cannot rely upon his reservation of title as against third persons where they have been injured by his waiting an unreasonable length of time, after breach of the condition precedent, before taking any steps to reclaim his goods. As far as the present record discloses, there was an absolute and unconditional delivery. The record does not show that there were any conditions made at the time of the delivery, any delivery, any letters written in regard thereto, or any notice of any character given to the vendee or to any one else. "In such case an absolute and unconditional delivery of the property by the vendor, without exacting at the time of delivery a performance of the condition, or attaching any other condition to the delivery, is presumed to be a waiver of the condition, and a complete title passes to the vendee. By such delivery the vendor is presumed to have abandoned the security he had provided for the payment of the purchase money, and to have elected to trust to the personal security of the vendee. But this presumption may be rebutted by the acts and declarations of the parties, or by the circumstances of the case." 6 Am. & Eng. Enc. Law (2d Ed.) 475. So far as the record discloses, there was no effort on the part of the vendor to rebut the

presumption of waiver raised by the delivery. It is true, the vendor wrote several letters requesting a performance of the conditions by the vendee, but these were long after the machines had been received by the vendee. A demand for compliance with the conditions should have been made at the time of the delivery. Had it been made, and the delivery thus been conditional, the vendor would have been protected as to this point, and the title, as between the vendor and vendee, would not have passed. Except the act of delivery itself, the only thing in the record touching upon the delivery is expressed in the contract: "Free on board, released." These words indicate that the machines were to be delivered to the common carrier at Bridgeport, Conn. No bill of lading, so far as appears, was obtainable payable to the order of the vendor, which would in itself be a reservation of title; nor was there a draft with bill of lading attached sent to a bank or third person, so as to prevent delivery to the vendee until it had performed the conditions. The absence of these circumstances would indicate very strongly that the delivery was unconditional; and, as before remarked, the burden was on the vendor to show a conditional delivery. Further, we are inclined to think that the vendor waived its rights by laches. The order was given on February 12th, the goods delivered March 1st, and no effort made to reclaim the machines until May 11th. We think that in these days of trade and traffic, when personal property is liable to change hands every day, two months and a half is too long a time for a vendor, reserving title to goods in another's hands, to wait without asserting his title or giving notice in some way that the goods belong to him. By a failure to exercise his rights in due time, he has lost them as against innocent third persons whose rights have accrued.

(a) Even if the above is not true, we are clear that the judgment of the trial judge was correct. This, being a contract of conditional sale, was not executed or recorded as prescribed by law. The Code declares, in substance, that every such contract shall be attested and recorded as are mortgages of personalty. A mortgage on personalty requires the attestation of a notary public or other officer, and must be recorded within the time prescribed by law. In 1881, when this recording act was enacted, a mortgage on personal property was required to be recorded within 30 days from its date. As to this kind of mortgage the law is now different; but in the case of *Bond v. Brewer*, 96 Ga. 443, 23 S. E. 421, it was held that the change in the law of the record of mortgages of personal property did not change the law as to recording conditional sales. The latter should therefore still be recorded within 30 days from its date. Treating the date of the real contract as of the time of delivery, which was March 1st, it should

have been recorded within 30 days from that time. The bank's mortgage was given on April 2d, more than 30 days after the delivery of the goods. The contract being neither executed and attested nor recorded as required by law, the reservation of time was not effectual as against third persons without notice, and the sale was, as to them, an absolute one. It follows that the title of the vendor could not prevail over the rights of the mortgagee. Judgment affirmed. All the justices concurring.

(33 S. C. 183)

SAHLMAN et al. v. MUTUAL RESERVE FUND LIFE ASS'N.

(Supreme Court of South Carolina. Sept. 22, 1898.)

COMPLAINT—ELECTION OF CAUSE OF ACTION—MAKING MORE DEFINITE.

1. Where two or more causes of action which should be separately stated are blended together, defendant may have the complaint made more definite and certain by having the causes of action separately stated, or have plaintiff elect on which cause of action he will proceed to trial.

2. Two causes of action, one on verbal agreement and one on receipt, are not stated by a complaint alleging that defendant, in consideration of the payment of an installment of premium and agreement to pay others, agreed to and did insure the life of S. for benefit of plaintiffs for a year for \$2,500, said agreement being verbal, and being evidenced in part by a receipt to the same effect, given by defendant's agent.

Appeal from common pleas circuit court of Spartanburg county; D. A. Townsend, Judge.

Action by John H. Sahlman and others against the Mutual Reserve Fund Life Association. From an order adjudging compliance with a previous order, and denying a motion, defendant appeals. Affirmed.

The previous order is as follows:

"On reading the foregoing affidavit of T. Moultrie Mordecai, Esq., one of the counsel for the defendant herein, it is, on motion of Messrs. Mordecai & Gadsden, attorneys for the defendant: Ordered, that the time for pleading, answering, or demurring to the complaint of the plaintiffs herein be, and is hereby, extended and enlarged until midnight of the 20th day of April, 1897. It is further ordered, that the plaintiffs herein do show cause before me at my chambers in the town of Union, S. C., on the 3d day of April next, at 10 o'clock forenoon, why the complaint herein should not be made more definite and certain by inserting in paragraph three thereof the specific day in the month of March, 1896, on which it is alleged as in said paragraph set forth, and so, likewise, the specific day and month in the year 1896, by inserting in paragraph four thereof the specific day and month in 1896 on which it is alleged as in said paragraph set forth, and also by inserting in said complaint, and making it a part thereof, either in body or by exhibit, the alleged agreement of insurance and alleged certificate or contract of insurance set

forth in said complaint as the basis thereof, and also why the said alleged original instruments in writing should not be deposited with the clerk of the court of common pleas for the county of Spartanburg, so that the same may be examined and inspected by the defendant or its counsel, either or both, and that they have an opportunity to make copies thereof, under such reasonable restrictions and conditions as the court may impose. Let a copy of this order be served upon the plaintiffs' attorneys herein. D. A. Townsend, Judge of Seventh Judicial Circuit."

Thereupon the court entered the following order:

"This cause coming up before me on the rule to show cause heretofore issued on the 20th day of March, 1897, why the complaint herein should not be made more definite and certain, after hearing argument of counsel for plaintiffs and defendant, it is ordered: That the plaintiffs in this action be required to insert in paragraph third of said complaint the specific day in the month of March, 1896, on which it was alleged that the agreement therein referred to was made, and to further allege whether said agreement was verbal or written. If verbal, and not written, to set forth the full terms of such verbal agreement, and with whom made, claimed to be the agent of the defendant (as full as possible); and, if in writing, to set forth the writing at length, showing its date and contents and by whom signed; and if it be alleged that said agreement was written, and has been lost, mislaid, or destroyed, that then the plaintiffs shall set forth the date of such alleged agreement, the name of the alleged agent to the best knowledge and belief of the plaintiffs, and the full contents of such agreement (as full as possible)."

Duncan & Sanders and Mordecai & Gadsden, for appellant. Thomason & Bomar and Bomar & Simpson, for respondents.

JONES, A. J. This appeal is from an order adjudging (1) that the complaint, as amended, substantially complied with a previous order requiring the complaint to be made more definite and certain, and (2) refusing defendant's motion to require plaintiffs to elect whether they would rely upon the verbal agreement of insurance alleged in the third paragraph of the complaint or upon the receipt for premium, also referred to in said paragraph. The third paragraph of the complaint is as follows: "(3) That on or about the 9th day of March, 1896, or shortly thereafter, at Spartanburg, in said county and state, the defendant corporation, by its authorized agent, A. W. Markell, in consideration of the payment to it of twenty dollars by John C. Sahlman, and of his agreeing to pay other installments of the annual premium charged as same should fall due, agreed to insure, and did thereupon insure, the life of the said John C. Sahlman for the

period of twelve months from said date, in the sum of two thousand five hundred dollars, for the benefit of the wife and children of the said John C. Sahlman, share and share alike, namely, the plaintiffs, Mary E. Sahlman, John H. Sahlman, and Harry Eugene Sahlman; said agreement being verbal, and being as stated in this paragraph, and being evidenced in part by a receipt for twenty dollars to the same effect, then given by said agent, and which receipt, as plaintiffs are informed and believe, has since been lost; the terms of which said receipt cannot be more fully and accurately given than as stated herein."

1. We agree with the circuit court that the amended complaint substantially complied with his previous order requiring the original complaint to be made more definite and certain.

2. The refusal to require plaintiffs to elect was not erroneous. When two or more causes of action which should be separately stated are blended together, the defendant has the right either to have the complaint made more definite and certain by having said causes of action separately stated, or to move the court to require plaintiff to elect on which cause of action he will proceed to trial. *Ross v. Jones*, 47 S. C. 214, 25 S. E. 59. The appellant has sought the first-mentioned remedy and the circuit court has correctly adjudged that plaintiffs have amended the complaint as required. The third paragraph of the amended complaint does not blend two causes of action. It states but a single cause of action. The judgment of the circuit court is affirmed.

(53 S. C. 132)

GRAHAM v. SEIGNIOUS.

(Supreme Court of South Carolina. Sept. 7, 1898.)

EVIDENCE—PRESUMPTIONS—LANDLORD'S LIEN—NOTICE—NONSUIT—APPEAL—REVIEW.

1. Knowledge of a relation of landlord and tenant during the year 1893 will not raise a presumption of such knowledge for the year 1894, where a new lease for 1894 was entered into by the landlord and tenant.

2. Knowledge that the seller of cotton was a tenant was sufficient to put the buyer on inquiry as to whether the cotton was incumbered with a landlord's lien.

3. The question whether such inquiry, if pursued with diligence, would have led to knowledge of the lien, was for the jury.

4. Under circuit court rule 18, providing that the grounds of a motion for nonsuit must be reduced to writing, grounds not stated in the motion and not passed on by the court will not be considered on appeal.

Appeal from common pleas circuit court of Charleston county; I. D. Witherspoon, Judge.

Action by Benjamin Graham against James M. Seignious for conversion. From a judgment of nonsuit, plaintiff appeals. Reversed.

Sloan & Green and Geo. F. Von Kolnitz, Jr., for appellant. Fitzsimons & Moffett, for respondent.

GARY, A. J. In order to understand clearly the questions at issue, it has been deemed advisable to set out the complaint and answer. The complaint alleges: "(1) That heretofore, to wit, on the 10th November, A. D. 1893, the plaintiff, Benjamin Graham, entered into a contract with one W. M. Arant, whereby it was agreed that the plaintiff lease certain lands in Orangeburg county, in Amelia township, known as the 'Arant Part Belleville Plantation,' to said W. M. Arant for the period or term of one year from the 1st day of January, 1894, to the 31st day of December, 1894, for the yearly rental of \$340, to be paid on or before 15th October, 1894; no part of which said sum has been paid except the sum of \$151.40, which sum was the proceeds of the crops raised by the said Arant on said lands during said year, except the 14 bales of cotton converted by the defendant as hereinafter alleged. (2) That to secure the payment of the said sum of money the said W. M. Arant executed and delivered in writing under seal a lien on the crop or crops which might be made on said lands. (3) That the said W. M. Arant, at the direction and request of defendant, and induced by him, shipped and delivered to him, the said defendant, James M. Seignious, a factor in the city of Charleston, state and county aforesaid, fourteen bales of cotton grown and raised on said lands by W. M. Arant, and under lien to the plaintiff herein. (4) That the said James M. Seignious, defendant herein, did receive and take the said fourteen bales of cotton so shipped as aforesaid, being well aware of the lien of this plaintiff thereon, and did sell and dispose of the same, thereby placing the said fourteen bales of cotton beyond the reach of a warrant of seizure. And though said cotton, or the proceeds of the sale thereof, has been demanded of him, the said James M. Seignious, he refuses either to deliver the said cotton or to pay the proceeds of sale of same, to the damage of plaintiff five hundred dollars. [Prayer.]" The answer alleges: "(1) Defendant denies that he at any time or in any way converted fourteen bales of cotton, or the proceeds thereof, as alleged in the first paragraph of the amended complaint. As to the remaining allegations of said first paragraph defendant denies any knowledge or information sufficient to form a belief. (2) Defendant denies any knowledge or information sufficient to form a belief as to the allegation of the second paragraph of the amended complaint. (3) Defendant denies the allegations of the third and fourth paragraphs of the amended complaint. (4) Further answering, defendant alleges that W. M. Arant shipped to this defendant, in the year 1894, fourteen bales of cotton, but this defendant has no knowledge or information sufficient to form a belief as to whether said cotton was grown on lands under lease from plaintiff, or that plaintiff had or has any lien or claim upon said cotton. Defendant alleges that on 19th

January, 1894, he entered into an agreement in writing with the said W. M. Arant and M. A. Arant to make advances in money or supplies to an amount not exceeding nine hundred dollars during said year, to be used by said W. M. Arant and M. A. Arant in the cultivation of plantations known as 'Belleville Tract,' containing 412 acres, near Fort Motte, and also the 'Bowman Place,' containing 574 acres, near Rowesville, both in Orangeburg county. Pursuant to said agreement this defendant did, subsequent to the execution thereof, and during said year 1894, make advances to the said W. M. Arant and M. A. Arant in consideration of the lien on the crop made during said year, secured to him by said agreement, which said agreement was duly indexed and recorded in the proper office in Orangeburg county. And this defendant alleges that the said fourteen bales of cotton were shipped to him pursuant to said agreement, and subject to the lien thereof, and the said cotton was sold, and the proceeds applied to the discharge of the debt of the said Menors to this defendant, pursuant to agreement, leaving said Menors still indebted to this defendant, after exhausting all securities covered by said lien, in the sum of three hundred and eighty-one and $\frac{72}{100}$ dollars, no part of which has been paid to this defendant. Defendant alleges that at no time has he been aware that plaintiff had or claimed to have a landlord's lien upon said cotton, or claim upon or interest in the same, and the first intimation he received of such a claim from any source before the service of the summons herein was about a year after the sale and delivery of the cotton by this defendant, and the application of the proceeds in the manner herein alleged. [Prayer.] At the close of the plaintiff's testimony, the defendant made a motion for a nonsuit on the following grounds: "(1) There is no evidence as to the material allegations of the complaint. (2) Because knowledge is the most material allegation in this action, and there is total absence of testimony tending to show the fact of knowledge on the part of defendant, to wit, that he received and took and sold and disposed of fourteen bales of cotton under lien to plaintiff, 'being well aware of the lien of plaintiff thereon' as alleged. (3) There is no testimony tending to show that James M. Seignious, of Charleston, ever knew or heard of Benjamin Graham, of New York, or ever knew or heard that said Benjamin Graham owned and rented out land in Orangeburg, or that Seignious received and took, sold and disposed of, cotton under lien to Graham, or that Seignious sold and disposed of fourteen bales of cotton under lien to plaintiff with knowledge of the existence of such lien. (4) Because there is no evidence that plaintiff was a landlord leasing land for agricultural purposes, or that plaintiff had a landlord's lien upon any cotton shipped to defendant." After argument the motion was granted in the following or-

der: "A motion for nonsuit having been made upon the grounds set out in the notice therefor, after hearing argument thereon it is ordered that the nonsuit be, and the same is hereby, granted, and that judgment thereon be entered with costs. [Signed] I. D. Wither-
spoon, Presiding Judge. March 18, 1897."

The questions properly raised by the exceptions are whether there was error in excluding the introduction of certain testimony mentioned in the first exception, and in granting the order of nonsuit, on the grounds upon which the motion was made. The first exception is as follows: "(1) Because his honor erred in ruling out all the testimony proposed to be introduced by the plaintiff of transactions between the defendant and Arant, the tenant of plaintiff, prior to the year 1894, showing or tending to show knowledge of the existence of the relation of landlord and tenant between plaintiff and Arant in 1893, by the defendant, to wit, the testimony of W. M. Arant on this point and of P. T. Hildebrand; for it is respectfully submitted that, should plaintiff show that defendant had actual knowledge of such relationship between plaintiff and Arant for the year 1893, and that such relation still existed in 1894 under a continuous possession and lease, this was competent evidence that defendant had knowledge of such relationship for 1894, and should have been submitted to the jury." In the first place, there was no testimony introduced tending to show that the defendant had knowledge of the relation that existed during the year 1893 between the plaintiff and his tenant. But, even if testimony had been introduced to that effect, the exception could not be sustained, as the relation that existed between the plaintiff and his tenant was not continuous in its nature. This is shown by the fact that the said landlord and tenant on the 10th of November, 1893, entered into the agreement set forth in the first paragraph of the complaint. Instead of there being a presumption that the same relation existed during the year 1894 as in 1893, the presumption was that the relation ceased at the end of the year 1893, when the contract between the landlord and tenant was terminated either by operation of law or under the agreement between the parties, thus necessitating a new contract for the year 1894. This exception is overruled.

The next question raised by the exceptions is whether there was error in granting the order of nonsuit, on the ground that there was a total failure of testimony tending to show that the defendant knew the plaintiff had a lien prior to that of the defendant on the cotton which was delivered to him. Before proceeding to consider this question, it may be well to state principles of law applicable to the case. If the defendant received and disposed of the cotton mentioned in the complaint, having actual notice of the plaintiff's prior lien for rent, then he became liable, not for the value of the cotton, or its

proceeds, but for the damages which the plaintiff sustained by reason of the impairment of the security which the plaintiff had for enforcing payment of his lien for rent. *Heath v. Halle*, 45 S. C. 642, 24 S. E. 300. Knowledge of such facts as, if they had been pursued with due diligence, would have led to knowledge of the prior lien for rent, is equivalent to actual notice. If the defendant received and disposed of a part of said cotton after actual knowledge of the plaintiff's prior lien, then he became liable only for damages to the extent that the plaintiff's security was impaired by receiving and disposing of such part of the cotton. The following letter was received by the defendant from M. A. & W. M. Arant: "Fort Motte, S. C., Oct. 25th, 1894. Mr. J. M. Seignious—Dear Sir: Our rent is due now, and would you send us (\$125.00) one hundred and twenty-five dollars on 6 bales of cotton. If so, let us know by return mail. Yours, truly, [Signed] M. A. & W. M. Arant." This letter informed the defendant that the parties who wrote it were tenants, and this was sufficient to have put him on inquiry. It should therefore have been submitted to the jury to determine whether the inquiry, if pursued with due diligence, would have led to a knowledge of the plaintiff's prior lien. *McGee v. French*, 49 S. C. 454, 27 S. E. 487.

As the presiding judge committed error in granting the order of nonsuit for the reason just stated, which will necessitate a new trial, it becomes unnecessary to consider whether there was any other testimony tending to establish the fact of notice. Indeed, it is deemed advisable, for the reason just stated, that the court should not express an opinion as to the other testimony, as it might prejudice one or the other of the parties to the action upon the second trial thereof. The exceptions raising this question are sustained.

The next question raised by the exceptions is whether there was error in granting the nonsuit on the ground that there was no evidence that plaintiff was a landlord leasing land for agricultural purposes, or that plaintiff had a landlord's lien upon any cotton shipped to defendant. The plaintiff introduced in evidence the instrument of writing described in the complaint, which showed that there was error in granting the nonsuit on this ground. The exceptions raising this question are sustained.

The respondent's attorneys served the following notice: "To Messrs. Sloan & Green, George F. Von Kohnitz, Jr., Appellant's Attorneys: Please take notice that if the supreme court should find itself unable to sustain the order of nonsuit upon the grounds upon which it was made, we will insist upon the following grounds, viz.: (1) There is no evidence that defendant 'converted' fourteen bales of cotton, as alleged. (2) There is no evidence that defendant 'directed, requested, or induced' W. M. Arant to ship him cotton

grown on leased land, or cotton upon which plaintiff had a lien, as alleged. (3) Because the evidence shows that, if plaintiff ever had a landlord's lien for rent on any cotton shipped to defendant in 1894, he voluntarily abandoned such lien, and waived his right thereto, and as against this defendant his conduct and laches estops him from the assertion of such claim. Fitzsimons & Moffett, Respondent's Attorneys." Rule 18 of the circuit court is as follows: " * * * A motion for a nonsuit must be reduced to writing by the moving counsel or by the stenographer, under the direction of the court, stating the grounds of the motion." These grounds were not stated in the motion for nonsuit, and have not been passed upon by the circuit judge. The rule has not been complied with, and these additional grounds cannot be considered. It is the judgment of this court that the judgment of the circuit court be reversed, and the case remanded for a new trial.

JONES, J. I think the first exception should also be sustained.

(53 S. C. 129)

FARMERS' MUT. INS. ASS'N OF EDGEFIELD COUNTY v. BERRY.

(Supreme Court of South Carolina. Sept. 6, 1898.)

MUTUAL INSURANCE COMPANIES—EQUITY PRACTICE
—REFERENCE—DISCRETION OF COURT—APPEAL
—DECISIONS REVIEWABLE—HARMLESS ERROR.

1. A cause of action by a mutual insurance company to compel a policy holder to pay his pro rata share of expenses, pursuant to the charter and the member's contract, and to foreclose a lien given therefor, is solely of equitable cognizance.

2. The granting or refusal of an order referring a chancery cause to a master to take testimony is discretionary.

3. In a chancery case, the refusal of an application for a referee to take testimony, on the erroneous ground that there were issues of fact triable by jury as a matter of right, was not prejudicial, where the judge did not refuse to try the case sitting as chancellor, and did not indicate what issues he deemed triable by jury.

4. An order denying a reference in a chancery cause for the purpose of taking testimony does not affect a substantial right, nor involve the merits, within Code Civ. Proc. § 11, and is hence nonappealable.

Appeal from common pleas circuit court of Saluda county; W. C. Benet, Judge.

Suit by the Farmers' Mutual Insurance Association of Edgefield County against Mrs. Alice Berry. From an order refusing to refer the cause to a master for the purpose of taking testimony, plaintiff appeals. Dismissed.

Folk & Folk and Simkin & Croft, for appellant. James Y. Culbreath and Johnstone & Welch, for respondent.

JONES, J. The appeal in this case is from an order refusing to refer the same to the master for the purpose of taking testi-

mony. The motion was refused on the ground "that the case involves issues of both an equitable and a legal nature, and that the legal issues should be tried by a jury." The object of this action is to compel defendant to pay her alleged pro rata share of the expenses and losses of the plaintiff association, pursuant to the charter of the association and defendant's contract when she was a member thereof, and to this end to foreclose an alleged lien therefor on certain described property, claimed to have been assigned and pledged to said association by defendant. The cause of action stated in the complaint is one solely of equitable cognizance. *Association v. Bunch*, 46 S. C. 550, 24 S. E. 508. The answer, consisting in general and specific denials of the allegations of the complaint, raises no issue of fact separate and distinct from the equitable cause of action stated in the complaint. The cause being one in equity, and there being no issue raised therein involving the recovery of money only, or of specific real or personal property, a trial by jury of any issue of fact in this case is not demandable as matter of right. Code, § 274; *Hughes v. Kirkpatrick*, 37 S. C. 169, 15 S. E. 912; *McLaurin v. Hodges*, 43 S. C. 192. The issues raised, therefore, are triable by the court, subject to the right of the court to refer any issue to a jury pursuant to section 274 of the Code and rule 28 of the circuit court, or to refer to a referee or master, as provided in sections 292 and 293 of the Code. In this case there was no application for the reference of any issue for trial, but the application was merely for a referee to take testimony. The court has power, of course, to order such a reference, but the granting or refusal of such an order is discretionary. *McSween v. McCown*, 21 S. C. 372. It is true in this case that the refusal to order such reference was based upon an erroneous view that there were issues of fact therein triable by jury as matter of right, but this view in no wise prejudiced or concluded appellant. The judge did not refuse to try the cause sitting as chancellor, for the record expressly states that neither party was ready for trial; nor did he indicate what issues were properly triable by a jury; nor did he undertake to order for trial by jury any issue properly triable by the court. The order, therefore, in no wise trammelled any succeeding judge, who could proceed to dispose of the case as if the order complained of had not been made. This would dispose of the appeal on its merits if the order was appealable, but the order is not appealable under section 11 of the Code. It does not affect any substantial right of appellant in this action, nor is it an order involving the merits. A reference for the purpose of taking testimony is not demandable as matter of right in an equity cause, hence an order denying such reference does not involve the

merits of the action. *Du Pont v. Du Bos*, 33 S. C. 395, 11 S. E. 1073. This case is not like *McLaurin v. Hodges*, 43 S. C. 190, 20 S. E. 991, in which was entertained an appeal from an order referring certain issues to a jury for trial as matter of right, which were properly triable by the court. In this case, as stated, there was neither refusal to try by the proper tribunal nor any reference of any issue to a jury. The order was a mere refusal to order a reference to take testimony, which appellant could not demand as matter of right. The appeal is dismissed.

(53 S. C. 173)

SAUNDERS v. A. C. PHELPS CO.

(Supreme Court of South Carolina. Sept. 16, 1898.)

GAMBLING CONTRACTS—COTTON FUTURES—RIGHTS AND REMEDIES.

Rev. St. § 1861, provides that any person contracting for the sale of cotton, etc., who shall pay money to any person on account of a loss sustained on such contract may recover the amount so lost from the person to whom he paid the same. It also provides that any person who shall act as agent or middleman in making "any such contract," or receive and forward any moneys in furtherance thereof, shall be liable to his principal or payor for the amount so received. *Held*, that the words "any such contract" refer, not to the first part of the section, but to section 1859, which provides that all contracts for the future delivery of cotton, etc., shall be void unless it was the intention of the parties that there should be an actual delivery in kind; and hence a person need not have sustained a loss by reason of the contract in order to recover moneys paid another who acts as agent or middleman.

McIver, C. J., dissenting.

Appeal from common pleas circuit court of Sumter county; Ernest Gary, Judge.

Action by George M. Saunders against the A. C. Phelps Company. From an order sustaining a demurrer and dismissing the complaint, plaintiff appeals. Reversed.

A. B. Stuckey, for appellant. Lee & Molise, for appellee.

GARY, A. J. The action herein was brought upon the following complaint, which alleges: "(1) That the defendant is a corporation duly chartered under the laws of the state of South Carolina. (2) That on the 21st day of July, 1897, the plaintiff contracted with the defendant to make a sale for him of cotton, for future delivery, to wit, in November, 1897, and, to cover the loss that might be sustained in such sale, paid over to the defendant as a margin the sum of one hundred and fifty dollars, and took its receipt for the same. That the said contract was made between the plaintiff and the defendant, without intention on the part of either that the said cotton should be actually delivered in kind by the plaintiff or received in kind by the defendant or the person to whom they might sell, and it was in fact no more nor less than

an act of gambling in cotton futures. (3) That the defendant failed to carry out its contract with the plaintiff, and on demand has refused to repay him the said sum of one hundred and fifty dollars, and has become liable to pay him the said sum, under the provision of section 1861 of the Revised Statutes, plaintiff having brought this action within three months from the payment to the defendant of the said sum." The defendant demurred to the complaint, on the ground that it does not state facts sufficient to constitute a cause of action, in that it does not allege that the plaintiff has paid to the defendant any sum or sums of money for and on account of a loss sustained by reason of the alleged contract, and on the further ground that the plaintiff cannot recover the amount sued for, because said transaction was void and illegal by the common law and by statute. The demurrer was sustained, and the plaintiff appealed.

Section 1859 of the Revised Statutes provides that all contracts for the future delivery of cotton, etc., shall be null and void unless it was the intention of the parties that there should be an actual delivery in kind. Section 1860 provides that in all actions brought to enforce such contracts, or to collect any note or other evidence of indebtedness, etc., the burden of proof shall be on the plaintiff to show that an actual delivery in kind was intended. Section 1861 is as follows: "Section 1861. Any person or persons so contracting, bargaining, or agreeing for the sale or transfer of any of the aforesaid commodities, in violation of the provisions of this article, who shall pay over to any person or persons any sum or sums of money for and on account of a loss sustained by reason of such contract, bargain or agreement shall be at liberty, within three months next ensuing after such payment, to sue and recover the amount so lost and paid, or any part thereof, from the person or persons to whom he or they shall have paid the same, with costs of suit, by action, to be prosecuted in any court of competent jurisdiction; and the oath of the loser that he has actually paid over the money to the party against whom the action is brought shall be regarded as prima facie establishing the case against such party; and any person who shall act as agent or middleman in the making or execution of any such contract, or who shall accept or receive and forward any moneys, drafts or bills of exchange in furtherance thereof, shall be held liable in an action by the party to recover the amount or value of the money so received, or the value of the draft or bill of exchange so accepted or forwarded." The allegations of the complaint show that the defendant was the agent of the plaintiff for the purpose of making the sale therein mentioned. Section 1861 may properly be divided into two parts: First, that which refers to the parties to the con-

tract for future delivery; and, second, that which relates to agents and middlemen (which we have italicised). In this way alone can full force and effect be given to the entire section. The first part was amply sufficient to embrace agents and middlemen, and there would have been no necessity for the second part if it had not been intended that the provisions of the two parts should be regarded as separate and distinct. The italicised words "any such contract" refer to section 1859, and not to the first part of section 1861. It was therefore not necessary for the plaintiff to have sustained a loss before his cause of action accrued. This construction is in harmony with the statute which was intended to break up the practice of gambling in cotton futures, which has caused so much ruin throughout the land. But, even if the complaint did not state facts sufficient to constitute a cause of action under the statute, it was not demurrable if it stated a cause of action at common law. This ruling is in harmony with the case of *Cartin v. Railroad Co.*, 43 S. C. 221, 20 S. E. 979, in which the court says: "If two causes of action were set forth in the complaint, without being separately stated, the defendant, it is true, had the right to make a motion that the complaint be made more definite and certain, or if allegations were made which were unnecessary to sustain the cause of action stated in the complaint, to make a motion to strike out such allegations as irrelevant and as surplusage. *Pom. Rem. & Rem. Rights*, §§ 447, 451. If the defendant waived such objections by failing to make such motions, then the plaintiff had the right to the relief to which all the allegations showed he was entitled. The plaintiff, when the allegations of the complaint are appropriate to either of two causes of action, may be required, upon motion of the defendant, to make his election as to the cause of action upon which he will proceed to trial. *Westlake v. Farrow*, 34 S. C. 270, 13 S. E. 409; *Hammond v. Railroad Co.*, 15 S. C. 10; *Hellams v. Switzer*, 24 S. C. 39." Also with the case of *Conner v. Ashley*, 49 S. C. 478, 27 S. E. 473, in which the court uses this language: "A complaint is not demurrable when its allegations show that the plaintiff is entitled to some relief, although he is not entitled to the relief for which he prays."

The allegations of the complaint, as we have said, are to the effect that the defendant was the agent of the plaintiff, and that it refused to comply with the requirements of its contract, or, after demand, to refund to the plaintiff his money which he had intrusted to it for the purpose of making the sale therein mentioned. The case of *Bernard v. Taylor* (Or.) 31 Pac. 968, was an action against a stakeholder to recover money which had been deposited with him as a wager on a foot race, but, before the race was run, a demand was made upon the stakeholder by

the plaintiff for a return of the money which he had deposited with him. In that case the court uses the following language: "The general rule is that the law will not interfere in favor of either party in *pari delicto*, but will leave them in the condition in which they are found, from motives of public policy. There is no doubt, where money has been paid on an illegal contract, which has been executed, and both parties are in *pari delicto*, the courts will not compel the return of the money so paid. But the cases show that an important distinction is made between executory and executed illegal contracts. While the contract is executory, the law will neither enforce it, nor award damages; but, if it is already executed, nothing paid or delivered can be recovered back. So that, while the contract is executory, the party paying the money or putting up the property may rescind the contract, and recover back his money. This arises out of a distinction between an action in affirmance of an illegal contract and one in disaffirmance of it. In the former such an action cannot be maintained, but in the latter an action may be maintained for money had and received. The reason is that the plaintiff's claim is not to enforce, but to repudiate, an illegal agreement. Whart. Cont. § 354. In such case there is a *locus penitentiae*. The wrong is not consummated, and the contract may be rescinded by either party. In *Edgar v. Fowler*, 3 East, 225, Lord Ellenborough said: 'In illegal transactions the money has always been stopped while it is in transitu to the person entitled to receive it.' As Lord Justice Mellish said: 'To hold that the plaintiff is entitled to recover does not carry out the illegal transaction, but the effect is to put everybody in the same situation as they were before the illegal transaction was determined upon, and before the parties took any steps. If money is paid or goods delivered for an illegal purpose, the person who has so paid the money or delivered the goods may recover them back before the illegal purpose is carried out; but if he waits till the illegal purpose is carried out, or if he seeks to enforce the illegal transaction, in neither can he maintain an action.'"

The rule is thus stated in 8 Am. & Eng. Enc. Law, p. 1014: "Although it has been the policy of the law to leave parties to an illegal transaction where it found them, by refusing relief to either in respect thereof, it has, on the other hand, never regarded property or money employed therein or produced thereby as common plunder, to be seized or retained by others in no way interested in such business. Consequently, although an agent has taken an active part in gambling transactions on behalf of his principal, if he has received money belonging to the principal and accruing from such business, by way of profits upon dealings in differences, he cannot defend himself in a court of law, against

liability to account therefor, by showing such unlawful business and his connection therewith as such agent." The following language from the case of *Norton v. Blinn*, 39 Ohio St. 145, is quoted with approval in the case of *Gist v. Telegraph Co.*, hereinafter mentioned, to wit: "It is contrary to public policy and good morals to permit employes, agents, or servants to seize or retain the property of their principal, although it may be employed in illegal business, and under their control. No consideration of public policy can justify a lowering of the standard of moral honesty required of persons in these relations." Mr. Chief Justice McIver thus states the principle in the case of *Gist v. Telegraph Co.*, 45 S. C., at page 372, and 23 S. E., at page 153: "Indeed, the true theory in such cases is that the illegal business out of which the money received by the agent arises is no part of the cause of action, and is not necessarily connected therewith; the real cause of action being money had and received by the agent for the use of his principal. This is the principle upon which the cases of *Andersons v. Moncrieff*, 3 Deasus. Eq. 125, and *Owen v. Davis*, 1 Bailey, 315, cited in support of the decision in *Tate v. Pegues*, 28 S. C. 463, 6 S. E. 298, rest; for as said by O'Neill, J., in *Owen v. Davis*: 'One who receives money to the use of another on an illegal contract cannot retain it to his own use on the ground of the illegality of the contract.'"

In the case of *Tate v. Pegues*, 28 S. C., at page 465, and 6 S. E., at page 300, Mr. Justice McGowan, in behalf of the court, said: "The defendant received the property of the plaintiffs under an agreement to sell it for them; and he cannot now refuse to account to them, upon the allegation that there was a law in the state forbidding the sale, especially as he appropriated a portion of the property so received to his own use." In the case of *Andersons v. Moncrieff*, supra, the court uses this language: "The suit is not brought to recover a cent out of the defendant's pocket of his own money; it is to make him pay money which he has received as the agent and for the use of the complainant. It would be monstrous that the defendant should be permitted to keep the money; and the decided cases, following the principle of abstract justice, show that, where an illegal transaction has taken place, the agent who has received the money on the part of the principal shall not shelter himself from the payment of it to his principal under the pretense of the illegality of the original transaction." It will thus be seen from the foregoing authorities that the complaint stated a cause of action at common law, both on the ground that an agent has no right to convert to his own use the money of his principal, even though it was delivered to him for an illegal purpose, and on the ground that the principal has the right to revoke the authority of an agent, and to re-

cover from him money which has been placed in his hands for an illegal purpose, at any time before the power to effect the illegal contract has been executed. The circuit judge was therefore in error in sustaining the demurrer. It is the judgment of this court that the order sustaining the demurrer be set aside, and the case remanded for a new trial.

JONES, J. I concur on the ground that the complaint, under a liberal construction, contains allegations which tend to show a cause of action under the last clause of section 1861, which provides that "any person * * * who shall accept or receive * * * any moneys * * * in furtherance thereof [i. e. in furtherance of the making or execution of a contract for the future delivery of cotton, etc., as are declared void under section 1859], shall be held liable in an action by the party to recover the amount or value of the moneys so received," etc.

McIVER, C. J. (dissenting). The case is so fully and fairly stated in the opinion of Mr. Justice GARY that any restatement here would be wholly unnecessary. The question arises under a demurrer to the complaint, upon the ground that the complaint does not state facts sufficient to constitute a cause of action. This action is, confessedly, brought for the recovery of money paid by plaintiff to defendant in pursuance of a contract which the plaintiff, in his complaint, shows was an illegal and void contract under our statute law, viz. "gambling in cotton futures"; and the plaintiff, in his complaint, expressly bases his right to recover upon section 1861 of the Revised Statutes. The first allegation in the complaint, after the formal allegation of defendant's corporate character, is "that on the 21st day of July, 1897, the plaintiff contracted with the defendant to make a sale for him of cotton for future delivery, to wit, in November, 1897, and, to cover the loss that might be sustained in such sale, paid over to the defendant, as a margin, the sum of one hundred and fifty dollars, and took its receipts for the same." It will be observed that there is no allegation either here or elsewhere in the complaint that defendant made or undertook to make any sale of cotton for future delivery, to wit, in November, 1897, and no allegation of any loss sustained by plaintiff by reason of any such sale. It is obvious, therefore, that the complaint fails to state the facts necessary to constitute a cause of action under the first branch of section 1861 of the Revised Statutes; for it is there declared that any person contracting for the sale of certain commodities, to wit, cotton, etc., for future delivery, who shall pay to any person any sum of money "for and on account of a loss sustained by reason of such contract, bargain, or agreement, shall be at liberty, within three months next ensuing after such payment, to sue and recover

the amount so lost and paid," etc. Now, it is obvious that the complaint fails to state facts sufficient to constitute a cause of action under the first branch of section 1861, for there is no allegation that any contract for the sale of November cotton had been made, and no allegation that any loss had been sustained by reason of such contract. Indeed, at the time this action was commenced, I do not see how it would be possible to ascertain whether there would be any loss sustained by reason of a contract for future delivery in November, even if such a contract had been alleged, for the complaint bears date 20th of October, 1897; and it was admitted, in open court, upon the argument here, that the argument was commenced on that day. It seems to me clear, therefore, that there was no error on the part of his honor, Judge Ernest Gary, in holding that the complaint did not state facts sufficient to constitute a cause of action under the first branch of section 1861 of the Revised Statutes, under which the complaint was manifestly drawn.

It is said, however, that the complaint may be sustained under the second branch of section 1861 of the Revised Statutes. The second branch of the section substantially provides that any person who shall act as agent "in the making or execution of any such contract [by which I understand a contract for the future delivery of cotton], or who shall accept or receive any money in furtherance thereof," shall be liable to an action for the recovery of the money so received. Here, again, there is an absence of the material allegation that the defendant, as agent of the plaintiff, made or executed any contract for the sale of cotton for future delivery; and, on the contrary, the allegation in the second paragraph of the complaint negatives the idea that the money sued for was paid to defendant in furtherance of the making or execution of any contract for the sale of cotton for future delivery which defendant agreed to make, but which is not alleged to have been made, for the allegation in that paragraph is that this money was paid "to cover the loss that might be sustained in such sale," which does not appear to have been ever made. It seems to me that it will be much more likely to effect the wise and beneficent purpose of the statute to hold both parties to the strictest compliance with the provisions of the statute; and, when either party invokes the aid of the courts to obtain the privileges which may be accorded to him, he should be held to the strictest compliance with the conditions of the statute which he invokes.

Neither do I think that this complaint can be sustained as stating a cause of action for money had and received at common law. In the first place, it is not framed in that aspect; and, even if it could be so regarded, it could not be sustained under the case of *Mordcau v. Dawkins*, 9 Rich. Law, 262, where it was

held that a note given for money lent to game with is void, even in the hands of an innocent holder. In that case, O'Neill, Jr., in delivering the opinion of the court, uses this strong language: "We have therefore concluded, on a full review, that it is better at once to say that not only the security for the reimbursement of the money lent to play with is void, but also that the money itself cannot be recovered back." How much stronger is this case, where it appears on the face of the complaint that one of the parties to a gambling contract is seeking to recover back money placed in the hands of another for the express purpose of carrying out such illegal and immoral contract. The case of *Tate v. Pegues*, 28 S. C. 463, 6 S. E. 298, differs materially from this case, for there it did not appear that the plaintiffs had any intention of violating the law. They simply employed Pegues as their agent to sell fertilizers,—a contract which, as said in that case, "was certainly not unlawful." See, also, comments on that case in *Gist v. Telegraph Co.*, 45 S. C., at pages 371, 372, and 23 S. E., at page 153. See, also, the remarks of Lord Mansfield in *Holman v. Johnson*, Cowp. 341, as well as the language of Dixon, C. J., in *Clemens v. Clemens*, 28 Wis. 637 (9 Am. Rep., at page 531), both quoted with approval in *Milhous v. Sally*, 43 S. C., at pages 324, 325, and 21 S. E., at page 270, where the principle is laid down that "no court will lend its aid to a man who founds his cause of action upon an immoral or illegal act," even though the result may be that an equally guilty party obtains an advantage thereby. The court simply leaves the parties in pari delicto in the situation which they have placed themselves, and will not extend its aid to either party. *Bostick v. McClaren*, 2 Brev. 275; *Harvin v. Weeks*, 11 Rich. Law, at page 608. Besides all this, no such question was made before the circuit judge, nor was it presented by any of the exceptions, and hence is not properly before this court. It seems to me, therefore, that the judgment of the circuit court should be affirmed.

(53 S. C. 139)

PADGETT v. McALHANY et al., Special Com'rs.

(Supreme Court of South Carolina. Sept. 7, 1898.)

COUNTIES—PAYMENT OF CLAIMS—INJUNCTION—MANDAMUS—RECORDS—JUDGMENTS—FEES OF CLERK OF COURT.

1. The order requiring county commissioners to pay a claim may only impound in their hands funds sufficient to pay the claim.

2. 22 St. at Large, p. 595, § 16, providing for the creation of a new county, required the clerk of the circuit court of a county from which the new one was made to make copies of all conveyances, mortgages, and liens on record in his office affecting the territory embraced in the new county. *Held*, that the clerk was required to copy judgment rolls.

3. Under 22 St. at Large, p. 595, § 16, requir-

ing the clerk of the circuit court to make copies of judgment rolls affecting territory in the county included in a new county made in part from the old, the clerk may not charge for the work the costs provided for entering up judgments in the first instance. He may charge only for a copy of each judgment roll and the certificate thereto.

4. Since 22 St. at Large, p. 595, § 16, organizing a new county, makes it the duty of the county commissioners to pay for certain work required by the act, payment may be compelled by mandamus.

Jones, J., dissenting.

Appeal from common pleas circuit court of Dorchester county; R. C. Watts, Judge.

Petition by H. D. Padgett, Sr., against T. O. McAlhany, L. A. Klauber, R. L. Ferrell, D. E. Thrower, E. B. Fishburne, Geddings Ilderton, and Roach Platt, as special commissioners for Dorchester county. From an order granting mandamus and an order of injunction, defendants appeal. Injunction modified, and cause remanded.

W. M. Fitch, for appellants. J. G. Padgett and Howell & Gruber, for respondent.

POPE, J. By an act of the general assembly of the state of South Carolina, entitled "An act to establish Dorchester county," approved 25th day of February, A. D. 1897 (see 22 St. at Large, p. 595), and by section 2 thereof, the appellants were named as commissioners, and charged with the duties of having the boundaries of said Dorchester county surveyed and properly marked, as well as to designate and establish the particular site for the public buildings of said county, and for these latter purposes to receive gifts and grants for the benefit of said county, so far as a site for the county seat may require; and, also, with the power to enter into proper contracts therefor, and to enforce said contracts according to their terms and conditions; with the power to said commissioners to take conveyances to themselves of lands or personal property by way of a bonus to said county; and authority, also, to convey, by deeds or conveyances, to third parties, in their own names, as commissioners, for any of the property received by them, as aforesaid, for the use of Dorchester county. The said commissioners were, by the eighth section of said act, declared to be "the proper corporate authorities of Dorchester county, and of each of the townships therein and thereof, for the purposes of this act," and said commissioners had the power to organize and elect their own proper officers. They were required to keep minutes of their meetings and proceedings and decisions, and have a seal. It required that four members of the board of seven members should constitute a quorum for the transaction of business, and the act required a concurrence of four members of said board to pass any measure, in order to be binding. The said commissioners were authorized to issue and sell at not less than par \$20,000 of bonds of Dorchester county.

and use said proceeds of said bonds for the purposes of said county. The sixth section of said act provided for the transfer to Dorchester county of all cases, civil and criminal, when the defendant therein resided in the territorial limits of said Dorchester county, and that all records appertaining thereto, or commissions and other papers belonging to, such cases, civil and criminal, should be transferred to Dorchester county. The sixteenth section of said act required the clerk of circuit court for Colleton and Berkely counties, respectively, within three months after a county seat for Dorchester county should be selected, to make, or cause to be made, "copies of all conveyances, mortgages, and liens of kind and description now on record in their respective offices, affecting or pertaining to all that territory embraced in the county of Dorchester as aforesaid. Provided. That the clerks of court, as hereinbefore stated, shall each receive for making and certifying such copies one half of the compensation, and no more, that they be entitled to under the present law for recording deeds, conveyances, mortgages, liens and other papers of a similar character. That such copies shall be made in substantial books to be procured for said purpose, and shall be filed with the commissioners provided for in section 2 of this act, or their successors in office, within three months after the vote is declared locating the county seat. That the cost of books and stationery as well as making the copies herein required and all other expenses incident to the same shall be paid for by the commissioners provided for in section 2 of this act." The commissioners named in said act organized thereunder.

After St. George was declared the county seat of Dorchester county, H. D. Padgett, the elder, as clerk of the circuit court for Colleton county, caused copies of conveyances, mortgages, and liens of every character to be made and presented to said commissioners, with a bill of \$7,394.68 as his charge therefor. The said commissioners declined to pay said account. Hence, on the 3d day of January, 1898, H. D. Padgett, the elder, by his petition, applied to his honor, R. C. Watts, at that time presiding over the courts of common pleas of the Second judicial circuit, to which circuit this said Dorchester county had been assigned, praying that the writ of mandamus should be issued to said commissioners, requiring them to pay his said account. Under the order of Judge Watts, the commissioners made their return, setting out therein their grounds for refusing to pay said account, and praying that the prayer of the petition should be denied. To this return the said H. D. Padgett, the elder, filed an affidavit. The matters came on to be heard before his honor, Judge Watts, on the 21st day of January, 1898, and on the next day he issued the writ of mandamus prayed for. At the same time he issued an order enjoining the said commissioners from paying out

any part of the funds in their hands until they had obeyed said writ. From both these orders the said commissioners appeal, and ask this court to reverse the same.

It was unquestionably an error for Judge Watts to issue such a sweeping order of injunction as that granted by him. It was quite enough for him to have impounded in the commissioners' hands, until they obeyed his writ of mandamus, the sum of \$7,394.68, which amount was all that the petitioner claimed to be due him by the said commissioners, for there were other duties imposed by law upon said board besides providing payment for the petitioner's services under said act. To this extent, certainly, the order of injunction must be modified.

The serious contention is over the account for \$7,394.68, which the petitioner seeks to have respondents pay, and, in order that this may appear in its true light, the account itself should be reproduced. It was as follows:

Dorchester County, in Acct. with H. D. Padgett for Transcribing Sundry Records, to wit:

Mortgage Real-Estate Books, 6, No. 1,485.

43 lines per page, 10 words		
per line, 430.		
600 pages per book X, 430		
words	258,000	
6 books X, 258,000 words.	1,548,000	
1,548,000. at 5c per hundred words..		\$ 774 00
419 satisfactions at 12½.....		52 37
14,850 mortgages. No.		
words to indexes 30.....	44,550	
44,550 words, at 5c. per 100 words..		22 27
1,485 certificates, at 12½.....		185 62
		<u>\$1,034 28</u>

Mortgage Personal Property Book, No. 6.

No. mortgages, pp. 1,537.		
43 lines per page, 10 words		
per line, 430 words.		
3,115 pages in six books.		
3,115 pages X, 430 words		
to page.....	1,339,450	
To indexing 1,537 mtgs. pp.		
On direct and cross, 30		
words	46,110	
		1,385,560
1,537 M. pp. X, 30 words.		
1,385,560, at 5c. per 100 words.....		\$ 692 78
1,537 certificates, at 12½.....		192 12
		<u>\$ 894 90</u>

Bill of Sale Books, No. 1,100.

43 lines per page. 10		
words to line, 430 words.		
600 pages in Book X,		
430 words to line... 258,000 words		
Indexing 1,100 bills of		
sale, 30 words each. 33,000 words		
	291,000	
291,000 words, at 5c. per 100 words..		\$ 145 50
1,100 certificates, at 12½.....		187 50
		<u>\$ 283 00</u>

Chattel Mtgs. Books, Nos. 1 & 2. No. 1,512

Mtgs.		
To indexing 1512 mtgs., less \$100, at		
7½		\$ 113 40
1512 certificates, each at 12½.....		189 00
		<u>\$ 302 40</u>

Liens on Crops, No. 565.

To filing 565 liens, at 7½.....	\$ 42 37
To 565 certificates, at 12½.....	70 62
	<u>\$ 112 99</u>

Deeds, No. 3,974.

43 lines per page, 10 words to line, 430.	
5,747 pages in 10 books.	
5,747 pages X, 430.....	2,471,210
To indexing 5,747 deeds, 30 words	119,220
	<u>2,590,430</u>
2,590,430 words, at 5c. per 100 words.	\$1,295 21
8,794 certificates, at 12½.....	496 75
	<u>\$1,791 96</u>

Judgments.

Judgments by default, No. 443.	
Average No. of words per judgment	2,625
2,625 words X, 443 judgments	1,162,875
At 5c. per 100 words.....	\$ 581 43
To copying, filing, and sealing 443 summons, at 25c.....	110 75
To copying, and filing, and sealing 443 complaints, at 25c.....	110 75
To copying, entering, and enrolling 443 judgments, at 37½c.....	166 12
To recording 443 judgments, at 75c..	332 25
To certificates, 443 judgments, at 25c.	110 75
To copying orders, final judgments, 443, at 12½c.....	55 37
	<u>\$1,467 42</u>

Sealed Note Judgments, No. 128.

Average words per judgments, 400.	
400 words X, 128 judgments, 51,200, at 5c. per 100 words.....	\$ 25 60
To copying, filing complaints, 128, at 25c.	32 00
To copying, entering, and enrolling judgments, at 37½c.....	48 00
To recording judgments, 128, at 75c..	96 00
To making certificates, 128, at 25c..	32 00
	<u>\$ 233 60</u>

Transcripts of Judgments, No. 128.

Average words per judgments, 200.	
200 words X, 128 judgments, 25,600, at 5c. per hundred words.....	\$ 12 60
To copying, filing transcripts of judgments, 128, at 12½.....	16 00
To entering and enrolling transcripts, 128, at 37½.....	48 00
To making certificates, 128, at 25c..	32 00
	<u>\$ 108 80</u>

Judgments, Foreclosure, and Partition, No. 194.

Average words per judgments, 5,500.	
5,500 words X, 194 judgments, 1,067,000, at 5c. per hundred words..	\$ 533 50
To copying, filing, and sealing 194 summons, at 25c.....	48 50
To copying, filing, and sealing 194 complaints, at 25c.....	48 50
To copying, filing, and sealing 194 answers, at 12½c.....	24 35
To entering and enrolling 194 judgments, at 37½c.....	72 75
To recording judgments for foreclosure, partition, and orders and reports, averaging 1,300 words per judgment, at 5c. per 100 words...	65
To recording judgments and orders, 194, at 65c.....	126 10
To certificates, 194, at 25c.....	48 50
	<u>\$ 902 10</u>

Grand Total.

Judgments by default, etc.....	\$1,467 42
Judgments sealed, notes, etc.....	233 60
Judgments, transcripts.....	108 80
Judgments, foreclosure, etc.....	902 10

Total am't for copying 895 judgments

\$2,711 92

13 names registered, at 12½.....	\$ 1 62
13 certificates, at 12½.....	1 62

\$ 3 24

Filing 16 notaries, at 12½..	\$2 00
Certificates, 10 at 12½....	2 00

4 00

Recording 8 statutory liens, at 50...	4 00
Recording 8 charts, at 50.....	4 00
Recording 12 homesteads, at 50....	6 00

Recording 288 plats, at 75.....	\$ 216 00
288 certificates, at 12½.....	36 00

\$ 252 00

Grand Total.

Mortgages of real estate.....	\$1,084 26
Mortgages of personal property....	884 90
Bills of sale.....	283 00
Chattel mortgages, less \$100.....	302 40
Liens on crops.....	112 99
Physicians	3 25
Notary public	4 00
Statutory liens	4 00
Charter	4 00
Homesteads	6 00
Deeds	1,791 96
Plats	252 00

4,632 76

Judgments	2,711 92
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\$7,394 68

We have reproduced this account of the petitioner in its entirety, in order that our observations touching the same may be now readily apprehended. There can be no question that the intention in passing this act, so far as the work required of the petitioner is concerned, was that the records of the new county of Dorchester should show the deeds, mortgages, chattel and real, and all judgments affecting persons and property, in such new county, which existed in the county of Colleton while such persons and property were embraced in Colleton county. While the terms of the act seemed to indicate that such deeds, mortgages, and judgments should be recorded in books by the petitioner as clerk of the circuit court for Colleton county, yet an examination of this act to form Dorchester county will show that such work, so confided to the petitioner, would also include certified judgment rolls which are not recorded in books. Nothing is more common in actions to try title to land than to rely upon sales made under judgments, and in such cases it is necessary to produce the entire judgment roll. We cannot see that the objection of the respondents to receiving and paying for the judgment rolls simply because the same are not recorded in books can be maintained. But an inspection of the account of the petitioner shows that he has there entered the tax costs provided for clerks of court in entering up judgments in

the first instance, for he has charged on said account the tax cost charges in relation to each summons, each complaint, each judgment, as though the parties litigant, plaintiff or defendant, were having their judgments entered up by the clerk of the circuit court immediately after the same were obtained. The act of the general assembly did not, by its terms, justify any such conclusion by the clerk, for all he was required to do was to make copies of these records, and certify to the same. The account by the petitioner should be purged of all such charges, and he should only be allowed to charge for a copy of each judgment roll and his certificate thereto. As an illustration of our meaning: In the account, as presented by the petitioner, under the head of "Judgments," he enters judgments by default to 443, and enters "To copying, filing, and sealing 443 summons, at 25 cents each, \$110.75." "To copying, filing, and sealing 443 complaints, at 25 cents each, \$110.75." "To copying, entering, and enrolling 443 judgments, at 37½ cents each, \$166.12." "To recording 443 judgments, at 75 cents each, \$332.25." "To certificates, 443 judgments, at 25 cents each, \$110.75." "To copying orders, final judgments, 443, at 12½ cents each, \$55.37." As we before remarked, this is all wrong, for all that the act required of the petitioner was to make a copy of each judgment roll, and place his certificate to each copy. And what is true of the foregoing illustration is also true of his charges on what he styles "Sealed Note Judgments, No. 128." So of his "Transcripts of Judgments." So, also, of his "Judgments, Foreclosure and Partition, No. 194." All of these charges, in the aggregate, amount to \$2,711.92. We repeat that, under the act, the petitioner is only allowed to charge for a copy of each judgment roll and his certificate thereto. It seems that the circuit judge did not pass upon these facts. There being clear error in these matters, it will be necessary for us to remand the case to the circuit court, with directions to have the amount due the petitioner ascertained according to the directions herein embodied.

The respondents have raised a preliminary question as to the jurisdiction of the circuit judge to issue a writ of mandamus. It is quite true that this board is clothed with great powers, yet, in regard to the copying ordered to be done for the commissioners, who are here as respondents, by the petitioner, such commissioners are directed to pay the petitioner for his work in accordance with the terms of the act, and we do not see why the writ of mandamus may not issue.

It is the judgment of this court that the order of injunction issued by Judge Watts, here appealed from, be so modified as only to require the commissioners for Dorchester county to hold until further order of court

the sum of \$7,394.68; and it is the further judgment of this court that the cause be remanded to the circuit court, for the purpose of ascertaining how much of the \$2,711.92 now charged in petitioner's account, in connection with judgments, should be stricken from said account, in accordance with the principles herein announced.

JONES, J. I am compelled to dissent in this case. In the first place, I do not think it competent for the circuit judge in mandamus proceedings to determine the amount due upon the disputed account in this case, and, in effect, render judgment thereon, and issue an order to compel its payment. All that he had power to do was to compel the special commissioners to move in the matter of auditing the petitioner's claim. Assuming that it was the duty of the special commissioners to audit said claim, the exercise of that duty involved discretion, which the circuit judge could not contract by mandamus. Conceding that the auditing of a claim of an officer for salary or fees fixed by law is merely ministerial, as held in *Richland Co. v. Miller*, 16 S. C. 251, it cannot be said that the passing upon the petitioner's claim in his case is merely ministerial, for in passing upon this claim the commissioners would necessarily be compelled to determine whether the "conveyances, mortgages, and liens" copied affected the territory embraced in the county of Dorchester, and whether the copying was same as required by the act; matters clearly involving the exercise of judgment and discretion. In the next place, while concurring in the view of the majority of this court as to the impropriety of allowing charges for certain items of the claim, inasmuch as the petitioner can only charge for one-half the usual fees "for making and certifying such copies" in a substantial book, I am bound to think an improper construction has been placed upon the act in question as to other charges. The sixteenth section of the act provides for copies of "all conveyances, mortgages, and liens of every kind and description now on record in their respective offices, affecting or pertaining to all that territory embraced in the county of Dorchester. * * * That such copies [of conveyances, mortgages, and liens now on record] shall be made in substantial books to be procured for said purpose," etc. It appears very clear to me that this act does not require the commissioners to pay for any copy of any conveyance, mortgage, or lien not recorded in the county of Colleton or Berkeley, and not copied by the petitioner in substantial books. This would eliminate from the account charges for mere sheet copies of the judgment roll, or any part thereof, most certainly for mere sheet copies of parts of the judgment roll not recorded or required to be recorded.

53 S. C. 150)

STATE v. DAVIS.

(Supreme Court of South Carolina. Sept. 7, 1898.)

CRIMINAL LAW—CHARGES ON THE FACTS—HARMLESS ERROR—HOMICIDE—MANSLAUGHTER—AUTHORITY TO ARREST—RIGHT OF RESISTANCE.

1. Under the provision of the constitution forbidding judges to charge juries with respect to matters of fact, an instruction that if the jury have a doubt such as a reasonable man would entertain in affairs of his own concern, "under the facts and evidence as strong as that in this case," that would be a reasonable doubt, is erroneous.

2. Where accused is on trial for killing one who, having detected him in stealing from a money drawer, attempted to arrest him, it is a violation of the constitutional provision forbidding judges to charge juries with respect to matters of fact to instruct that "in this case the question of the right to make an arrest cannot arise."

3. Where accused, on being discovered in the commission of larceny, was seized by deceased, and in the struggle deceased was killed, it was error to charge that manslaughter from accidental but negligent killing could not arise in the case.

4. Where accused was caught in the act of stealing by the owner of the property, and in the struggle for its recovery the owner was killed, the statement of the court at the outset of an instruction that the right of arrest did not arise in the case was harmless, where the court further stated that, no felony having been committed, an arrest by deceased as a private individual without a warrant would have been illegal.

5. One restrained of his liberty under an illegal arrest may use necessary force, even to the taking of life, to make his escape.

6. Where one is caught in the act of stealing, the owner of the property is authorized to arrest him, and regain possession of the property; and this regardless of the value of the property.

Appeal from common pleas circuit court of Fairfield county; J. C. Klugh, Judge.

Henry Davis was convicted of murder, and he appeals. Reversed.

J. E. McDonald and Jas. W. Hanahan, for appellant. J. K. Henry, for the State.

POPE, J. This is the second time this case has been before this court on appeal. 27 S. E. 905. It seems that the appellant was again convicted of the murder of James E. Suber by a jury in Fairfield county. The grounds of appeal allege that the circuit judge, in his charge to the jury, commented on the facts, in violation of that provision of the constitution which interdicts such a course. By the brief it appears that the circuit judge used this language: "Now, in considering this whole case, Mr. Foreman and gentlemen, if you have a reasonable doubt of the guilt of the accused, if you have a doubt in considering the testimony which is well founded,—a doubt such as a reasonable and prudent man would entertain in affairs of his own concern,—*under the facts and evidence as strong as that in this case, that would be a reasonable doubt,*" etc. (Italics ours.) And also in his charge he said, "In this case the question of the right to make

an arrest cannot arise." As to the first quotation, it is evident that the circuit judge was betrayed into an expression of his opinion upon the weight of the testimony. So, also, in the second quotation, it appears that unwittingly the circuit judge suffered himself to state what was his inference from the testimony which had been offered. Such a course as to either of the questions was not open to the judge. By the constitution he was debarred this privilege, and both instances present reversible error. This disposes of the second and fourth grounds of appeal.

Another question is as to the power of the circuit judge in his charge to limit the inquiry of the jury in the application of the facts to the crime of manslaughter by declaring that manslaughter from the accidental but negligent killing of a human creature could not arise in this case. This was error. It is but due to the circuit judge to state that his charge in laying down the principles of law touching murder, manslaughter, and self-defense were admissibly put, and it is to be regretted that these mistakes have occurred.

The last question presented by the appeal is that relating to an alleged error in the circuit judge in his reference to the second request to charge, which request was as follows: "Every touching of the person of another in a rude, violent, or revengeful manner, without a warrant, except in cases of felony, is in law an assault, which the person so touched has a right to resist, and against which he may use as much force as is necessary." The language of the charge in this connection was as follows: "In this case the right to make an arrest cannot arise. The law in this state has been correctly stated, and has been established in this very case, because it existed long before this case ever arose, that a private person—that is, a person not an officer of the law—may arrest another who is guilty of a felony, either where the felony is committed in view of the party making the arrest, or where he has reasonable and certain information that a felony has been committed. But, except in cases of felony, a private individual has no right, under the law of this state, to make an arrest. There is nothing in this case to show that the deceased was an officer of the law, and there is nothing to show—at least there is no sufficient proof to show—that there had been a felony committed; and therefore, under the facts of this case, you would be bound to conclude that, if he were attempting to arrest this defendant in the legal sense of restraining or detaining him, it would not have been a lawful arrest. But, Mr. Foreman and gentlemen, the mere fact that a person is making an arrest without a warrant, and is making an illegal arrest, will not justify the party being arrested in taking the life of his assailant. It is an assault and battery for a man without a warrant to

make an arrest; that is, to make an illegal arrest. If he lays his hands on a party, and arrests him illegally, it is an assault and battery; and an assault and battery may be repelled with so much force as may be necessary. But the mere restraining a man—depriving him for a time of his liberty—would not justify the other in taking his life. The law only allows the plea of self-defense where the act is done in defense of life and limb, not in the defense of liberty; and, for the very manifest reason that a man in danger of losing his life or of receiving serious harm to his body is imperiled, the necessity exists for his immediate action, in order to defend himself against such danger. But if it is a mere restraint of his liberty, it is better, and the law would hold it to be his duty, to submit even to illegal restraint, rather than to take the life of his fellow man, because the law furnishes abundant means for him to regain his liberty, and affords him sufficient remedy for illegal restraint; but it cannot afford to him sufficient remedy for the taking of his life, or for inflicting such injury upon his person as may result in permanently maiming him; and therefore it permits a man to exercise such force as may even result in taking the life of his assailant where his own life or personal security—the security of his body—is involved. So, with these comments, I charge you the second proposition of law." We remark that, although the language of the circuit judge, when he spoke of the right of arrest not arising in this case, might, if it had occurred without any explanatory words from the judge, have occasioned some criticism, yet, following these words, as he did, with the fullest explanation, there is no reversible error, so far as this language is concerned. A much more serious question arises where the circuit judge comes to discuss the right of a man to relieve himself from an illegal arrest. We cannot hold that the judge has stated the law of this state on this subject. The constitution sacredly guards life, liberty, and property of the citizen, and our laws have always upheld the sacred boon of liberty. In the last edition of the American & English Encyclopedia of Law (at page 852 of volume 2) occur these words: "An unlawful arrest vests no authority in the one arresting; hence one arrested may lawfully escape, if possible, and he has the right to use as much force as may be necessary to regain his liberty, even to the actual taking of life." We cannot agree that the circuit judge is correct in laying down the law so as to maintain a distinction between the right of man to resist an injury to life or body and his right to resist an invasion of his personal liberty, for each of the three occupies the same plane. This position by no means lays down the rule that a man may kill his assailant to protect any one of the three, but it is the province of the jury to determine if the facts and circumstances sur-

rounding each case would justify the taking of the life of the person who shall seemingly jeopardize life, or serious bodily injury, or the liberty of the person assailed. While all this is true, it does seem to the writer of this opinion that when a thief is detected with the goods of the owner, by such owner, while such thief is in the house or on the premises of the owner, such owner is justified in making efforts to regain his property from such thief, even if he has to use force to accomplish his purpose. It seems idle to say that, if the goods stolen shall amount in value to \$20, or more, such being a felony, the thief may be arrested without a warrant for such arrest, but that, if the goods be of the value of \$19, or less, stolen from the owner in his presence, it will not justify such owner in arresting such thief, and recovering his property from him. Take the case at bar as an illustration: Here Mr. Suber, the owner, sees the defendant take money from his money drawer, and goes to the money drawer, and sees for himself that the thief has actually taken his money; and he immediately calls upon the thief to restore his money to him, the owner, and, upon the refusal of the thief to deliver to him his money, the owner catches hold of the thief to try and regain his money, and he is killed by the thief. Does it not seem that the law should justify the owner in this arrest of the thief? We would be understood upon this matter, for we mean only to hold that when a thief is caught in the act of stealing from the person, or the house, or the premises of such owner, the owner, in such a case, is authorized to arrest the thief, and regain his property, at that moment in the possession of the thief. This is what, no doubt, was in the mind of the circuit judge, and if he had charged in this restricted sense, I would not have been willing to hold him in error. As we have seen, there must be a new trial. It is therefore the judgment of this court that the judgment of the circuit court be reversed, and that the case be remanded to the circuit court for a new suit.

(96 Va. 255)

BAYLOR et al. v. FULKERSON'S EX'RS.
(Supreme Court of Appeals of Virginia. July 7, 1898.)

EQUITY—LACHES—FRAUD.

A father, who, as guardian, had possession of his children's property, and who was executor of an estate to which the children were heirs, made a contract with them, by which they, for a consideration, released him from all liability as guardian and executor. The contract recited that, as such guardian and executor, he had received and disbursed various sums, and that no settlement thereof had been made before a commissioner. It was executed when the daughters were of age, married, and residing apart from their father with their husbands, who joined with them in the contract. *Held*, that the daughters were estopped on account of laches to set the contract aside on the ground of fraud after the father's death 12 years after its execution.

Appeal from circuit court, Lee county.

Bill by Jennie Baylor and Kate Carr against Fulkerson's executors. From a decree for defendants dismissing the bill, complainants appeal. Affirmed.

H. S. K. Morison and B. H. Sewell, for appellants. A. L. Pridemore and J. H. Fulton, for appellees.

HARRISON, J. It appears from the record that A. H. Fulkerson, by his second wife, who was Henrietta Baltzell, had three children, viz. John B., Jennie, and Kate. These three children, their mother having died in 1863, inherited an interest in the estate of their maternal grandfather, and they also became entitled to other property under the will of their maternal uncle, Joseph C. Baltzell, who died in 1866. After the death of the grandfather, intestate, which occurred in 1863, very soon after the death of his daughter, A. H. Fulkerson qualified as guardian of his three children.

The administrators of Joseph C. Baltzell, the uncle, were successively John G. Kreger, W. M. Hopkins, and A. H. Fulkerson. No settlement was ever made before a commissioner by either one of these fiduciaries.

In March, 1880, Kate, the youngest child, married Robert F. Carr, and in September, 1882, Jennie married Charles E. Baylor.

In March, 1884, A. H. Fulkerson and his wards—the husbands of Jennie and Kate uniting—made and entered into a contract under seal, which sets forth the several capacities in which A. H. Fulkerson is liable, viz. as guardian, as administrator of Joseph C. Baltzell, and as security for W. M. Hopkins, a former administrator of Joseph C. Baltzell; and sets forth that, as guardian and administrator, said Fulkerson had received various sums of money, notes, accounts, bonds, rents, etc., which had been partly disbursed and expended for the benefit of his wards, and of which no accurate account had been taken, and no settlement thereof made before a commissioner; and further sets forth that, in order to fully and finally settle and adjust all these various matters of account and liabilities, the said Fulkerson should pay to Charles E. Baylor and Jennie, his wife, \$500, to Robert Carr and Kate, his wife, \$500, and to J. B. Fulkerson, \$500. In consideration of these sums, the receipt of which is acknowledged, the wards agree to fully and finally acquit, release, and discharge A. H. Fulkerson from all liability on account of the several matters and things enumerated and set forth in the contract.

A. H. Fulkerson died in January, 1896, and in April, 1896, this suit was instituted by his daughters, Jennie Baylor and Kate Carr, who are the appellants here, in which they charge that the contract of 1884, entered into by them with their father, was procured by fraud and concealment, and for the purpose of hindering and estopping them from en-

forcing the solemn and sacred trust for their benefit voluntarily assumed by him; they pray that the same may be set aside, annulled, and declared void as to them, and that the accounts of A. H. Fulkerson, as administrator of Joseph C. Baltzell, deceased, and as their guardian, be settled, and that the executors of A. H. Fulkerson, deceased, be required to pay over from the estate of their father the amounts shown to be due them.

The executors of A. H. Fulkerson demur to and answer this bill, denying all charges of fraud and concealment by their testator in making the contract of 1884, and insist that said contract represents a full and fair settlement of all that was due appellants from their testator in his capacity of guardian, administrator, or otherwise. They further rely upon the statute of limitations, and insist that appellants have been guilty of such laches in bringing their suit assailing the fairness of the transaction that a court of equity will not now entertain them for that purpose.

The law is well established that settlements made soon after the ward comes of age, and especially before he is in possession of his estate, are viewed by a court of equity with a watchful and jealous eye. The law, however, does not prohibit the guardian from dealing with his recently emancipated ward, although it regards the transaction with jealousy; and a release of the guardian or a gift to him may consequently stand, if shown to have been made deliberately, and with a sufficient opportunity for consultation and advice. Long and unexplained acquiescence is, in this, as in other cases of like kind, an effectual bar. 2 White & T. Lead. Cas. Eq. pt. 2, pp. 1212, 1213, and cases there cited; 1 Minor, Inst. p. 492, and cases cited.

At the time the contract here assailed was entered into between the father and his children, John B. had reached his 27th year, Jennie, who had previously married, was in her 25th year, and Kate, who was married at 18, was in her 28d year. None of them were living with the father, but in homes of their own; the appellants under the influence and protection of their respective husbands, who were men of intelligence and business capacity, and they ladies of education. There was no undue haste about the execution of the contract. On the contrary, it appears that there was ample time for consultation and advice, and that it was executed deliberately and voluntarily. The contract on its face was ample notice, if any was wanting, of the characters in which the father was under obligation to settle with his wards, and gave a full account of the character of property that had come to his hands in which they were interested. It also informed them that no accurate account had been kept, and no settlement made before a commissioner. There is not shown to have been any misrepresentation on the part

of the father, or the concealment of any material fact. It further appears that Charles E. Baylor, the husband of one of the appellants, certainly soon after the execution of the contract was investigating these matters, and advising with counsel in regard thereto; and in May, 1886, he received a letter from the clerk of the county court of Washington county, giving him an elaborate and detailed account of the matters and items of charge against A. H. Fulkerson, now set up in the bill, and alleged to have been discovered since the death of A. H. Fulkerson in 1896. This letter also discloses the fact that Baylor was then conferring with counsel, and contemplating a suit against his father-in-law.

Notwithstanding this knowledge of the facts, and all the means of knowledge then within easy reach of the appellants, they remain silent for 12 years, acquiescing in the contract they have made, until their brother, John B., and all other persons connected with the transactions they now seek to investigate, have passed away, and, within 90 days from the time their father's lips are sealed in death, they bring this suit. Such laches, under such circumstances, leave appellants without ground to stand upon in a court of conscience, and their bill was therefore properly dismissed.

While this decision rests upon the doctrine of laches, it is proper to say that, before the circuit court dismissed appellants' bill, the cause was referred to a competent commissioner, who, after an elaborate and painstaking investigation, as appears from his report, covering many pages of the record, stated the accounts of A. H. Fulkerson as administrator and as guardian, with the result that appellants had been overpaid by their father in the final settlement of 1884.

This report and the evidence upon which it is based has been carefully considered, and no error appears therein to the prejudice of appellants.

For these reasons, the decree appealed from must be affirmed.

BUCHANAN and CARDWELL, JJ., concur.

CARNAHAN v. ASHWORTH et al.

(Supreme Court of Appeals of Virginia. July 7, 1898.)

CONTINUANCE—JURISDICTION—CREDITORS' SUITS—PARTIES—SALE OF LAND—LIENS—COMMISSIONERS' REPORT—APPEAL—REVIEW.

1. A party who obtains a continuance cannot afterwards say that he was not regularly brought into court on account of a noncompliance with Code, § 8818, requiring the clerk of a circuit court where a suit is begun to transmit to the clerk of the circuit court to which the cause is removed, not only the original papers in the cause, but copies of all rules and orders made therein, and a statement of the costs incurred by each party.

31 S.E.—5

2. In a creditors' suit, the trustees in all deeds of trust on the property sought to be sold, and all the creditors named therein, are necessary parties.

3. A decree for the sale of land in a creditors' suit is erroneous where the priorities of the liens against the land have not been established.

4. Where, in a creditors' suit, the commissioner's report does not indicate the order of priority of liens of different rank on the land sought to be subjected, objection thereto may be first taken in the supreme court.

5. Where, in a creditors' suit, a party who held a lien against the property sought to be sold proved his lien before the commissioner, he became a substantial party to the cause.

Appeal from hustings court of Radford.

Bill in chancery by Mrs. J. S. Ashworth against J. W. Carnahan and the Wytheville Building & Loan Fund Association. From a decree in favor of complainant, defendant J. W. Carnahan appealed. Reversed.

Blair & Blair, for appellant. W. B. Kegley, M. M. Caldwell and Bolling & Stanley, for appellee.

KEITH, P. Mrs. J. S. Ashworth recovered a judgment against J. W. Carnahan for \$33.36, and filed a bill in chancery in the circuit court of Wythe county to enforce the lien thereof against the real estate of the debtor. The plaintiff alleges that Carnahan is the owner of several parcels of real estate in Wythe county, incumbered by deeds of trust and judgments, but she fails to make the trustees in said deed, or indeed any one save the judgment debtor, parties defendant. The judge of the circuit court, after notice in vacation, directed one of the commissioners of his court to state an account showing the real estate owned by Carnahan, the liens binding thereon, and the order of their priorities, the annual rental value thereof, and any other matter he might deem pertinent. The commissioner reported on the 20th of June, 1893, in obedience to this order. He divides the liens into two classes,—those which he denominates as specific liens, which include the "two deeds on the lot at the corner of 10th and Spring streets, to secure the Wytheville Building & Loan Fund Association, and a lien reserved in the deed, to secure Mrs. Stephens on the same property." Then follows in this class a deed of trust on three lots in the Trinkle addition, and then a deed of trust on five lots in the Trinkle addition, to secure J. G. Shelton. There is nothing in this report to indicate the order of priority among such of the liens embraced in this class as rest upon the same subject. The amount of the liens is stated, but not their relations to each other, or, as the phrase is, "the order of their priorities."

The defendant filed exceptions to this report, and the cause was brought on to be heard at the February term, 1894, upon the bill, the commissioner's report, the exceptions thereto, upon the answer of the Wytheville Building & Loan Fund Association, and upon the defendant Carnahan's objection to the

filing of the answer. Thereupon the court decreed that Carnahan have leave to file his answer, and, without adjudicating any other question in the cause, it was continued.

At the March term, 1894, Carnahan filed his demurrer to the bill and his answer thereto, and at the September term, the judge of the circuit court of Wythe county finding himself so situated as to render it improper for him to sit in the cause, it was removed to the circuit court of Smythe county, there to be heard and determined.

At the December term of the circuit court of Smythe county, the Wytheville Building & Loan Fund Association appeared, and asked the court to be permitted to retire from the cause, in accordance with the objection made by its co-defendant, Carnahan, to the filing of its answer at the February term, 1894, but Carnahan had in the meantime changed his position, and now resisted the association's effort to retire from the cause; but the court allowed the association to withdraw.

At the March term for the circuit court of Smythe county, the judge of that court found himself unable to proceed further, and ordered the cause to be removed to the corporation court of Radford.

On the 15th day of May, 1895, at the hustings court held for the city of Radford, the following decree was entered in this cause: "On motion of the defendant, this cause is continued to the 15th day of June, 1895, to be peremptorily heard at that time"; and on that day the cause came on to be heard upon motion of defendant to dismiss for want of jurisdiction, because the clerk of the circuit court of Wythe county had not furnished to the clerk of the circuit court of Smythe county a statement of costs and copies of orders, decrees, and rules entered in said cause in the circuit court of Wythe county, in accordance with section 3318 of the Code. This motion the court overruled, but directed the clerk of the circuit court of Wythe to comply with the law upon the subject.

On the 18th of July the cause came on again to be heard before the hustings court of the city of Radford, which entered a decree upon the bill and exhibits, the report of Commissioner Powell, and exceptions thereto, the demurrer of the defendant Carnahan, and upon the answer of the Wytheville Building & Loan Fund Association, which had been again brought into the cause upon a rule issued at the request of the defendant Carnahan, upon the answer of Carnahan, and upon depositions and evidence filed with the report of Commissioner Powell; whereupon the court overruled Carnahan's demurrer, and the objections made by him to the filing of the answer by the Wytheville Building & Loan Fund Association, and decreed that, unless the defendant Carnahan should pay off and satisfy the liens mentioned in Commissioner Powell's report within 30 days, that commissioners be appointed to sell the house and

lot in Wytheville upon the terms named in the decree. The decree further directed that the several trustees in the proceedings mentioned be made parties, and leave was granted the plaintiff to amend her bill for that purpose. Other matters are mentioned in the decree, but we have set forth only so much of it as is deemed necessary to the disposition of this controversy.

From this decree an appeal was obtained to this court by Carnahan.

He assigns as error the want of jurisdiction in the hustings court of the city of Radford to enter the decree complained of. This point is not well taken. He appeared in the hustings court of Radford on the 13th of May, 1895, and moved that court to continue the case, and set it for trial on the 15th day of the June following. As was said by Judge Buchanan in *Bell v. Railroad Co.*, 91 Va., at page 104, 20 S. E. 943: "The mere fact of a party taking and agreeing to a continuance is evidence of having made himself a party to the record, and of his having recognized the case as in court. It is too late afterwards for him to say that he has not been regularly brought into court."

The next serious error assigned is to the action of the hustings court of Radford in overruling the demurrer of the defendant.

It appears from the face of the bill that there were two deeds of trust upon the property which the plaintiff seeks to have sold for the satisfaction of her debt. "As a rule," says Barton, in the first volume of his *Chancery Practice*, at page 178, "the trustees in the several deeds of trust, and all the creditors therein named, should be made parties either by process or convention." And in 1 Daniell, Ch. Prac. (4th Ed.) at page 192, it is said that, "where the plaintiff has only an equitable right in the thing demanded, the person having a legal right should be made a party to the suit, for otherwise his legal right would not be bound by the decree." See, also, page 193, and *Kendrick v. Whitney*, 28 Grat. 646. The demurrer was well taken, and should have been sustained by the court. It is by no means clear, however, that, under the circumstances disclosed by this record, the decree should be reversed on account of that error. The bill was filed in May, 1893. The defendant was duly summoned, orders of reference were taken and executed by the commissioner of the court, his report returned, and exceptions to it filed; but Carnahan did not demur or answer until March, 1894. The cause was then banded about from court to court for more than a year, and when it was finally argued and submitted in July, 1895, the court overruled the demurrer, but directed parties to be made to the bill, whose absence constituted the only ground upon which the demurrer could have been sustained. Had the demurrer been sustained, that adjudication would have been followed by leave to make proper parties to the bill, and in the case of formal parties it

is not usual to remand the cause to rules for that purpose. We have, then, this result: the court overruled the demurrer, but required that the necessary parties should be introduced into the cause, when, in strictness, it should have sustained the demurrer, and required the same parties to be brought before the court.

There is another error assigned, however, for which the decree must be reversed. It is settled law in this state that land shall not be sold under a decree of court until the liens binding it, their amounts, and the order of their priorities, have been established. *Kendrick v. Whitney*, supra, is one of many cases to that effect. The object of the sale is that the property may be exposed to sale under the most advantageous circumstances, so that the best price may be obtained for it. To accomplish this, those who have liens upon it must be advised beforehand as to the amount of their liens, and the order in which they stand. In this case the house and lot in Wytheville constitutes the most valuable part of the defendant's real estate. The liens upon it are stated in two classes, as we have already seen. It is manifest upon the face of this report that all of the liens upon this property are not of the same date, and that they do not hold the same rank. The report should have set out their order clearly, so that all interested would have been informed as to their rights and interests in the property when it came to be sold. The report is not excepted to for this cause, but the defect here pointed out is apparent upon its face, and in such case objection may be taken to it in this court. See 2 Bart. Ch. Prac. § 648. For this error, we are of opinion that the decree complained of must be reversed, and, as the cause has to go back, we suggest that the subject of parties be considered by the circuit court, as the record before us does not leave it altogether free from doubt whether all the proper parties are before the court, though we incline to think that such is the case.

The error assigned to the ruling of the court upon the subject of usury was withdrawn during the argument, and the other errors mentioned in the petition we deem it unnecessary to consider.

Before closing this opinion, it is proper to add a word with respect to the Wytheville Building & Loan Fund Association. Leaving out of view the action of the court upon the answer of the association, which was, without doubt, hesitating, inconsistent, and misleading, it appears that the association proved its debt before the commissioner, and thus became a substantial party to the cause, in a position to appeal from an adverse decree, and to take the benefit of a favorable decision. Under such circumstances, it cannot be permitted to escape the consequences, and must be adjudged liable for the costs of this appeal.

The decree of the hustings court of the city

of Radford must be reversed, and the cause remanded for further proceedings to be had therein.

CARDWELL and KIELY, JJ., absent.

(96 Va. 238)

BANNER v. ROSSER et al.

(Supreme Court of Appeals of Virginia. July 7, 1898.)

CONTRACTS—REALITY OF ASSENT—CONFIDENTIAL RELATIONS—FRAUD—CONSIDERATION—ACKNOWLEDGMENT.

1. Where by a conveyance made after full disclosure of the facts, and on advice of counsel, a previous relation of trust and confidence between the parties is terminated, one of them cannot take advantage of the confidential relation to avoid an agreement made 20 months later, on advice of counsel, and on a thorough understanding of the facts.

2. In the absence of a showing that its execution was the result of undue influence, or was not his voluntary act, a grantee cannot set aside an agreement to accept a reconveyance of property in payment of its price, on the ground that he reposed great confidence in the grantor, and that his influence due to former confidential relations still remained.

3. A grantee, under an agreement to reconvey property in payment of its price, cannot set the agreement aside for fraud, in that the grantor told him that he had been advised by able lawyers that the vendor's lien was defective, and could not be enforced, where the question was involved in great doubt and difficulty.

4. Where one having the capacity enters into an agreement voluntarily, he cannot complain that it was unconscionable as to consideration.

5. A notary's certificate of acknowledgment of a conveyance by a corporation is not defective which states that it was acknowledged by "Thomas L. Rosser, Pres.," where the conveyance was signed by the "Minneapolis Improvement Company, by Thomas L. Rosser, President."

Appeal from circuit court, Scott county.

Bill by George Banner against Thomas L. Rosser and others. There was a decree for defendants, and complainant appeals. Affirmed.

White & Penn and W. W. Bird, for appellant. W. E. Burns, J. C. Gent, and J. B. Moon, for appellees.

RIELY, J. George Banner, on March 20, 1890, sold and conveyed to Thomas L. Rosser certain lands on Clinch river, in Russell county, containing in the aggregate 904 acres, for the sum of \$90,400, of which \$20,400 was to be paid down, and the residue as follows: \$20,000 on May 15, 1890; \$25,000 on October 15, 1890; and \$25,000 on April 15, 1891. Notes were given for the deferred installments, bearing interest from the day of sale, and the vendor's lien reserved on the face of the conveyance to secure them. The cash payment of \$20,400 was duly made, and the note for \$20,000, due on May 15, 1890, was paid at its maturity. The two notes for \$25,000 each, payable, respectively, on October 15, 1890, and April 15, 1891, were not paid, and this suit was brought to

July rules, 1892, to enforce the vendor's lien, and subject the land to their payment.

Rosser promptly answered the bill, and averred that the two notes had been fully settled and discharged, and he released from all liability upon them. In support of the averment, he exhibited with his answer an agreement in writing, executed by him and the complainant, by which the complainant agreed to purchase and take back from Rosser the said land, exclusive of 279 acres thereof, which had been divided up into town lots, and sold off to various persons, in full payment, satisfaction, and discharge of the principal and interest of the aforesaid two notes. By the said agreement, Rosser covenanted to have the residue of the land, which had been also divided up into town lots, granted and conveyed by a proper deed to Banner by the Minneapolis Improvement Company, which had become the owner thereof, and Banner covenanted that, contemporaneously with the delivery to him of the deed of conveyance, he would receipt and deliver up the said notes to Rosser. On December 2, 1891, the Minneapolis Improvement Company, in accordance with the provisions of the agreement, executed a deed conveying to Banner the residue of the land, which, after being duly acknowledged for record, was transmitted for delivery to Banner, but, when tendered to him, he refused to receive it.

The complainant twice amended his bill, making by the last amendment the New South Mining & Improvement Company and the Minneapolis Improvement Company, of which Rosser was president, parties defendant along with him, and attacking the validity of the agreement of November 13, 1891, upon sundry grounds.

It was first objected that it was invalid because Rosser stood in a confidential relation to the complainant. For the due consideration of this objection, it is necessary to advert to transactions between the parties which preceded the sale by Banner of his land to Rosser on March 20, 1890. It appears from the great mass of testimony taken in the cause that Rosser, in the summer of 1887, was consulting engineer of the Charleston, Cincinnati & Chicago Railroad Company, whose line of road was then in course of location and construction, and also had charge of the development companies it was proposed to establish along its line. While examining the country, with the view of selecting a crossing of the Clinch Valley for the railroad, he became impressed with the favorable location of the farm of Banner as the site of a future town or city. The Norfolk & Western Railroad Company had run a preliminary line along and north of Clinch river, opposite the farm of Banner, which lay south of the river, for the projected Clinch Valley branch of its line of railway. The line of the Charleston, Cincinnati & Chicago Railroad had not been defi-

nately located, but a preliminary line had been run, which crossed the river many miles below the farm of Banner. The company agreed, at the instance of Rosser, to change the location of its line and make its junction with the Clinch Valley branch of the Norfolk & Western Railroad Company just across the river from the farm of Banner, if it could be secured for development purposes; thus imparting to it, it was supposed, great adventitious or speculative value. Rosser sought the acquaintance of Banner, and laid his plans before him. Banner became interested in the scheme, and together they repaired to Lebanon, the county seat, in order that Banner might get the advice of his counsel. The scheme was unfolded by them to the counsel. It received his favorable consideration, and he thereupon drew up a deed, which was executed by Banner, whereby he conveyed, on September 24, 1887, to Thomas L. Rosser, president of the New South Mining & Improvement Company, his land in Russell county, according to certain boundaries, but which were to be thereafter definitely ascertained by a competent surveyor, and, when so ascertained, were to constitute a part of the deed.

The deed recited that it was made subject to certain conditions and limitations therein expressed, and that these were the main inducements of the conveyance. The condition and limitations referred to were as follows:

"First. The said Thomas L. Rosser, president, as aforesaid, shall proceed expeditiously as may be to establish on said lands a town or city site, and shall have the same surveyed and laid out in town lots, with proper streets, alleys, etc., which shall be mapped, numbered, and designated.

"Secondly. The said Thomas L. Rosser, as president, aforesaid, shall make sale of said lots from time to time, as he may consider best and most profitable to bona fide purchasers, and as sales are made, and proceeds are realized, he shall pay one-half of the same to George Banner, his heirs, executors, and assigns.

"Thirdly. Said George Banner shall remain in exclusive possession of all the lands or lots from time to time remaining unsold by the party of the second part, his successors or assigns.

"Fourthly. Said Thomas L. Rosser, president, as aforesaid, his agent and employes, shall be allowed to enter upon said lands at will, for the purpose of making all necessary surveys, and laying out said land in lots, aforesaid, and for purposes of improvements.

"Fifthly. In the event of the failure of the said Thomas L. Rosser, his successors or assigns, to lay out in a town or city the lands aforesaid, or any part thereof, then the same, or any part thereof not so laid out and sold for the purpose aforesaid, shall revert to and be the property of the said George Banner and the said Thomas L. Rosser, president,

his successors and assigns, shall reconvey the same to the said Banner, his heirs and assigns.

"This deed further witnesseth that the time and manner of laying out said lands into lots, streets, etc., and the manner and time of making sales thereof, from time to time, are all left to the judgment and decision of Thomas L. Rosser, provided he shall obtain the best and highest price said properties will command.

"It is likewise understood and stipulated that the said Thomas L. Rosser, president, and his successors and assigns, shall pay all the expenses of surveying, laying out, and mapping lands into lots, streets, etc., and shall pay all expenses of conveying to purchasers, and, when said lands are mapped and laid out and numbered, the same shall be recorded.

"This conveyance further witnesseth that the party of the second part shall hold the lands aforesaid subject to all and singular the conditions herein named, and the said George Banner and Priscilla, his wife, warrant generally the lands herein conveyed free from all incumbrances and liens, and against the claims of all persons whomsoever."

On October 24, 1887, a further deed was made by Banner to Rosser, president, as aforesaid, perfecting the previous conveyance with respect to the boundaries of the land thereby conveyed as the same had been ascertained by the surveyor, and fixing the number of acres at 868, more or less. This deed was made subject to all the conditions, provisions, and stipulations of the deed of September 24, 1887.

The effect of these conveyances was to create a relation of trust and confidence between Banner and Rosser, which constitutes the foundation of the first objection made to the validity of the agreement of November 13, 1891.

The New South Mining & Improvement Company, in obedience to the provisions and stipulations of the said deeds, surveyed and laid out the land as a town site, divided it into town lots, streets, and alleys, built a bridge across Clinch river, and got ready to dispose of the lots to the public; but, when it undertook to sell the lots, it was confronted with the fact that there were many judgments against Banner, aggregating a large amount, which constituted liens upon the land at the time he conveyed it to Rosser; that a suit in chancery was pending to enforce the judgments against the lands; that an account of the liens had been taken, and the cause made ready for a decree of sale,—which circumstances prevented a clear title from being made to the lots, and interfered with their sale.

In view of this condition of affairs, in order to save the lands from a forced sale by the court, and to secure to Banner the gains, which, it was expected, would be realized

from the scheme provided for under the deeds of September 24 and October 24, 1887, it was deemed best to make a new arrangement, by which the requisite funds could be raised to discharge the liens. Rosser, as president of the New South Mining & Improvement Company, thereupon, on November 27, 1888, conveyed the land back to Banner, and he in turn reconveyed it on the same day to Rosser in his own right. A collateral agreement was contemporaneously executed by them, by which Rosser agreed to raise the sum of \$15,000, which, it was supposed, would be sufficient to discharge the liens, and to place it in the hands of W. A. Ayers, to be applied by him to that purpose; and, if more than sufficient for the discharge of the liens, he was to pay the balance over to Banner. In the event that the sum was not raised and placed by Rosser in Ayers' hands within 60 days, then he was to reconvey the land to Banner. By the said agreement Rosser also bound himself to endeavor to sell off the land in lots for a town or city, if practicable, upon such terms as he should deem best, and for the best price he could obtain; the proceeds of sale to be equally divided between Banner and himself, subject to the right of Rosser to be first reimbursed out of Banner's half for the \$15,000 to be advanced by him to pay off the liens.

Rosser had difficulty in raising the money to pay off the liens, and it was also ascertained that \$15,000 would be insufficient to discharge them. On January 14, 1889, Banner, by a written agreement, extended the time for raising the amount necessary to pay off the liens, and on March 5, 1889, again extended it. On the latter date, Rosser, as a means of raising the money, conveyed the land to the New South Mining & Improvement Company, of which he was still the president, and on June 25, 1889, it conveyed the same to the Minneapolis Improvement Company, of which Rosser was also the president, and which company was incorporated for the express purpose of pushing the contemplated town or city, and making it a reality.

It was under this state of things, and while Banner and Rosser bore to each other the confidential relations created by the several conveyances and agreements referred to, that the deed of conveyance of March 20, 1890, was made, whereby Banner sold and conveyed the said land, and certain other small parcels, embracing, in the whole, 904 acres, to Rosser in his own right, without any condition or limitation, for the sum of \$90,400, upon the terms set forth in the early part of this opinion; but reserving the vendor's lien for the unpaid purchase money, for the enforcement whereof for the last two installments of \$25,000 each this suit was brought.

This deed was prepared by the regular counsel of Banner, after full conference with

him and Rosser. No complaint has been made that it was not perfectly fair, the free and voluntary act of Banner, and in every respect binding, which is conclusively manifested by the suit of the complainant, recognizing its validity, and seeking to enforce for the payment of the unpaid purchase money the vendor's lien therein reserved to secure it. It refers specifically to all of the previous conveyances and contracts made between Banner and Rosser, with all and singular their conditions, reservations, and limitations, and, in consideration of the sale then made, by mutual agreement sets aside, rescinds, and annuls them. The effect of this deed was to terminate the past relations of trust and confidence between the parties, and to create the new relation of creditor and debtor.

Equity wisely views with jealousy transactions between persons holding a fiduciary or confidential relation to each other, and will not suffer one party, standing in a situation of which he can avail himself against the other, to derive an advantage from that circumstance, for it is founded in a breach of confidence. These relations, and the equitable principles governing them, are fully discussed by Story in his *Equity Jurisprudence* (volume 1, §§ 307-323). See, also, *Statham v. Ferguson*, 25 Grat. 28. A court of equity, in accordance with these principles, will scrutinize with a "close and vigilant suspicion" a purchase made by a trustee from the beneficiary, or by an agent of the property of his principal, and will not permit it to stand, except where there has been entire good faith, a full disclosure of all facts and circumstances affecting the transaction, and the absence of all undue influence, advantage, or imposition. 1 *White & T. Lead. Cas. Eq.* pt. 1, p. 360; 2 *White & T. Lead. Cas. Eq.* pt. 2, pp. 1228, 1229; 1 *Story, Eq. Jur.* § 315.

In the case at bar the sale was made by Banner under the advice of his counsel, and the conveyance prepared by him after a full disclosure of the facts. It was then executed by Banner, and witnessed by the counsel. No complaint of any unfairness in its procurement is made, or of any advantage taken of Banner by Rosser alleged. Its validity is not questioned, but, on the contrary, the very object of the suit is, as we have seen, to uphold and enforce it. It is therefore to be given the effect intended by it. It constituted a valid sale of the land to Rosser, terminated absolutely the previous relation of trust and confidence between the parties, and created the new relation of vendor and vendee, creditor and debtor. Where the fiduciary relation has been completely dissolved, and the parties are no longer under the antecedent influence, they are restored to their common competency to deal with each other. 1 *Story, Eq. Jur.* (11th Ed.) §§ 313, 316 (a), and *Kerr, Fraud & M.* 159.

When the contract of November 13, 1891, was entered into, whereby Banner agreed to

purchase and take back the unsold land in satisfaction and discharge of the two notes for \$25,000 each, the confidential or fiduciary relation between him and Rosser had been wholly dissolved for the period of a year and eight months. The parties in their dealings were no longer subject to its influence. Their transactions had ceased to be regarded by equity with the jealousy that it views the dealings between persons occupying that relation. It follows that the contract in question is to be treated as a transaction between any other creditor and debtor. The wild and inexplicable speculation in lots in imaginary towns and cities had subsided, and the Minneapolis Improvement Company, in which the title to the land was then vested, had become seriously embarrassed, if not insolvent. Its creditors were clamorous, a receiver was threatened, and the danger imminent. Rosser himself was much indebted, though the extent of his indebtedness does not appear in the record. Rosser had caused the agreement to be prepared by his counsel at Charlottesville, Va., where or near which he resided, and carried it with him to Russell county, where was Banner's home, and at which Rosser arrived after nightfall. The next day he explained the situation to Banner, and advised him to consult his counsel about signing the agreement. As they approached the railroad depot at St. Paul, Mr. Gent, a lawyer residing in the same county with Banner, and well known to him, happened to be there, and when Banner saw him, he observed to Rosser that he would just as soon consult Gent as his regular counsel, Mr. Routh, and did so. Rosser explained the situation of affairs to Gent in the presence of Banner, and exhibited to him the agreement he had caused to be prepared. He then retired, and Banner and Gent conferred together, with the result that Gent advised Banner to sign the agreement, which he did, and the same was witnessed by Gent and another person. It was urged that Gent was not employed by Banner as his counsel in the matter, and that Gent did not consider himself as his counsel when advising him as to the agreement. It is conceded, however, that he was a reputable lawyer, and presumed competent to advise Banner in the premises. It may not be doubted that he advised Banner as conscientiously as if he had been regularly employed as counsel, and been paid a fee for his advice.

The testimony tends to show that Banner was not a man of much education, but that he had always transacted his own business, managing his large farm, and trading in cattle to a considerable extent, without question from any source of his capacity to do so. In the execution of the agreement of November 13, 1891, he did not rely solely on his own judgment, but acted only after he had taken the advice of an experienced lawyer. The confidential relation that existed at one time between the parties, but which had been

completely dissolved nearly two years before, is not a ground to avoid the contract entered into under the circumstances proved.

It was further urged in this connection that, although the fiduciary relation formerly between them no longer subsisted on March 20, 1890, when the land was sold and conveyed to Rosser, yet its influence still remained, and the confidence reposed by Banner in Rosser was so great as to amount to undue influence in the execution of the agreement. The depositions of a number of persons were taken to prove that Banner reposed great confidence in Rosser, and that he was by nature prone to confide too much in those whom he liked. There was, however, an absence of evidence that his execution of the agreement was the result of undue influence on the part of Rosser, or that it was not the free, voluntary act of Banner. The latter did not pretend in his testimony that he reposed blind confidence in Rosser, but only that he regarded him as an honest and upright man, who had always treated him fairly and justly in the dealings between them, and as one who would not deceive him.

The next ground of objection to the agreement was that it was induced by misrepresentation and fraud. In support of this objection, it was asserted that Rosser represented to Banner that the Minneapolis Improvement Company, in which the title to the land was vested, was unable to meet its debts, and was threatened by some of its creditors with the appointment of a receiver, which, if done, would be likely to result in protracted litigation, and his debt be jeopardized; as he had been advised by counsel that the vendor's lien reserved by Banner in the deed of March 20, 1890, was invalid in consequence of some defect, and that he, Rosser, was insolvent.

The testimony of Banner, though vague, does tend to show that these or similar representations were made by Rosser, and the testimony proves that the representation as to the financial condition of the Minneapolis Improvement Company was correct.

As to the alleged representation that Rosser asserted that, if Banner sued him, he would have to make an assignment, or that he was insolvent, it is not supported by the testimony. Banner deposed that he so understood Rosser, but the latter denied that he made any such statement. Gent testified that he did not hear Rosser say that he would have to make an assignment, but that, in discussing the matter, he merely stated to Banner that if he were to sue him to recover those large notes, and thereby bring his other creditors on him, he could not say that in that event he would be good for the notes, and not that he did not have ample property to pay his debts.

It was admitted by Rosser that he told Banner that he had been advised by able lawyers that the vendor's lien was defective, and could not be enforced, and Gent, with

whom Banner advised, had previously examined into the question as counsel for creditors of the Minneapolis Improvement Company, and reached the same conclusion. Whether it really constituted an incumbrance upon the land, and was capable of being enforced against it, was a question far from being free from difficulty. The deed of November 27, 1888, was on its face an absolute conveyance of the land by Banner to Rosser, though the latter, as between him and Banner, took it subject to the contemporaneous collateral agreement. As heretofore stated, Rosser by deed of March 5, 1889, conveyed it to the New South Mining & Improvement Company, and it conveyed the same by deed of June 25, 1889, to the Minneapolis Improvement Company; the conveyances being duly recorded. It thus appears that the title to the land, when Banner sold and conveyed it absolutely to Rosser in his own right by the deed of March 20, 1890, wherein the vendor's lien was reserved, was in the Minneapolis Improvement Company. Whether the vendor's lien could be effectively reserved by Banner on the land, and enforced against it, under all the circumstances, when the title thereto was vested in, and the right of property therein claimed by, a third party, under previous conveyances from his vendee, under the authority of the deed of November 27, 1888, was a question involved in so much difficulty and doubt as to make it a fair subject of compromise, and to constitute it a strong inducement to the settlement made by the agreement of November 13, 1891. Whether the lien was valid and susceptible of enforcement or not, it is not material to decide. The parties themselves have settled the debt, and their settlement, as against the charge of misrepresentation and fraud, must stand. So far as the evidence shows, the parties acted in good faith, and a settlement made under the circumstances disclosed by the record will not be disturbed. *Moore v. Fitzwater*, 2 Rand. (Va.) 442; *Lee v. Harlow*, 75 Va. 39; *Zane v. Zane*, 6 Munf. 406, and 2 White & T. Lead. Cas. Eq. pt. 2, p. 1703.

The further objection was made that the agreement was unconscionable. This objection was founded upon the ground that Rosser was solvent, and that the unpaid notes could have been made out of him, and that Banner agreed to surrender them for the residue of the land still owned by the Minneapolis Improvement Company, which, by reason of the division into lots, streets, and alleys, the grading thereof, and the ownership of lots which had been bought from the company by various persons, situate here and there in its midst, so affected the land which Banner was to get back in discharge of the notes as to make it comparatively valueless.

The witnesses were greatly at a loss to express any opinion as to its value. If the scheme of building a town or city should in the future be revived and succeed, the

land so purchased back would be of very great value; but, if not, the ownership of lots here and there in its midst, if the owners should not abandon them, would seriously affect its value for farming and grazing purposes.

In considering this objection, it cannot be overlooked that the whole scheme was a speculative venture, in which both Banner and Rosser engaged, fully conscious of its nature and the risks attending it, but which they were willing to incur in the hope of the great gains it held out to them in the event of success. The scheme, in consequence of the universal financial depression that quickly followed its inauguration, failed, and the question with Banner was, when he executed the agreement, what was the best course to pursue; what it was best for him to do. He was confronted with the fact that the Minneapolis Improvement Company, in which was vested the legal title to the land, was in great straits, if not insolvent, with the threat of being placed in the hands of a receiver impending over it, with the fact that there was grave doubt, to say the least, as to the efficacy of his supposed vendor's lien, and with the possibility of not being able to make the notes out of Rosser, even if he desired to do so out of the originator of the scheme, whose sole object had been, by great enterprise and bold speculation, to make money for them both. He decided to accept the offer to convey back to him the unsold lands, if he would release the balance of the purchase money, and signed the agreement. Can it be said that he acted unwisely, or that his conduct was not that of a prudent business man? But whether wise or unwise, the agreement, in view of the testimony that he had the capacity to make it, and that it was his own free, voluntary act, cannot be impeached, however unreasonable or imprudent it may now seem to others. *Greer v. Greers*, 9 Grat. 330.

The testimony shows that the lands of Banner—the whole 904 acres—were not worth, according to the highest estimate, over \$40,000. The average estimate of his own witnesses was \$37,850. They were assessed for taxation at \$5,616, and it was thought would probably have brought \$25,000 at a sale by the court for the payment of the judgment liens, which was imminent when Rosser raised the money to pay them off. By the agreement of November 13, 1891, Banner was to get back the whole 904 acres, less 279 acres, which had been sold off in lots. All the judgments against him had been paid, and perhaps some other debts, amounting to \$20,400, and he had also received in money \$20,000. The result was that he had already received in payment of his debts and in cash upwards of \$40,000, more than the entire lands were worth, and was to get back besides more than two-thirds thereof. So far from being an unconscionable contract, the result would rath-

er indicate that Banner had displayed good judgment and decided business capacity.

It was also objected that the certificate of acknowledgment to the deed of December 2, 1891, from the Minneapolis Improvement Company to Banner, filed with the answer of Rosser, and made in pursuance of the agreement of November 13, 1891, is defective. The objection is not well founded. The deed bearing date December 2, 1891, was signed by the "Minneapolis Improvement Company, by Thomas L. Rosser, President," with the corporate seal affixed, and the certificate of the notary states that "Thomas L. Rosser, President, whose name is signed to the writing hereto annexed, bearing date on the 2d day of December 1891," acknowledged the same before him in his county. It identifies the subscriber, specifies the writing subscribed, states the capacity in which he executed it, and certifies his acknowledgment thereof. The certificate contains all that is necessary. See *Bank v. Goddin*, 76 Va. 506.

It was urged in argument that if Banner was not entitled to have the land in controversy sold to satisfy the lien reserved in the deed of March 20, 1890, then the court should annul all deeds and contracts made subsequent to the deeds of September 24 and October 24, 1887, and restore the parties to their original rights under those deeds. This position is wholly untenable. The agreement of November 13, 1891, was intended by the parties to be an absolute settlement of the debt now here in litigation, and, being valid, this was its effect. It was a voluntary adjustment by the parties of their rights, final in its nature, and by it they must abide.

The circuit court did not err in dismissing the original and amended bills of the complainant, but, in doing so, provision should have been made in the decree for the delivery by its clerk to Banner of the deed from the Minneapolis Improvement Company to him of December 2, 1891, which was filed with the answer of Rosser. The decree will be amended in that respect, and, as so amended, affirmed.

CARDWELL, J., absent.

(96 Va. 191)

OWENS v. OWENS.

(Supreme Court of Appeals of Virginia. June 30, 1898.)

DIVORCE FROM BED AND BOARD—CRUELTY—FEAR OF BODILY HURT—CUSTODY OF CHILDREN—ALIMONY—PLEADING—EVIDENCE.

1. A bill for divorce from bed and board alleged the marriage, the birth of issue, poor health and inability of complainant to support herself and children, cruel, inhuman, and abusive treatment by the husband of complainant for several years past, denial by the husband of paternity of the children, his refusal to provide either food or clothing for them, and his driving them from home; the children being of tender age. It also alleged that the husband

forced complainant to sleep on the floor in cold weather; that he more than once drove her from home; that she returned on promise of better treatment, but that his promises were not kept; that she was afraid of personal violence at his hands; that he had so threatened and abused her that she felt it unsafe to live with him; and that he had falsely accused her of inconstancy. *Held*, that the bill was sufficient on demurrer.

2. A wife, while in delicate health, was driven from home by her husband. She returned on his promise of kind treatment, but the promise was violated. He violently jerked her from bed, and compelled her to sleep on the floor, falsely accused her in the grossest terms of adultery, and denounced their children as bastards, and finally ordered her to leave, and never return. *Held*, that it was a case of cruelty and reasonable apprehension of bodily hurt, justifying a divorce from bed and board.

3. Where an innocent wife is compelled to resort to divorce on account of the misconduct of her husband, she is entitled to the custody of the children.

4. At the time of their marriage the parties had very little property, but, as a result of industry, they became owners of a farm worth \$2,500 and of personal property valued at \$500. The husband was a strong and healthy man, between 40 and 45 years of age, and he had rendered it impossible, by his misconduct, for his wife and three small children to remain under his roof. *Held*, on granting a divorce from bed and board, that an allowance of \$20 per month as permanent alimony would not be disturbed; especially where the trial court has reserved the right to increase or diminish such amount on a proper showing.

Appeal from circuit court, Scott county.

Bill by Sarah D. Owens, by next friend, against Berry C. Owens. From a decree in favor of plaintiff, defendant appealed. Affirmed.

H. S. K. Morrison and R. R. Kane, for appellant. Ewing & Richmond, for appellee.

KEITH, P. Sarah D. Owens, by her next friend, filed a bill for divorce in the circuit court of Scott county, in which she states that she is the wife of Berry C. Owens, and that seven children have been born of their marriage, five of whom are now living; the three youngest being seven, five, and two years old, respectively, at the institution of this suit. She states that she is in poor health, is unable to support herself and children, and has no means to do so; that she has been a true, virtuous, and kind wife, and has used every endeavor to live with her husband in peace, but her husband for several years past has been cruel and inhumanly abusive in his treatment of her, because insanely jealous, without the semblance of a cause; that he has denied the paternity of his own children, refused to provide proper provision for them, either in food or clothing, has driven them from home, and that she and they are now dependent upon others for the necessities of life. Among the acts of cruelty which she recites is that he refused to permit her to occupy her own bed in cold weather, but forced her to lie upon the floor; that he has more than once driven her from home with her children, and compelled her to seek protection from her friends;

that she has more than once returned, upon the promise of better treatment, but that his promises were not kept, and that recently his conduct has been more than could be borne; that he has denounced their children as bastards, and locked the door of his house upon his wife; that his treatment has reached such a degree of unkindness that she is afraid of personal violence at his hands; and that he has so threatened and abused her that she no longer feels that it is safe to cohabit or live with him. She states that the charges brought against her of inconstancy are utterly false, that no breath of suspicion exists against her chastity, save in the breast of her husband, and declares that he is not a suitable person to have the custody of their children.

The prayer of the bill is that the plaintiff may have a divorce from bed and board, that she may be granted alimony, and the custody of their three youngest children.

The husband appeared and demurred to this bill, and we have stated its averments as a complete vindication of the decree of the circuit court in overruling his demurrer.

His answer denies the allegations of the bill. He admits that he may have sometimes been hasty and inconsiderate, but declares that there has never existed any purpose upon his part to harass or harm the plaintiff in any way. He avers that he has always provided for her a comfortable maintenance, plain, but wholesome, food, and in sufficient quantity, and clothing suitable to their means and station in life.

There is evidence proving that his wife is in delicate health, that her lungs are affected, and that she is frequently subject to hemorrhages and spitting of blood. It is proved that on one occasion, at least, he jerked her violently out of bed, and that he compelled her to sleep upon the floor, and, when remonstrated with, said: "It is quite good enough for her;" that he accused her of inconstancy, and denounced their children as bastards; and their oldest son, a youth of 18 years of age, says that "his treatment has been cruel and inhuman, and I would not think it safe for her to live with him any more; and that he forced her on one occasion to leave home when their youngest child was but three weeks old."

There is much evidence tending to prove harsh and unkind conduct on his part, and neighbors and friends have frequently found the wife in tears as a consequence of his treatment, and her sister swears that in her opinion, from all that she has seen and heard, she does not consider it safe for the plaintiff any longer to cohabit with her husband. He admitted to her father that he had driven her from home, and the father testifies to a very striking and touching incident which sheds light upon the relations that existed between the appellant and his family. When Mrs. Owens left her husband's home with her children, she sought shelter under her

father's roof, and some time thereafter, when her husband came to take the children back, the father said to him: "You cannot get them until this suit is settled. The custody of the children is a part of the suit, and, besides, they would not go with you, unless you dragged them out; and I could not see that done." The husband then said: "That will do, let us go;" and he got up and went out. Thereupon the grandfather says that he discovered that the children had hid in the back room, to keep him from taking them.

It is charged in the bill, and it appears in evidence, that Mrs. Owens had upon two occasions been driven from home, and upon the promise of amendment and better treatment she had returned to her husband's house.

Upon this state of facts, the circuit court granted a divorce from bed and board, gave the wife the custody of their three children, and fixed her permanent alimony at \$20 per month.

As to the question of alimony, the proof is that at the time of the marriage of the plaintiff and defendant they had very little property, but, as a result of industry and thrift, they had become the owners of a farm worth about \$2,500, and personal property valued at \$500. The husband is shown to be a man between 40 and 45 years of age, strong, and in good health. He is under a legal obligation to support his wife and children, and if without fault upon their part he renders it impossible for them to remain under his roof, he cannot by his misconduct escape the performance of the duty which the law imposes upon him. He has no room to complain, therefore, if he is required to contribute by the payment of money to the maintenance of his wife and children.

The decree of the circuit court is fully sustained by authority. As we have seen, the wife on more than one occasion was driven from home by the unkindness of her husband. Her voluntary return was a condonation of the offense which induced her to leave.

Condonation is defined to be the remission, by one of the married parties, of an offense which he knows the other has committed against the marriage, on the condition of being continually afterwards treated by the other with conjugal kindness. 2 Bish. Mar. & Div. § 269. As a result of this rule, while the condition remains unbroken, there can be no divorce, but a breach of it revives the original remedy.

Cruelty, it is said, is cumulative, admitting of degrees and augmenting by addition; so that it may be condoned and even forgiven for a time, and up to a certain point, without any bar in sense or reason to bring it all forward when the continuance of it has rendered it no longer condonable. While, therefore, acts of violence committed at an earlier period, and which have not prevented the wife from living with her husband, or going

back to him after they have been separated, cannot be made the sole foundation of an action of separation, they form the subject of investigation and proof, with a view to determine what is the true issue in the case; namely, whether the wife can, with safety to her person and health, continue to live with him. 2 Bish. Mar. & Div. § 304.

Cruelty consists of successive acts of ill treatment, if not of personal injury; so that something of a condonation of earlier ill treatment must in such cases necessarily take place. *Id.* § 305.

Nothing can be more grievous to a true and faithful wife than a malicious charge from her husband of adultery. Standing absolutely alone, it is commonly regarded as not quite sufficient to justify a divorce, yet, when presented with other facts enhancing its enormity, it is deemed a gross act of cruelty. 1 Bish. Mar. & Div. § 1569.

We have, then, a case of a wife in delicate health, driven from her home, and returning upon the promise of kind treatment, the promise violated, and the offense renewed, violently jerked from her bed, and compelled to sleep upon the floor, accused in the grossest terms of infidelity to her marriage vow, and her children denounced as bastards, and finally ordered to leave, and never to return. These acts, in our judgment, and upon the authority quoted, establish a plain case of cruelty, and a "reasonable apprehension of bodily hurt," justifying a sentence of divorce from bed and board.

The innocent parent, on whose prayer the divorce is granted, will usually have the custody of the children. A woman compelled by her husband to resort to divorce ought not to obtain it at the expense of losing the society of her children; and also, because one who has done well or ill in the marriage relation will be likely to do the same in the parental, all courts lean to the innocent parent when determining the custody of the child. 2 Bish. Mar. & Div. § 1196.

Nothing need be added to what has already been said upon the subject of alimony, especially in view of the fact that the decree of the circuit court reserves the right to increase or diminish the amount allowed, and that court will doubtless give any relief to which the parties may show themselves entitled.

We are of opinion that the decree of the circuit court should be affirmed.

(96 Va. 177)

CHAPMAN v. VIRGINIA REAL-ESTATE INVESTMENT CO.

(Supreme Court of Appeals of Virginia. June 30, 1898.)

STOCK SUBSCRIPTION—EVIDENCE—HARMLESS ERROR.

1. Evidence showed that a stock subscription was charged to defendant, a corporation, but that the certificate was taken in the name of one C., who was neither an officer nor agent of defendant, nor authorized to purchase stock

on its behalf; that C. paid the first assessment; that none of the officers or directors of defendant had subscribed for stock on its behalf; that there was another similar corporation, having the same officers as defendant. None of plaintiff's witnesses testified that defendant had subscribed for the stock. *Held*, that an order setting aside a verdict for plaintiff was proper.

2. Where a verdict is returned for plaintiff for the full amount of his claim, error in rulings on evidence and instructions excepted to by him are without prejudice.

Error to circuit court, Tazewell county.

Action by one Chapman against the Virginia Real-Estate Investment Company to recover unpaid stock subscriptions. From a judgment in favor of defendant, plaintiff brings error. Affirmed.

Henry & Graham and Chapman & Gillespie, for plaintiff in error. Clark & Denniston, for defendant in error.

BUCHANAN, J. Upon the first trial of this case the jury rendered a verdict in favor of the plaintiff. Upon motion of the defendant it was set aside, and a new trial granted. On the second trial the verdict was in favor of the defendant. The motion of the plaintiff to set it aside was overruled, and judgment rendered thereon.

To the action of the court on both trials this writ of error was awarded.

By section 3484 of the Code, as amended by an act of the general assembly approved March 3, 1892 (Acts 1891-92, p. 962, c. 609), it is provided that where there have been two trials in the lower court the appellate court shall "look first to the evidence and proceedings on the first trial, and if it discovers that the court erred in setting aside the verdict on that trial, it shall set aside and annul all subsequent proceedings to said verdict and enter judgment thereon."

The first question, therefore, to be considered is whether or not the court erred in setting aside the verdict of the jury upon the first trial.

Upon that question the exceptions of the plaintiff in error as to the several rulings of the court in admitting evidence and giving and refusing instructions can have no effect. If all the rulings complained of upon these points had been in favor of the plaintiff, instead of against him, the jury could not have found for him a more favorable verdict than they did find, for they gave him all that he demanded in his declaration. *Ruffner v. Hill*, 81 W. Va. 428, 7 S. E. 13; *Bart. Law Prac.* 724, 725.

The action was brought by the plaintiff, who had been appointed a receiver in a creditors' suit against the West Graham Land & Improvement Company, to recover \$7,650 alleged to be due from the defendant on account of unpaid assessments on stock in that company. The defendant denied its liability, claiming that it never was, by subscription or otherwise, a stockholder in the company.

The evidence of the plaintiff showed that the defendant was listed upon the books of the treasurer of the land and improvement company as a subscriber for, or owner of, 50 shares of its stock at the price of \$15,000; that it was credited with the payment of \$5,000 and of \$1,500, the amounts, respectively, of the first and second assessments on the stock; that J. R. Jordan, an agent of the defendant, was present at a meeting of the stockholders of the company claiming to have authority to represent the defendant, having a proxy, as some of the witnesses of the plaintiff state, signed, as they believed, by the treasurer of the defendant corporation, and under its seal; that he voted the 150 shares of stock listed in the defendant's name; was elected a director and also secretary and treasurer of the company, although he held no stock in it in his own right; that the \$1,500 assessment credited to the defendant company was paid by a check signed by G. L. Estabrook, treasurer, and countersigned by Clarence M. Clark, president, and that the check was one of the stereotyped checks of the defendant, according to the recollection and belief of the cashier of the bank which cashed it, and who frequently handled the checks of the defendant; that Estabrook, who was secretary of the defendant corporation, asked for a statement of the condition of the land and improvement company, which was furnished him; that the land and improvement company had directed at its meeting July 6, 1891, that each stockholder who would pay the assessment that day made should be allowed to draw a lot for each \$1,000 of stock owned by him, and that pursuant to this arrangement 15 lots were set apart to the defendant on the books of the land and improvement company.

The plaintiff also read in evidence four letters, of which the following are copies:

"Clarence M. Clark, Pres. Arthur O. Denniston, Vice Pres. Geo. L. Estabrook, Jr., Sec'y and Treas. Virginia Real-Estate Investment Company. Office, Bullitt Building, Phila. Telephone No. 2,720. Philadelphia, Pa., Feb. 4, 1892. Mr. J. B. Greever, Graham, Va.—Dear Sir: Your favor inclosing duplicate receipt for our payment on account of West Graham Land & Imp. Co. stock was duly received. I have delayed replying to your inquiry in regard to the exchange of the West Graham Land & Imp. Co. stock for Graham Land & Imp. Co. stock awaiting Mr. Denniston's return to Philadelphia. He says now that there is certain other information which he wishes in regard to the matter before he gives a definite reply. Your former communication does not state the basis upon which you would propose to make an exchange. Kindly let me hear from you in this regard, and oblige, yours, truly, G. L. Estabrook, Jr."

Philadelphia, January 8th, 1895. Mr. J. B. Greever, Graham, Va.—Dear Sir: I have

yours of the 2nd inst., and in reply can only repeat the offer I made you when you were in Philadelphia,—that if you wish to trade your Graham Land & Improvement Company stock, dollar for dollar, for the amount that has been paid in on our West Graham Land and Improvement Company stock, namely \$6,500, we are ready to make the trade. Otherwise we will have to take the chances. Of course, if you will make this trade, it is understood that you will assume all liability on account of the 150 shares which I represent. Yours, truly, G. L. Estabrook, Jr.”

“Bullitt Building, Philadelphia, February 18, 1895. Prof. J. B. Greever, Graham, Va.—Dear Sir: I am in receipt of yours of the 14th inst. Please reduce your proposition to figures, naming the amount of stock you are willing to exchange for the West Graham stock which I represent, the amount you will have left, and what houses and lots you are willing to take, and at what valuation. I will then see the parties interested in the West Graham stock and in the real estate, and see whether we can make any deal with them which should enable us to carry through such a deal as you suggest. Yours, truly, G. L. Estabrook, Jr.”

“Philadelphia, March 8th, 1895. Mr. J. B. Greever, Graham, Va.—Dear Sir: Your favor without date was received on March 1st. The people I represent do not care to consider paying \$2,000 cash for \$2,500 of stock of the Graham Land & Improvement Company. The only way in which we can make an exchange of the West Graham Land Improvement Company's stock and the Graham Land & Improvement stock is dollar for dollar on the amount paid in. If you care to make the exchange in this way, I will see my parties, and I have no doubt but what I can get them to make the exchange, although it looks as though we are giving away something that may become valuable some day for that which does not have any great promise of having any value whatever. Yours, truly, G. L. Estabrook, Jr.”

The plaintiff also proved some other circumstances of minor importance, tending to show that the defendant was a shareholder in the land and improvement company.

The defendant, upon the cross-examination of the plaintiff's witnesses, showed how its name had been placed upon the books of the treasurer as the holder or owner of the 150 shares of stock. The treasurer stated that he had placed its name upon his books by direction of the president of the company, and the president proved that the shares of stock charged to the defendant had been subscribed for by E. J. Collins; that his name was upon the list of stockholders of the land and improvement company; that when Collins subscribed for the stock he (witness) did not know, but thought, it was for the defendant, and that he understood Collins to so state at first; that Collins had paid the \$5,000 credit-

ed by the treasurer of the defendant, and that, after both assessments had been paid, and credited to the defendant, a certificate for the stock was issued in the name of Collins, though it does not appear to whom it was delivered.

The defendant read in evidence the depositions of its president, secretary, and treasurer, and also of several of its directors. The president testified that he had been the president and a manager of, and a director in, the company since its organization; that he had not subscribed for stock in the land and improvement company, or authorized any such subscription to be made; neither had he purchased nor authorized any purchase to be made of the stock, or of any interest in the stock, of that company; that as president of the defendant company he never signed any check to pay any assessment on any stock of the land and improvement company, so far as he remembered, and that, if he had done so, he thought he would undoubtedly have remembered it; that J. R. Jordan was the agent of the defendant to look after its property, collect rents, find tenants, and to report upon the general condition of its property; that investments for the defendant were made by the president, vice president, and board of directors, and sometimes by the managers acting for the board, but that Jordan had no authority to make any subscription or investment for it; that E. J. Collins was never the agent of, nor did he have any connection with, the defendant company.

George L. Estabrook, Jr., testified that he had been secretary and treasurer of the defendant company since its organization; that he had never heard of any subscription to, or purchase of, the stock of the land and improvement company by the defendant, and that it had never owned, or claimed to own, any such stock; that all disbursements of the defendant were made by him as treasurer, except a few checks, which were signed by the president; that he was entirely familiar with all the checks that had been signed by the president, and that no check was ever given by them for any payment for stock in the land and improvement company, and that all disbursements for permanent investments were made by checks; that he never made any payment to E. J. Collins for any interest of any kind in the land and improvement company, and that he (Collins) never was the agent of, nor did he ever have any connection with, the defendant; that the charter of the defendant was lodged with the secretary of the commonwealth on the 16th day of May, 1890, and the first meeting of its incorporators and stockholders held on the 9th day of June following.

E. W. Clark testified that he had been a director in the defendant company since its organization; that he, as director, had made no subscription for it in the stock of the land and improvement company, and that

he had no recollection of any ownership or claim of ownership by the defendant company in the stock of the land and improvement company.

A. C. Denniston stated that he had been vice president and director in the defendant company since its organization; that he had made no subscription for his company in the stock of the land and improvement company, and had never authorized any one else to do so, and that the defendant has not, and never had, any interest in the stock of the land and improvement company; that J. R. Jordan had nothing to do with investing the funds of the defendant, and never made any such investments; that all investments were made by the president or vice president of the company, and afterwards sanctioned by the board of directors, or made in the first instance under the authority of the board; and that E. J. Collins never had any connection with the defendant.

Joseph S. Clark testified that he was named as one of the directors in the charter; that C. M. Clark, A. C. Denniston, and himself were the managers of the defendant company, and that it never did own, or make any payment upon, or claim any interest in, any stock of the land and improvement company, to his knowledge; and that, if any such thing had been true, he certainly would have known it.

The defendant proved by the secretary of the land and improvement company that the 15 lots assigned to the defendant company were made without its authority, and that, so far as he knew, the defendant had never applied for any conveyance of the lots. It was also proved by the clerk of the county court of Tazewell county that there were no conveyances of record from the West Graham Land & Improvement Company to the defendant.

The defendant also introduced certain letters, which were produced by the president of the land and improvement company, at the defendant's request, of which the following are copies:

"Clarence M. Clark, Pres't. Arthur C. Denniston, Vice Pres't. Geo. L. Estabrook, Jr., Sec'y and Treas. Southwest Virginia Real-Estate Investment Company. Bullitt Building, Philadelphia. Telephone No. 2,720. Philadelphia, October 10, 1891. Mr. J. B. Greever, President, Graham, Va.—Dear Sir: Referring to your favor of the 21st of August, addressed to Mr. E. J. Collins, I beg to inclose herewith check and voucher to the West Graham Land and Imp. Co. for \$1,500, being payment of 10 per cent. on account of our subscription to \$15,000 of the capital stock of the above company. Please receipt, and return voucher, and also send us your usual form of installment receipt. I note from the latter part the letter above referred to that we are entitled to draw a medium lot for each \$1,000 of stock. We have

written to Mr. James L. Hamill, of Graham, to attend to this matter for us, and I will be obliged if you will advise him when the drawing will take place. Yours, truly, G. L. Estabrook, Jr., Treasurer."

"Clarence M. Clark, Pres. Arthur C. Denniston, Vice Pres. Geo. L. Estabrook, Jr., Sec'y and Treas. Southwest Virginia Real-Estate Investment Company. Bullitt Building, Philadelphia. Philadelphia, October 22, 1891. Mr. J. B. Greever, Pres't. West Graham Land & Imp. Co., Graham, Va.—Dear Sir: A few days ago we made payment of 10 per cent. on account of our subscription to 150 shares of the capital stock of your company. At the time of payment we sent you a voucher, which you receipted and returned. We would also like to have your usual form of installment receipt, showing this payment. Will you kindly have this forwarded to us, and oblige, yours, truly, G. L. Estabrook, Jr., Treasurer."

"Clarence M. Clark, Pres. Arthur C. Denniston, V. Pres. Geo. L. Estabrook, Sec'y. and Treas. Southwest Virginia Real-Estate Investment Company. Bullitt Building, Philadelphia. Telephone 2,720. Philadelphia, November 30, 1891. Mr. J. B. Greever, Graham, Va.—Dear Sir: I have your favor of the 20th inst. In reply I beg to say that I have written to Mr. Hamill, asking him to obtain for us certain information. As soon as I have this information, we can decide whether we wish to make the exchange as outlined in your letter. Yours, truly, G. L. Estabrook, Jr."

"Clarence M. Clark, Pres. Arthur C. Denniston, Vice Pres. Geo. L. Estabrook, Sec'y and Treas. Southwest Virginia Real-Estate and Investment Company. Bullitt Building, Philadelphia. Telephone 2,720. Philadelphia, April 6th, 1892. Mr. J. B. Greever, Graham, Va.—Dear Sir: I have not received the copy of the balance sheet of the West Graham Land & Imp. Co. Can you not prevail on the treasurer to send this to me pretty soon? Yours, truly, G. L. Estabrook, Jr., Treasurer."

"Clarence M. Clark, Pres. Arthur C. Denniston, Vice Pres. Geo. L. Estabrook, Sec'y. and Treas. Southwest Virginia Real-Estate Investment Company. Bullitt Building, Philadelphia. Telephone 2,720. Inquiring regarding deeds West Graham Company. Philadelphia, October 5th, 1892. Mr. J. B. Greever, Graham, Va.—Dear Sir: Will you kindly advise me whether the deeds for the lots of the property of the West Graham Land & Improvement Co. which were drawn by our company are ready for delivery? If not ready at this time, when will they be? Yours, truly, G. L. Estabrook, Jr., Treasurer."

It also introduced in evidence an act of the general assembly approved January 24, 1890, amending the charter of the Southwest Virginia Real-Estate Investment Company, by

which it was authorized to subscribe for, guaranty, or acquire the stock and bonds of any corporation.

The question for us to determine is whether the evidence in the case is of such a character as to make it the duty of this court to set aside the action of the circuit court granting a new trial, and to enter judgment upon the first verdict.

There is always a fair presumption that the verdict of the jury is correct; and when the judge who presides at the trial, who has heard all the evidence, witnessed all the proceedings and the manner of conducting the cause before the jury, is satisfied with the verdict, and refuses to set it aside, an appellate court, which cannot have an equal opportunity for forming a just judgment, ought not to interfere without the strongest reasons for doing so. "On the other hand," as was said by Judge Baldwin in *Patteson v. Ford*, 2 Grat. 19, 25, "when the judge [who presided at the trial] is dissatisfied with the verdict, and grants a new trial, some latitude must be allowed to his discretion; especially where the propriety of its exercise is affirmed by a verdict on such new trial for the party to whom it was granted." In setting aside the verdict, the trial court must, to some extent, pass upon the weight of the evidence before the jury; and a stronger case must be made in order to justify an appellate court in disturbing an order granting a new trial than where it has been refused. The reason usually assigned for this rule is that the refusal to grant a new trial operates as a final adjudication of the rights of the parties, while the granting of the new trial simply invites further investigation, and affords an opportunity for showing the truth, without concluding either party. *Bart. Law Prac.* 725, 726; *Ruffner v. Hill*, 31 W. Va. 428-432, 7 S. E. 13.

The uncontradicted evidence in the cause shows that the 150 shares of stock charged to the defendant upon the books of the treasurer of the land and improvement company were subscribed for by E. J. Collins; that the first assessment of \$5,000 was paid by him; that a certificate for the stock was issued in his name; that he never was the agent of, or had any connection with, the defendant; that there was no authority for charging the defendant with the Collins stock, or crediting it with the \$5,000 paid by Collins upon the books of the treasurer of the land and improvement company; that the defendant did not subscribe for any stock in that company, nor authorize any one else to do so for it; that some time prior to the organization of the real-estate investment company (the defendant) another corporation, known as the Southwest Virginia Real-Estate & Investment Company, was chartered; that both companies had the same president, the same vice president, and the same secretary and treasurer, with offices in the same building.

It is clear from the letters written to the president of the land and improvement company by G. L. Estabrook, Jr., who was secretary and treasurer of both the defendant company and of the Southwest Virginia Real-Estate & Investment Company, that one or the other of the companies was the owner of 150 shares of stock in the land and improvement company. The letters themselves do not clearly show which of the investment companies owned the stock, but, when read in the light of the evidence of the officers and directors of the defendant company, that it had never subscribed for or purchased any stock in the land and improvement company, or authorized any one else to do so for it; that it had never paid anything on account of stock in that company; and that E. J. Collins, who subscribed for the stock, was not its agent, and never had any connection with it,—it can scarcely be doubted that the Southwest Virginia Real-Estate & Investment Company, and not the defendant, was the owner of the 150 shares of stock.

There is very little conflict in the evidence. None of the plaintiff's witnesses testified that the defendant had subscribed for or purchased the 150 shares of stock. His evidence upon that question is made up of circumstances and facts which, for the most part, the defendant's evidence explains, but does not contradict.

We are therefore of opinion that the evidence upon the first trial is not of such a character as that this court ought to reverse the action of the circuit court in setting aside the verdict and granting a new trial.

We are further of opinion (and plaintiff's counsel seem to so concede) that there was no error in the proceedings upon the second trial to the prejudice of the plaintiff.

The judgment of the circuit court must be affirmed.

CARDWELL, J., absent.

(96 Va. 165)

JACKSON'S ADM'R v. JACKSON.
(Supreme Court of Appeals of Virginia. June 30, 1898.)

PARENT AND CHILD—ACTION FOR SERVICES—
PROOF OF CONTRACT.

1. Where a grandfather takes a grandchild into his home, and supports him until he attains his majority, a claim by the grandchild for services rendered must be based upon proof of an express contract with the grandfather, or on direct and unambiguous facts, from which it may be reasonably inferred that there was an express contract by which the grandfather was to pay, and the grandchild to receive pay, for the services.

2. Wages for services rendered by a minor may be recovered by the minor after becoming of age, where his father testifies that he never claimed, and did not then claim, plaintiff's wages, or anything recovered in the suit.

3. Where an infant grandchild, who is being supported by his grandfather, is told by his

grandfather, while preparing to leave his house, that if he will stay he shall receive wages, that fact negatives any presumption that he was to receive pay for services rendered before that time.

4. Evidence that a grandfather, who had taken a grandchild into his home, and supported him until he attained his majority, said that he was a good boy; that he could not get along without him; that he should have wages; and that he intended to pay him,—does not establish a contract for wages.

Error to circuit court, Wythe county.

Action by John W. Jackson against Richard Jackson's administrator. Judgment for plaintiff, and defendant brings error. Reversed.

Blair & Blair and Fulton & Fulton, for plaintiff in error. W. S. Pooge and M. M. Caldwell, for defendant in error.

CARDWELL, J. This is a writ of error to a judgment to the circuit court of Wythe county in an action of assumpsit brought by John W. Jackson against Richard Jackson's administrator c. t. a. for wages for services alleged to have been rendered Richard Jackson by the plaintiff from January, 1890, to January, 1897, at the price of \$15 per month.

John W. Jackson is the son of David Jackson, a son of Richard Jackson, and it appears that about January, 1890, when the plaintiff was 14 years of age, the wife of David Jackson died, leaving, surviving her, her husband and nine children, some of them of tender years, and owing to his poverty and surroundings David Jackson was compelled to put out some of his children among relatives and friends; the plaintiff being sent to the home of his grandfather, Richard Jackson, where he was received and lived as a member of his grandfather's family. It is not pretended that there was any contract between the grandfather and the plaintiff at the time that the latter was taken by the former to be cared for and raised by him, and there is absolutely no proof of any promise made by the grandfather to the plaintiff, prior to the spring of 1896, that the plaintiff would receive compensation for his labor, and there is no proof showing any facts or circumstances from which it could be reasonably inferred that any such promise was made by the grandfather. While the plaintiff lived with his grandfather, the latter had never less than two of his own sons living with him, and doing such work on and about the farm and around the house as was done by the plaintiff. Richard Jackson died in February, 1897, and plaintiff attained his majority in April following, and this suit was instituted shortly thereafter. The evidence shows that Richard Jackson not only supported the plaintiff as if he had been his own child, but at times gave him pocket money; and the only evidence adduced to show facts and circumstances from which to infer a contract between the parties prior to the spring of 1896 is to the effect that the

grandfather had been heard to say that "the plaintiff was a good boy, and it was hard to do without him"; that he worked there, and was a good hand; that the grandfather paid one of his sons, about 38 years old, for labor on his farm, 50 cents per day and his board, and that plaintiff's work was worth as much as his; that David Jackson, father of the plaintiff, heard the grandfather say several times that the plaintiff should have wages, and on one occasion, while he was sick, and a few months before he died, he heard him say that "the plaintiff should be well paid for his work"; and about two months before his death this witness, David Jackson, heard him say "the boy has to be paid for three or four years' work." This witness, however, says that he could not say that the grandfather ever made any other contract with witness or with the plaintiff than that just stated; that his grandfather furnished plaintiff his board and clothes, and he lived with his grandfather as a member of his family; that witness was not paid any wages by other persons that took his children; that, his wife having died, and he having no way to raise them, he was compelled to put them out; and that he never claimed his son's (the plaintiff's) wages, and did not do so now, and did not claim anything he might recover in this case. After making the foregoing statement, David Jackson says that, "a short time after John was sent to his grandfather's, he [witness] went over there, and found John there; that he [witness] and Richard had a conversation on this occasion, and Richard said, 'If John stayed with him until he was 21 years old, and satisfied him, he would pay him for his work.'" But witness says that he kept this secret, telling no one about it. One witness testified that he sometimes worked for Richard Jackson, and last spring, a year ago, which was the spring of 1896, while working there, some difference arose between plaintiff and one of the family, and witness heard Richard Jackson say: "John, never mind that. Go on, pay no attention to it, and you shall have pay for your labor." Nobody else was present but Richard, plaintiff, and witness, and after the above conversation plaintiff continued to work for his grandfather as he had been doing. That he had known Richard Jackson, when he sent John on an errand, or John did extra work, to give him some money as pocket change, and that Richard Jackson said it was for that purpose.

Another witness for the plaintiff testified that "last spring, a year ago [which was the spring of 1896], she was at Richard Jackson's doing some work; that an altercation arose between plaintiff and some one on the place; that plaintiff was fixing to leave, and Richard Jackson sent her for plaintiff, and in her presence said to him that he, Richard, could not do without him, and would pay him for his labor if he would stay on; that

plaintiff did stay, and continued to work; and after the will was made she heard Richard say that he owed the two Johns and Fishy Archer for their work."

Other witnesses testify to the effect that they had heard Richard Jackson say that he intended to pay John for his labor, and pay him well, or that, if the plaintiff stayed with him until he was 21 years of age, that he must be paid; but he would never pay a minor, because he was afraid the father might claim wages,—one saying that he had heard Richard Jackson say, a little over a year prior to his death, that he had to give work to the two John Jacksons, and keep money to pay them.

All of the witnesses testify that the plaintiff worked well, and that the grandfather furnished him with board, clothing, lodging, and everything he needed. J. K. Hollandsworth, administrator c. t. a. of Richard Jackson, testified that, on the morning Richard Jackson's will was written, he sent for witness to come over to his house; that while there, before dinner, witness asked about John, the plaintiff, and Richard said the plaintiff "shall have some pay"; that after dinner witness again called his attention to this,—that is, to John's pay,—and Richard said: "I will have to fix that another way"; that Captain Crockett wrote the will that day; that Richard owned a farm of 375 acres of land, on which he lived; that it was worth about \$20 per acre; that the personal estate amounted to about \$4,700; that he had on hand, in bank, and in good notes, about \$2,000; that Richard Jackson only owed two debts that had thus far been presented to witness as administrator,—one was for \$2.75, and the other was \$1.94,—but there were credits on these that reduced the amount down to \$1.11.

By his will Richard Jackson devised his land to his three living sons in equal shares, David Jackson, the father of the plaintiff, being one of them; charging each with the payment of \$200 in five equal annual payments to the children of a deceased son of testator, and gave his personal estate to his living daughters and the children of his deceased daughters.

Witnesses for the defendant testify that they had heard the plaintiff say that there was no contract between him and his grandfather that he was to have wages; that on one occasion plaintiff left because his grandfather would not pay him wages, and remained away several days, but went back, because, as plaintiff said, it was best to go back anyhow; that Richard Jackson had been heard to say in plaintiff's presence that he was not paying him any wages, and would not, as his father had brought him there for his victuals and clothes, and he (the grandfather) had taken him for pity's sake; and that if he (plaintiff) was not satisfied, he could go away.

At the trial the plaintiff asked for an in-

struction, which was given over the objection of the defendant, and the defendant asked for four instructions, all of which were refused; and exceptions were taken by the defendant to the rulings of the court in giving plaintiff's instruction and in refusing the instructions asked for by the defendant.

Plaintiff's instruction is as follows: "The court instructs the jury that where near relatives are residing in the same house together, or persons standing in loco parentis, before there can be a recovery for such services, the express promise of the party served must be shown, or such facts and circumstances as will authorize the jury to find that the services were rendered in expectation by one of receiving, and of the other of making, compensation therefor. Therefore, if the jury believe from the evidence that the service in this case was rendered in the expectation on the part of John W. Jackson of receiving, and of Richard Jackson of making, compensation, or paying for the services rendered, they will find for the plaintiff, and assess his damages at such sum as, under all the circumstances, is fair and right."

There is nothing in this instruction to indicate to the jury either the degree or the quality of proof necessary to establish such a promise or undertaking on the part of Richard Jackson to pay plaintiff for his services as is required by law to warrant a recovery in a case like this; and the instruction was calculated to mislead the jury into a finding that there was such a contract between these parties as justified a recovery by the plaintiff, merely from such facts and circumstances as would raise in law an implied promise on the part of Richard Jackson to pay plaintiff the value of his services, as in cases where the parties do not stand in loco parentis.

In all cases where compensation is claimed for services rendered near relations, as a father, brother, grandfather, etc., the law will not imply a promise, and no recovery can be had unless an express contract, or what is equivalent thereto, is shown. It is not enough to establish a moral obligation to pay for them, but an actual promise must be proved, or facts from which such promise can be reasonably inferred, established by evidence so clear, direct, and explicit as to leave no doubt as to the understanding and intention of the parties. Loose declarations to neighbors or friends, or even to the claimant himself, are not enough, particularly when such relative is deceased. It must be shown that the deceased intended to, and did, assume a legal obligation to the complainant for such services, of such a character that it could be legally enforced against him. Expressions of commendation or gratitude, or of an intention to remember him in his will, cannot, unless brought home to the knowledge of the claimant, and shown to have been the consideration upon which the services were rendered, to the knowledge of

the deceased, be made the basis of a contract obligation. An action cannot be predicated upon intentions merely.

These are substantially the rules as stated by law writers, and as stated in Am. & Eng. Enc. Law, p. 337, where it is added "that the proof must leave no doubt, and that the rules are to be more rigidly enforced where the action is by one for services rendered before he became an adult." See, also, cases cited in notes.

Mere general expression by a father, to the effect that his son waited on him well, and that he wanted him to be well compensated for it, are not sufficient proof of any contract, either express or implied. *O'Kelly v. Faulkner* (Ga.) 17 S. E. 847; *In re Kirkpatrick's Estate* (S. C.) 13 S. E. 450.

In the last-named case it was held that, to entitle the daughter to recover from the father for services, declarations of the father of an intention to pay, and to pay well, for her services were insufficient to create a legal obligation; as in such cases the presumption is that the services were gratuitous, and there must be, in order to recover, proof of an express agreement to pay. It must appear either that there was an express agreement between the parties providing for specific or reasonable compensation, or that the circumstances show clearly that the parent had not only intended to pay something, but had assumed a legal obligation to do so.

In *Hartman's Appeal*, 3 Grant, Cas. 276, it was said by Strong, J.: "Loose declarations, made to others, or even to the claimant himself, will not answer. That which is only an expression of intention is inadequate for the purpose. It must have been the purpose of the deceased to assume a legal obligation capable of being enforced against him. The ordinary expressions of gratitude for kindness to old age, weakness, or suffering are not to be tortured into contract obligations."

In *Miller's Appeal*, 100 Pa. St. 568, it was said: "The question always is whether the parties contemplated payment, and dealt with each other as debtor and creditor."

In *Bash v. Bash*, 9 Pa. St. 260, where an action was brought by a son against the estate of his father for services, under an alleged promise of the father to leave the son his farm, *Gibson, C. J.*, said, in reference to this class of actions, and the species or quality of proof essential to sustain them: "A contract for testamentary compensation for work done for a father by his son after his majority can be proved only by direct and positive evidence of it. Yet [referring to the charge of the court below] for 'direct and positive' the judge in his charge substituted 'clear and satisfactory,' and thus put such a contract as to the proof of it on the footing of a contract between strangers, unaffected by any personal relations. The course of this court has been to hold a tight rein over it, by making the quality, if not the sense, of the proof a subject of inspection and governance by the

court, and by holding the jury strictly to the rule prescribed, instead of suffering them to be led away by considerations of hardship or paternal injustice. Every man must be allowed to make his own contract, as well as his own will; and to prevent jurors from making it for him, according to their peculiar notions of fitness and propriety, we have held that the evidence of a contract to compensate the services of a child must be positive and direct. But evidence clear and satisfactory in the estimation of a jury may be neither. It may be no more than presumptive or inferential; and, if that were sufficient, it would be easy to see how every case of this sort would go. To an unpracticed eye loose and inconsiderate expressions, such as make up the mass of evidence in this case, and the presumptions or probabilities resting on circumstances, may seem perfectly clear and satisfactory; but they do not constitute the proof by which, in the judgment of this court, such contracts are to be established."

"The true rule upon the subject is," said the court in *Re Kirkpatrick's Estate*, supra, "that where a child renders service to his parent, the presumption is that the service was rendered in obedience to the promptings of natural affection, and not with a view to compensation; but that such presumption may be rebutted by positive and direct evidence that such is not the fact, and that mere loose declarations on the part of the parent that the child ought to be paid for its services, or that he intended or wished him to be paid, will not be sufficient to rebut the presumption."

The case at bar is of that class of cases of which *Pearson, C. J.*, in *Hudson v. Lutz*, 50 N. C. 217, said: "The same principle applies to a grandfather and grandchild when the one assumes to act in loco parentis. * * * The relation of the parties rebuts the presumption of a special contract, and puts the idea that he was to be paid for furnishing them a home, or they were to have a 'price' for work and labor done, out of the question." And by *Ruffin, J.*, in *Hussey v. Roundtree*, 44 N. C. 111: "Such claims ought to be frowned on by the courts and juries. To sustain them tends to change the character of our people, cool domestic regard, and in the place of confidence sow jealousies in families."

"In such cases," said the court in *Poorman v. Kilgore*, 26 Pa. St. 365, "the very nature of the relations therefore requires the contracts between parents and children to be proved by a kind of evidence that is very different from that which may be sufficient between strangers. It must be direct, positive, express, and unambiguous. The terms must be clearly defined, and all the acts necessary for its validity must have a special reference to it, and nothing else."

In the case of *Harshberger's Adm'r v. Alger*, 31 Grat. 52, to which we have been cited, and in which Mrs. Alger sought to set up a claim against her mother for services,

this court held that no express contract for the services had been proved, and no contract could be justly implied, as the evidence rebutted the presumption of any contract. The opinion by Burks, J., did not, nor was it necessary to, discuss the degree or quality of evidence that would be deemed sufficient to prove a contract upon which Mrs. Alger could have sustained her claim.

So in the case of *Stoneburner v. Motley* (recently decided by this court) 30 S. E. 364, it was held that the fact that the son had secured, by deed of trust on his property, a debt to his father for board of himself and horse, and for furnishing the horse for 12 years, there being no antecedent contract by which the son agreed to pay the father, this did not constitute a valid consideration for the deed, and that, therefore, the deed in this respect was void as to creditors; and it was said in the opinion by Keith, P., that, as between father and son, grandfather and grandson, or others standing in loco parentis, no contract was implied in law upon which compensation for services could be recovered; but it was unnecessary in that case, as in the case of *Harshberger's Adm'r v. Alger*, supra, to enter into any discussion of the degree or quality of evidence required to overcome the presumption that there was no such contract.

An examination of the best reasoned decisions to which we have had access brings us to the conclusion that, in cases like the one under consideration, in order to recover, the plaintiff must prove an express contract, whereby the person sought to be charged assumed a legal obligation to the claimant to pay him for his services, and of such a character that it could be legally enforced against him, and was so understood when made, or, by proof direct, positive, express, and unambiguous, establishing facts and circumstances from which it may be reasonably inferred that there was an express contract by which one promised or agreed to pay, and the other was to receive, compensation.

The first and second instructions asked for by the defendant are to the effect that, if the jury believe from the evidence that Richard Jackson did make a contract with the plaintiff, and the plaintiff was then under 21 years of age, the father alone could recover the wages, and not the plaintiff. These instructions were properly refused. In addition to the fact that the father may emancipate his child, and allow him to contract for and receive his wages, plaintiff's father in this case had testified that he never claimed, did not then claim, plaintiff's wages, or anything that he might recover in this suit, and the plaintiff was then over 21 years of age.

Defendant's instruction No. 3, refused, is as follows: "The court instructs the jury that, because of the family relations of plaintiff and Richard Jackson, a contract by Richard Jackson to pay for the services of plaintiff must be proven by the plaintiff; that

the proof of the same must be direct, positive, express, and unambiguous."

It follows from what has already been said in this opinion that there was error in refusing this instruction, especially in view of the instruction given for the plaintiff.

The remaining instructions asked for by the defendant and refused were to the effect that, if there was no express contract by which Richard Jackson agreed to pay wages for plaintiff's services, and if the contract was only implied from the facts and circumstances, then this suit could not be maintained in the name of the plaintiff.

This instruction was properly refused, as it was calculated to mislead or confuse the jury.

There was a verdict and judgment in the court below for \$500, and a motion of the defendant to set aside the verdict, and grant a new trial, because excessive, and contrary to the law and the evidence, was overruled, and the defendant excepted.

It is needless to review the evidence again in this connection. We are of opinion that it wholly failed to authorize the jury to find that the grandfather had made any sort of contract to pay the plaintiff for his services prior to the spring of 1896. The testimony of the two witnesses who say that his grandfather promised the plaintiff, in the spring of 1896, that if he would stay he should be paid for his labor, and that plaintiff did stay, and continued to work as before, negatives every presumption even that there was an antecedent contract of any character that the plaintiff was to be compensated for his services. How could he have been induced, by the promise to pay him wages then made, to remain and continue his work, if that was already the contract with his grandfather?

The verdict was not only excessive to the extent that it included compensation to the plaintiff for services rendered Richard Jackson prior to the spring of 1896, but was contrary to the law and the evidence in the case, and for this reason should have been set aside, and a new trial awarded.

The judgment of the court below must be set aside and annulled, and the case remanded for a new trial, to be had in accordance with the views expressed in this opinion.

(36 Va. 257)

ANDERSON et al. v. CRESTON LAND CO.
(Supreme Court of Appeals of Virginia. July 7, 1898.)

PRINCIPAL AND AGENT — RATIFICATION — VENDOR AND PURCHASER — FRAUD — RESCISSION — EQUITY — PLEADING AND DECREE.

1. A relative of complainants formed an association to purchase land on speculation, making them members thereof without authority, and applied money of complainants in his hands on their share of the price, and afterwards wrote, informing them of the purchase, and stating that the amount held by him lacked a certain amount of the sum advanced on their

account, and assured them "that they had made a big bargain," and "that they would never have any more money to pay." Complainants paid the amount which had been advanced for them without further investigation. Held, that they were sufficiently advised to the extent of their interest, although they did not know that other persons were associated with them in the purchase, and hence their said payment was a ratification of the purchase, and they were therefore liable for their share of the balance of the price.

2. An unfulfilled assurance made by a vendor of lots that he would grade certain streets and construct waterworks, and that certain persons contemplated the erection of dwellings on property in the vicinity, is not a fraud which entitles the purchaser to rescind.

3. A land contract entered into by the purchaser's agent cannot be avoided by the purchaser, in a suit to enforce the purchase money notes, because the agent also represented the vendor, where that fact was not presented in the pleadings.

Appeal from circuit court, Roanoke county.

Bill by the Creston Land Company against George W. Zirkle, John W. Harveycutter, John T. Anderson, George E. Anderson, G. Jones Ligon and R. H. Ligon, partners trading as Ligon & Bro., and L. C. Hansbrough, trustee, to enforce the collection of notes given for the price of certain lots, by selling said lots, and applying the proceeds on said notes, and holding defendants responsible for any deficiency arising after the application of said proceeds. From a decree in favor of complainant, defendants John T. Anderson and George E. Anderson appealed. Affirmed.

Alexander Coke and S. D. Davies, for appellants. A. A. Phlegar and W. W. Moffett, for appellee.

KEITH, P. The decree appealed from was rendered by the circuit court of Roanoke county under the following circumstances:

The appellants, John T. and George E. Anderson, found themselves in August, 1890, in the city of Salem, Va., as guests of their uncles, G. J. and R. H. Ligon. At that time there was great activity in the real-estate market in that vicinity. Companies were being chartered and organized for the purchase of land, to be subdivided and sold as town lots. Prices were advancing from day to day, and purchasers, upon the payment of a small sum in cash, often realized in a short time a considerable profit. Such transactions proved to be most attractive. All were anxious for the opportunity to make money without labor, and apparently without risk. While in Salem the appellants purchased three lots, one from the Lakeside Land Company and two from the Creston Land Company, of which G. Jones Ligon, their uncle, was the president. They also contemplated the purchase of a third lot from a Mr. Zirkle, provided the title to it on investigation proved satisfactory, and on returning to Richmond left the sum of \$405 in the hands of their uncle, \$5 to pay for an examination of the title, and the residue to go as a payment upon the purchase money. The purchase from Zirkle was not consummated,

and the Ligans, instead of returning to the Andersons the money in their hands, took it upon themselves to invest it as follows: They formed a "syndicate," as associations for the purchase of property for speculative purposes were called, composed of the Andersons, Zirkle, Harveycutter, and themselves. This association purchased 10 lots from the Creston Land Company for \$3,450, one-third to be paid in cash, and the balance in one and two years. The Andersons were each to have an undivided one-fifth interest in the purchase, and the lots were to be conveyed free from all incumbrances, upon the payment of the purchase money. The Andersons knew nothing of this transaction at the time, but in about two months they were informed by a letter from their uncle, Mr. Ligon; that he had invested their money remaining in his hands in the purchase of lots from the Creston Land Company, and that it lacked \$49.20 of paying the amount due by them at the date of the letter. After consulting together, the Andersons agreed that their uncle had no right so to use their money without asking their consent, but, as John Anderson says in his deposition, "as he [the uncle] stated in his letter that they had made a big bargain, and that we would never have any more money to pay, we decided that, as it was only \$24.60 apiece more that we would have to contribute, my brother sent him a check for \$49.20." George Anderson gives substantially the same account, and adds that he "was very much outdone when I heard of the transaction, because I had emphatically refused to buy any more property of the Creston Land Company, except the two lots we had bought of our own accord, and I would myself then and there have repudiated the whole transaction, if they had not been relations of our family, and their whole assurances so very fair."

It may be observed here that the terms of purchase of the 10 lots bought by the "syndicate," of which the Andersons were made members without their authority previously given, were identical with the terms upon which they themselves purchased two lots from the Creston Land Company. They allege that, while negotiating for the purchase of those two lots, they were assured that streets would be graded and put in first-class condition; that a reservoir would be built upon the property of the Creston Land Company, from which pure spring water would be carried through pipes to all the streets; that several persons contemplated the erection of dwellings upon the property; and, finally, that the purchasers were to have a deed for their lots free from all incumbrances. When the deferred payments upon these lots became due, the appellants objected, because these assurances had not been fulfilled, and it was ascertained that the title was incumbered; but, upon the incumbrances being removed, and a sufficient deed tendered to them, they paid the balance due, and obtained their title.

Now appellants claim that, when informed

that their uncle had invested in lots of the same company, they had a right to rely upon the assurances given with respect to these two lots, and this may be conceded; but the claim and concession with respect to the conditions and incidents of the purchase tend strongly to support the inference that the terms of sale were identical. It is admitted that no previous authority had been given the Lignons to make the investment which is the subject of this controversy. Upon receiving notice of it, therefore, the Andersons were at liberty to affirm or reject it, to ratify or repudiate the assumed agency of the Lignons. It cannot be denied that their act in sending the check for the balance of the cash payment was a ratification of the unauthorized act of their agent. They contend, however, that it was made in ignorance of a material fact. They admit in their answer the receipt of a letter from Ligon & Bro., in the course of a month or so after they left Salem, "informing them that they [Ligon & Bro.] had invested the money left with them in lots purchased of the complainant for a speculation; that said lots were represented by complainant to be free from incumbrance, and of perfect title; and that complainant promised to supply them with pure spring water, and to open and construct streets and walkways for the comfortable ingress and egress of their occupants"; but they deny that they knew that others were associated with them in the purchase in addition to the Lignons, or that they knew anything of the notes or deed of trust mentioned in the bill of plaintiff. It is not claimed that they are liable jointly with others for any portion of the purchase money due upon the transaction. Plaintiff only seeks to recover of them their proportionate parts of the purchase money, and we are of opinion that, to the extent of their interest in the subject, they were duly advised at the time they forwarded the check for \$49.20, in compliance with the demand made upon them.

The letter written to them has not been produced, so other evidence has to be resorted to, in order to determine what facts with respect to the transaction were known to the Andersons at the time that check was drawn. They say that the letter informed them of the purchase by the "syndicate," and that the amount in the hands of Mr. Ligon lacked \$49.20 of paying what he had advanced on their account; that it assured them that they had made a big bargain, and "that they would never have any more money to pay." When they purchased the two lots, the identical assurance was made to them "that they would never have any more money to pay"; the meaning of the assurance being that, in the judgment of Ligon, lots would advance in price, and could shortly be disposed of at a profit; and such, doubtless, was the expectation with which they entered into the transaction. What need of an assurance? What probability would there have been that they would never have any more to pay, if what

they had already paid satisfied the obligation of the contract into which their uncle had entered on their behalf? The truth, without doubt, is as stated by the appellant George Anderson, and already quoted: "I was very much outdone when I heard of the transaction, and would have repudiated it, if they had not been relations of our family, and their whole assurances so very fair." We see the appellants, then, tempted on the one hand by the hope of profit so confidently assured to them, and moved on the other by considerations growing out of their relationship to the agent, who had, without authority, assumed to act for them; and with the knowledge imparted by the letter which they received, and the previous dealings between themselves and the Creston Land Company, they determine to ratify the transaction, without further inquiry upon the information which they already possessed. *Mechem, Ag. §§ 128, 160; Whart. Ag. § 92.*

The purchase, as we have said, was speculative in its character. The price of lots was changing from day to day. It was, therefore, of importance to all concerned that the election which the appellants enjoyed to ratify or repudiate the bargain should be promptly exercised. They were informed of the purchase within a few weeks after it was made. So far from disaffirming the unauthorized act of their agent, they, with sufficient knowledge of the circumstances attending it, approved his conduct. By so doing the Creston Land Company was lulled into repose, and in the meantime the prices of such properties have shrunk to a small fraction of those obtained in 1890. That such an act, under such circumstances, is a ratification, and cannot be recalled, is fully established by the authorities. *Improvement Co. v. Brady, 92 Va. 71, 22 S. E. 845; Wilson v. Hundley (just decided) 30 S. E. 492.*

Appellants also claim that the assurances made to them with respect to what the company would do in the grading of streets and the construction of waterworks, etc., not having been performed, constitute a fraud which entitled them to a rescission of their contract and a recovery of the money which they have paid.

The assurances relied upon in this case were matters of opinion, and not of fact, and the law applicable to them has been so recently and so fully considered by this court that nothing more need be said than to refer to decided cases. *Wilson v. Carpenter, 91 Va. 183, 21 S. E. 243; Watkins v. Improvement Co., 92 Va. 1, 22 S. E. 554; Improvement Co. v. Brady, supra; Grosh v. Improvement Co. (Va.) 27 S. E. 841.*

With respect to the alleged incumbrance upon the title, it appears that there was a prior incumbrance by deed of trust upon the property purchased, in favor of Chalmers and others, and that deed also contains a covenant "that, upon payment to them of the proceeds of sale, if any one or more par-

cels or lots of the said land which the said company may at any time before a sale is made by the said trustee under this trust sell, as provided by a resolution adopted by the board of directors of the said company at a meeting held on the 11th day of April, 1890, then the said parties of the third part will cause the trustee to release the parcels or lots so sold from the lien of this trust deed."

Under this provision of the deed, releases were made of very many lots, among others, the two lots purchased by the appellants in person from the Creston Land Company.

Another contention of the appellants is that this transaction ought not to be maintained and enforced, because G. Jones Ligon was the president of the Creston Land Company, and Ligon & Bro., who were members of the purchasing "syndicate," were the land agents through whom the sale was effected, and received a commission from the appellee for their services; that the Ligans, therefore,—one as president of the Creston Land Company, and both of them as land agents,—occupied such improper and incompatible relations to the transaction as rendered it fraudulent as to appellants.

Upon this subject it is sufficient to say that there is no hint of it in the pleadings, and therefore it cannot be made a ground for relief. The evidence disclosing the facts upon which the appellants rely to vitiate the transaction for this cause might, if scrutinized, be found sufficient to furnish an answer to the charge, but we decline to enter upon the inquiry, for the reason already assigned. It presents an issue not made in the pleadings.

We have only considered questions arising upon the record between the appellants Anderson and the appellee, the Creston Land Company. There were other parties to the suit, but, as their relations to the transaction and to each other were not the subjects of controversy, the discussion of law and fact has been confined to the parties between whom the issues have been made.

For the foregoing reasons, we are of opinion that the decree of the circuit court of Roanoke county must be affirmed.

CARDWELL, J., absent.

(96 Va. 158)

JOHNSTON et al. v. VIRGINIA COAL & IRON CO.

(Supreme Court of Appeals of Virginia. June 30, 1898.)

ADVERSE POSSESSION — RIGHTS OF CO-TENANTS — OUSTER.

Where one of several tenants in common, who is in possession of the premises, conveys the same to a third person, who enters under such conveyance, claiming title to the whole, there is an ouster of the other tenants, which will bar their right of entry, if continued for the length of time required to establish title by adverse possession.

Appeal from circuit court, Wise county.

Bill by John T. Johnston and others against the Virginia Coal & Iron Company and others for partition of land. From a decree dismissing the bill, complainants appeal. Affirmed.

Blair & Blair, Geo. A. Smith, and B. H. Sewell, for appellants. Bullitt & McDowell, E. M. Fulton, R. C. Dale, and R. A. Ayers, for appellee.

HARRISON, J. It appears from the record that on January 30, 1796, the commonwealth of Virginia issued a patent to Nathaniel Taylor, Nathan Fields, and John Johnson, all non-residents of the state, granting to them a tract of land containing 62,000 acres, situated, at the time of the grant, in Lee county, the larger part of the tract being now located in Wise county.

The entries and surveys for this patent had been made in 1795, and before the patent was formally issued, to wit, on January 1, 1796, Nathan Fields conveyed to Nathaniel Taylor all of his right, title, and interest in the tract of land called for by the grant.

In 1816 Nathaniel Taylor died, leaving a will, by which he directed his executors "to sell so much of his back lands and other property as could best be spared, sufficient to pay all of his just debts."

In 1827 Mary Taylor and James P. Taylor, as executrix and executor of this will, sold and conveyed to John Crabtree a boundary containing 12,800 acres, it being part of the 62,000 acres covered by the patent of January, 1796.

The evidence shows that Crabtree took possession under this deed, and commenced selling off portions of the land thereby conveyed, and that he and his grantees have been in the open, notorious, uninterrupted, adverse possession thereof ever since. Among other alienations by Crabtree of this land, he conveyed by deed dated March 18, 1833, 4,000 acres to J. C. Olinger.

The sale of 12,800 acres by the Taylors to Crabtree left of the Taylor, Field, and Johnson patent 49,200 acres, which residue stood on the land books for the years 1833 and 1834 assessed in the name of "Taylor's heirs."

At the October court for Lee county, on the 21st of October, 1834, this residue of 49,200 acres was offered for sale at public auction for the nonpayment of \$4.92, the taxes due thereon for the year 1834, and 48,200 acres thereof was knocked down to J. C. Olinger, no other person offering to pay the taxes for a less quantity of said land.

On the 7th of December, 1836, Alexander Mills, clerk of the county court of Lee county, conveyed to J. C. Olinger the 48,200 acres purchased by him at this tax sale. This deed sets forth that J. C. Olinger had complied with the terms of his purchase and the requirements of law in respect thereto, and expressly reserves on its face the residue of

the 49,200 acres, to wit, 1,000 acres not sold to Olinger.

This residue of 1,000 acres reappeared upon the land books in the name of Taylor, Fields, and Johnson, and was sold for taxes due thereon, and conveyed to the purchaser, Henry S. Kane, by Claiborne Anderson, commissioner of delinquent and forfeited lands for Lee county, by deed dated November 20, 1842.

By deed dated May 12, 1853, J. C. Olinger conveyed to Henry S. Kane an undivided one-half interest in the 48,200 acres bought by him in 1834 at the tax sale.

J. C. Olinger by his will, probated in 1863, devised to his children his undivided half interest in this 48,200-acre tract held jointly with Henry S. Kane.

In 1876 Henry S. Kane died intestate, and it is conceded, by agreement of counsel, that his undivided interest in the 48,200 acres was sold in appropriate proceedings under a decree of the circuit court of Scott county, and conveyed by Vance and Wood, commissioners, acting under decree of that court, to the purchaser, C. S. O. Tintzman, by deed dated April 30, 1880.

In 1881 the heirs of J. C. Olinger conveyed the undivided half interest in the 48,200 acres derived by them under the will of their father to C. S. O. Tintzman, and in the same year Tintzman conveyed the whole tract that vested in him by these several deeds to E. K. Hyndman.

By deed dated May 6, 1882, E. K. Hyndman and wife conveyed, together with other lands, this 48,200 acres, which has been known and described all through these transactions as the "Olinger Survey," subject to certain reservations mentioned in the deed, to the Virginia Coal & Iron Company, the appellee here.

As already stated, the three original patentees were nonresidents of the state of Virginia, and none of them ever in the actual possession of the land.

This suit was brought to the June rules, 1893, of the circuit court of Wise county by John T. Johnston and some 30 other persons, residing in some 10 different states of the Union, representing themselves as the children, grandchildren, and heirs at law of John Johnston, deceased, who they say was sometimes known as John Johnson, and further allege that their ancestor was the John Johnson named in the patent of 1796, and that he resided up to the time of his death in the state of Pennsylvania, and died intestate in the year 1826, leaving to them, as his heirs at law, an undivided one-third interest in the tract of 62,000 acres mentioned in the patent of 1796 to Taylor, Field, and Johnson. They further allege that they are tenants in common with those claiming to be the owners of the Taylor and Field interests in said patent, and pray that there may be a partition in kind between the various owners, and an account for rent, etc.

The land in dispute in the case now before us is the 48,200 acres bought by J. C. Olinger at the tax sale in 1834, and we do not understand it to be denied that said land is now in possession of the Virginia Coal & Iron Company under and by virtue of the various alienations through which it has passed from J. C. Olinger to the appellee.

The evidence abundantly shows that, immediately after J. C. Olinger obtained the deed from Mills, clerk, in 1836, he took actual possession of the land conveyed to him, and that he and those claiming under him have been in open, notorious, continuous possession thereof, claiming and dealing with the whole as their own, from that day to this.

It is contended, however, by appellants that the effect of the deed in 1827 by Taylor's executors to John Crabtree for 12,800 acres by metes and bounds was to make him a co-tenant, to the extent of the interest thereby conveyed, with the heirs of Johnson and the estate of Taylor in the 62,000 acres of land, and that the conveyance by Crabtree to J. C. Olinger in 1833 for 4,000 acres made Olinger a co-tenant with the heirs of Johnson and the estate of Taylor; and that, therefore, when J. C. Olinger bought the 48,200 acres by metes and bounds at the tax sale in 1834, he, being a tenant in common with the Johnson heirs at that time, could not buy and hold adversely to them, but that his purchase inured to the common benefit of all his co-tenants. It is likewise contended that each of the subsequent alienations to the various owners of this land through the last 50 years, down to the acquisition of the entire title by the appellee, has had the effect of bringing each of said several vendees into the same fellowship and confidence, in respect to the title and interest of each, as exists between co-tenants, and that this relation existing between the parties gives the appellants the right to maintain this suit for partition.

Without by any means admitting this to be a sound proposition, or that the relation of tenants in common ever existed between J. C. Olinger and the appellants, under the circumstances disclosed by this record, it is sufficient to say that, when the Virginia Coal & Iron Company became the purchaser of the entire boundary by metes and bounds in 1882, it was a stranger, and had never before owned any part of the land, and therefore could not have occupied any relation of trust and confidence to appellants. There can be no question that the deed from E. K. Hyndman, dated May 6, 1882, conveying the entire tract by metes and bounds to the Virginia Coal & Iron Company, gave that company color of title for the whole boundary.

While the exact question did not arise in *Buchanan v. King*, 22 Grat. 422, the law is there well stated by Judge Staples as follows: "It is equally true that, if a purchaser takes the conveyance of the whole estate from one tenant in common, and enters into exclusive

possession under such conveyance, claiming title to the whole, this is an ouster of the other tenants, and the grantee, so entering and claiming title, may rely upon his adversary possession, if continued a sufficient period to bar the recovery by the other tenants."

In *Sedg. & W. Land Title*, § 287, the law is thus stated: "Where the grantee has obtained a conveyance of the whole estate from one of the co-tenants, entry made under such a title is disseisin of the other co-tenants. This doctrine is just and reasonable, for the grantee does not intend to enter or hold as a co-tenant. His entry is adverse. The same principle applies to joint tenants."

This principle is so universally settled that a further discussion of it is wholly unnecessary. See *Freem. Co-Ten.* § 197; *Town v. Needham*, 3 Paige, 545; *Culler v. Motzer*, 13 Serg. & R. 356; *Kitteredge v. Merrimack River Locks & Canals*, 17 Pick. 246; *Bradstreet v. Huntington*, 5 Pet. 402.

The evidence is clear that when the appellee became the purchaser May 6, 1882, of this entire boundary, it took actual possession at once of the land conveyed, and has been ever since in the open, notorious, continuous, adverse possession thereof, with the evidences of its possession and ownership daily increasing, until now it has spent several hundred thousand dollars in surveys, coal openings, coke ovens, and other improvements, and has tenants scattered all over the property.

Inasmuch as the appellee was a stranger at the time it took a conveyance of the whole estate from the allenees of J. C. Olinger, and entered into exclusive possession under such conveyance, claiming title to the whole, it has a right to rely upon its adversary possession, and is in no sense a tenant in common with the appellants. This being so, a court of chancery had no jurisdiction to entertain the suit of appellants for partition, and the bill was therefore properly dismissed.

If, however, the court had jurisdiction, the result would be the same, for, as already seen, the appellee has been in the open, notorious, uninterrupted, adverse possession of the whole tract under the deed from E. K. Hyndman of May 6, 1882, for more than 10 years before the institution of this suit, and the claim of appellants is therefore barred by the statute of limitations. Code, § 2915.

For these reasons, the decree appealed from must be affirmed.

CARDWELL and BUCHANAN, JJ., absent.

(103 Ga. 351)

MERCHANTS' NAT. BANK OF ROME v. FOUCHÉ.

(Supreme Court of Georgia. July 28, 1898.)

NATIONAL BANKS—ASSESSMENT OF STOCK—SALE.

A sale of all the shares of stock held by a shareholder in a national bank when such sale is made, under the provisions of and for the purpose set forth in section 5205, Rev. St. U. S., as amended by Act June 30, 1876, is void,

unless at such sale the stock brings a price equal in amount to the assessment placed thereon under the provisions of that section.

(Syllabus by the Court.)

Error from city court of Floyd county; G. A. H. Harris, Judge.

Action by J. S. Fouché against the Merchants' National Bank of Rome. A demurrer to the complaint was overruled, and defendant brings error. Reversed.

O. N. Featherston, for plaintiff in error. Fouché & Fouché, for defendant in error.

FISH, J. The capital stock of the Merchants' National Bank of Rome became impaired 25 per cent, and, in pursuance of the provisions of section 5205, Rev. St. U. S., an assessment of 25 per cent. was levied upon the shareholders, pro rata, to make good such impairment. One of the shareholders neglected or refused to pay his pro rata of this assessment, and all of his stock was offered for sale and bid off by the plaintiff (defendant in error), at the price of \$10.90 per share, at public auction had in conformity with the statute. The officers of the bank refused to deliver the stock to the plaintiff, upon the tender of the amount of his bid, whereupon he sued the bank for the difference between the real value of the stock at the date of sale and the sum at which it was knocked off to him. A demurrer was filed to the petition, the main ground of which was that the petition showed the sale to be void because the amount of the bid was less than the amount of the assessment. The demurrer was overruled, and the defendant excepted. Section 5205, Rev. St. U. S., prescribes that "every association whose capital stock shall have become impaired by losses or otherwise, shall, within three months after receiving notice thereof from the comptroller of the currency, pay the deficiency in the capital stock by an assessment upon the shareholders, pro rata, for the amount of capital stock held by each." Section 4, Act June 30, 1876 (Rev. St. U. S. § 5205), further provides "that if any shareholders of such bank shall neglect or refuse, after three months' notice, to pay the assessment as provided in this section, it shall be the duty of the board of directors to cause a sufficient amount of the capital stock of such shareholder or shareholders to be sold at public auction (after thirty days' notice shall be given by posting such notice of sale in the office of the bank, and by publishing such notice in a newspaper of the city or town in which the bank is located, or in the newspaper published nearest thereto), to make good the deficiency; and the balance, if any, shall be returned to such delinquent shareholder or shareholders." The question made is whether a sale under this law is valid, and can be enforced by the buyer, when the price at which the stock is bid off is less than the amount of the assessment. The intention of the national bank-

ing act is that the capital stock of national banks shall not be worth less than par. And to this end it is provided, by the statute above quoted, that if, by losses or otherwise, the stock of any such bank shall become impaired, then, within three months after receiving notice thereof from the comptroller of the currency, the bank shall pay the deficiency in the capital stock by an assessment upon the shareholders, pro rata, for the amount of capital stock held by each; and if any shareholder shall neglect or refuse, after three months' notice, to pay his pro rata assessment, then the board of directors shall cause a sufficient amount of the stock of such shareholder to be sold at public auction, after proper advertisement, to make good the deficiency. The law contemplates that the burden of restoring an impaired capital shall rest equally on all the shareholders. If some pay their pro rata in full, and the purchasers of the stock of delinquents pay less, then such purchasers hold stock in a corporation on better terms than those who paid in full; and, again, a portion of the impairment, which it was the only object of the assessment to make good, remains, and the evident purpose of the law is thus defeated. Moreover, the statute imperatively states that a sufficient amount of the delinquent's stock shall be sold to make good the deficiency, and the balance, if any, returned to such delinquent shareholder. The law here provides for the disposition of the "surplus" arising from the sale, provided the stock sells for more than the assessment, but, of course, could not entertain the possibility of a deficiency in view of the plain provision that a sufficient amount of the stock must be sold to make good the deficiency. The law, in effect, makes the amount due by each delinquent shareholder, under the assessment on his stock, "an upset price," which it must bring, when sold under the provisions of the statute, and this bidders are presumed to know. We are of opinion, therefore, that as the bid for the stock, in this instance, did not equal the amount of the assessment for the payment of which the stock was offered for sale, there was no legal sale, and the intended purchaser acquired no right or title to the stock upon tendering the amount of his bid. The construction which we have placed upon the statute is the same as that which it has received from the comptroller of the currency under the present and the last preceding administration at Washington. The court below erred in overruling the demurrer. Judgment reversed.

(102 Ga. 471)

JOHNSON v. McCURRY.

(Supreme Court of Georgia. Aug. 5, 1897.)

DEFAULT JUDGMENT—PLEA OF PAYMENT—COSTS—ATTORNEY'S LIEN.

1. Where an action had been brought and marked "in default" before the passage of ei-

ther the pleading act of 1893 or the practice act of 1895, there was no error at the trial thereof, occurring after the latter act took effect, in allowing the defendant, without requiring him to pay the costs, to file a plea setting up a payment alleged to have been made after the default judgment had been entered.

2. As attorneys at law have a lien for their fees upon all suits brought by them, the defendant in a civil action cannot settle with the plaintiff so as to defeat the lien of the latter's attorney, or his right to proceed with the case to recover the amount of his fee. Applying this well-settled rule to the facts of the present case, the verdict in the defendant's favor was contrary to law.

(Syllabus by the Court.)

Error from superior court, Floyd county; W. M. Henry, Judge.

Action by R. H. Johnson against L. D. McCurry. Judgment for defendant, and plaintiff brings error. Reversed.

Henry Walker, for plaintiff in error. E. P. Treadaway and J. B. F. Lumpkin, for defendant in error.

FISH, J. 1. When this case was called for trial in the court below on July 20, 1896, it was in default. Complaint is made by the plaintiff in error that, notwithstanding this fact, the court, over his objection, permitted the defendant to file a plea of payment, without at the same time requiring him, as a condition precedent to opening the default, to pay all costs which had accrued in the case up to that time. In this connection the practice act of 1895 (now embodied in sections 5069 et seq. of the Civil Code) is cited and relied upon. It does require, not only "payment of all costs which have accrued," but that the defendant shall move "within thirty days after the entry of default." The record before us discloses, however, that the present action was instituted on March 7, 1893, and that the judgment of default therein was entered long prior to the passage of that act. Indeed, the case stood in default upon the docket prior to the passage of the pleading act of 1893, which left somewhat in doubt the power of the judge to open a judgment of default even upon payment of costs. It follows, therefore, that neither of these two acts can have any bearing upon the question here presented. Tested by the law as it stood when the judgment of default was entered in the case at bar, there is no merit in the complaint made by the plaintiff in error that no terms were imposed upon the defendant as a condition to allowing him to open the default and file a plea, for this was a matter within the sound discretion of the trial judge. *Lambert v. Smith*, 57 Ga. 25; *Sasser v. Sasser*, 73 Ga. 283; *Russell v. Hubbard*, 76 Ga. 621; *Jones v. Grantham*, 80 Ga. 474, 5 S. E. 764. Moreover, it appears from the record that the plea alleged payment to have been made subsequent to the entry of the judgment by default, and if it were necessary, to open the default, to file

such a plea, there certainly was no error in so doing.

2. The rule of law stated in the second headnote is one no longer open to question. Under the evidence submitted, a finding in favor of the defendant was a legal impossibility, and therefore the verdict returned by the jury was contrary to law, and should have been set aside. Judgment reversed.

(102 Ga. 485)

COMER et al. v. BARFIELD.

(Supreme Court of Georgia. Aug. 5, 1897.)

RAILROADS—INJURY AT CROSSING—CONTRIBUTORY NEGLIGENCE.

1. Though a traveler upon a public highway in approaching a railroad crossing may not observe that amount of care and diligence which would be exercised under like circumstances by an ordinarily prudent person, he is not necessarily precluded from recovering for injuries to his person or property received on the crossing, if, after it is apparent that the engineer of the company is disobeying the provisions of section 2222 of the Civil Code, he then exercises ordinary care and diligence in endeavoring to escape the consequences of the company's negligence.

2. The charge complained of in the present case was substantially in accord with the law as above announced, and the evidence warranted the verdict.

(Syllabus by the Court.)

Error from superior court, Spalding county; M. W. Beck, Judge.

Action by N. G. Barfield against H. M. Comer and others, receivers. Judgment for plaintiff. Defendants bring error. Affirmed.

Hall & Boynton, for plaintiffs in error. Hammond & Cleveland and T. E. Patterson, for defendant in error.

FISH, J. 1. It is provided by section 2322 of the Civil Code that: "No person shall recover damages from a railroad company for injury to himself or his property, where the same is done by his consent, or is caused by his own negligence. If the complainant and the agents of the company are both at fault, the former may recover, but the damages shall be diminished by the jury in proportion to the amount of default attributable to him." Section 3830 declares that: "If the plaintiff by ordinary care could have avoided the consequences to himself caused by the defendant's negligence, he is not entitled to recover. But in other cases the defendant is not relieved, although the plaintiff may in some way have contributed to the injury sustained." Construing these two sections in pari materia, this court, in Railroad Co. v. Luckie, 87 Ga. 6, 13 S. E. 105, speaking through Mr. Justice Lumpkin, said: "It seems to be the clear meaning of our law that the plaintiff can never recover in an action for personal injuries, no matter what the negligence of the defendant may be, short of actual wantonness, when the proof shows that he could by ordinary care,

after the negligence of the defendant began or was existing, have avoided the consequences to himself of that negligence. The law also clearly contemplates cases in which, while the plaintiff is to some extent negligent, he nevertheless could not, by using ordinary care, have avoided an injury resulting from defendant's negligence. Of course, there can be no recovery when the defendant is entirely free from negligence, and uses all proper care to prevent injury. The law of contributory negligence is applicable only where both parties are at fault, and when, also, the plaintiff could not by ordinary care have avoided the injury which defendant's negligence produced." The rule thus evolved was approved and followed in the later case of Railroad Co. v. Gibson, 97 Ga. 489, 25 S. E. 484. Its application to a case wherein it appears that a traveler upon a public highway was injured at a railway crossing under circumstances suggesting a doubt whether his own contributory negligence, in failing to take the necessary precautions to insure his safety, is to be regarded as the proximate or efficient cause of his injury, must, of course, depend largely upon the character and degree of the negligence with which the railway company is charged. In this connection it is important to note the duty, relatively to a traveler on a public highway, which devolves upon the company of observing extra precautions in order to avoid casualties at grade crossings. Section 2222 of our Civil Code provides for the erection of "blow posts" by the company upon its right of way, at a distance of 400 yards from, and on either side of, every public road crossing, and declares that the company's "engineer shall be required, whenever he shall arrive at either of said posts, to blow the whistle of the locomotive until it arrives at the public road, and to simultaneously check and keep checking the speed thereof, so as to stop in time should any person or thing be crossing said track on said road." It will therefore be seen that, if the requirements of this section are strictly observed, a collision at a public road crossing can seldom, if ever, occur; and it follows that the danger of driving a vehicle upon and over such a crossing without first observing the ancient rule that a traveler, before so doing, must "stop, look and listen," is not one so patent as to warrant the conclusion that it is negligence per se to endeavor to cross without taking such precautions. At any rate, our general assembly has seen fit to prescribe that the traveler shall be given ample warning of the approach of a train by a continuous blowing of the whistle of the locomotive from the time it reaches the "blow post" until it arrives at the crossing; and, in the event the company fails to discharge its duty in this respect, it does not lie in its mouth to say that the traveler has voluntarily, and through his own negligence alone, placed himself in a situation of

peril by driving on the crossing without taking steps to ascertain whether or not a train was approaching. The circumstances under which he did so may perhaps have been such as to negative the assumption that a person of ordinary prudence would have done likewise; still his exposure to danger would be traceable, not alone to his own heedlessness, but to the culpable omission on the part of the company's servants to give him in time the warning to which he was entitled under our statute. If the company's negligence ends here, and the traveler sustains injury by reason of being thrown from his vehicle because unable to control his horse, doubtless the company might reply to any claim upon it for damages that he himself was not without fault, and might by the exercise of ordinary care "have avoided the consequences to himself caused by" its negligence. See Civ. Code, § 3830, above quoted. But this defense could not be urged if the company, after omitting to warn the traveler of the impending danger, follows up its negligence in this regard by a total failure to observe the additional duty imposed upon it by statute of having its train under perfect control, and itself inflicts the injuries by negligently running him down with its locomotive. This would be the immediate and efficient cause of the injury inflicted upon him; and if, as soon as his peril was apparent, he used all diligence to avert the catastrophe, it could not be said that by ordinary care he might have escaped the consequences to himself of this particular and most aggressive act of negligence on the part of the company. Therefore he would not be entirely precluded from recovering damages, although, being chargeable with contributory negligence, because acting in concert with the company in bringing about the situation of peril to himself, he could not in good conscience, or (as is more to the point) under section 2322 of the Civil Code, recover damages undiminished "in proportion to the amount of default attributable to him."

2. It appeared in the case at bar that the vehicle, for injury to which the plaintiff claimed damages, had been loaned to one Patterson, who was in charge thereof, and was driving the animal attached thereto, on the night the casualty occurred. The presiding judge, as was unquestionably proper, tried the case upon the theory that the plaintiff's right to a recovery necessarily depended upon the inquiry whether, under the circumstances brought to light, Patterson himself, had he been injured rather than killed outright in the collision, could have recovered damages against the defendants. In this connection his honor charged the jury: "If Patterson had been intrusted with Barfield's buggy, and was driving it, and drove it upon the railroad track, and the buggy at the crossing was struck and injured by defendants' locomotive, and both Patter-

son and defendants' agents were at fault, and the circumstances were such that, after defendants' negligence (if there was such negligence) became operative as to Patterson and plaintiff's property, Patterson could not have avoided the consequences of defendants' negligence by the exercise of ordinary care, then plaintiff is entitled to recover damages, but the damages should be diminished by the amount of default attributable to him." As we understand the facts of the case, this charge was not only substantially correct as an abstract proposition of law, but was relevant and well adapted to one of the main issues in controversy. A very similar charge was approved in Gibson's Case, supra, which was an action for the homicide of the plaintiff's son, who was killed while endeavoring to cross the defendant's railroad at or near a public crossing. It clearly appears from the record now before us that the defendants were culpably negligent. Even though an ordinarily prudent person might not, under the circumstances, have failed to observe the approach of the train, still it was not, as matter of law, incumbent upon Patterson to anticipate that the defendants' servants in charge of the train would disregard and violate a criminal statute, to the protection incident to an observance of which he was entitled. So we are not prepared to say that the trial judge erred in giving the above quoted charge, or that the jury were not warranted in reaching the conclusions indicated by their verdict. Judgment affirmed.

(105 Ga. 380)

BLACKSTONE v. CENTRAL OF GEORGIA RY. CO.

(Supreme Court of Georgia. July 19, 1898.)

INJURY TO EMPLOYE—PLEADING—PETITION—SUFFICIENCY.

1. Though the petition of an employé of a railway company, suing the latter for personal injuries, may contain allegations from which it might be inferred that it was the plaintiff's duty to have known and to have removed the cause from which his injuries resulted, yet, when such an inference does not necessarily follow from the averments of the petition taken as a whole, and it affirmatively alleges that the plaintiff was "wholly without fault," and that at the time he was injured he was attending to his duties, and was not aware of the danger to which he was exposed, the petition is good as against a general demurrer.

2. Where, however, the cause of the injury was alleged to be a pole, concerning which the petition, in general terms, only alleged that it was "too near the track," and the defendant by special demurrer made the point that the petition did not allege "how near said pole was to the track," the petition ought to have been amended so as to set forth the facts as to this matter more fully and explicitly; and, in the absence of such an amendment, this court will not reverse a judgment sustaining the demurrer and dismissing the action.

(Syllabus by the Court.)

Error from city court of Richmond: W. F. Eve, Judge.

Action by H. F. Blackstone against the Central of Georgia Railway Company. Judgment for defendant on demurrer, and plaintiff brings error. Affirmed.

Henry C. Roney and J. R. Lamar, for plaintiff in error. J. C. C. Black, for defendant in error.

LITTLE, J. The question presented is whether or not the petition sets out a cause of action. The defendant contends that it does not, because it appears that the plaintiff's injury was caused by his own negligence, and because by the exercise of ordinary care he could have avoided the consequences of the defendant's negligence, and because it appears that the plaintiff was not free from fault, and because it was the duty of the plaintiff to have known of the situation of the electric pole, and because the petition does not allege how near the pole was to the track. We are not able to say that all of the reasons given in the demurrer are sound. The allegation of the petition is that the plaintiff was in the discharge of his duty when he was injured. It is true that at the time he was injured he was mounted on a ladder attached to one of the cars while the train was in motion. Ordinarily this would be held an act of negligence, but, referring to it, the petitioner alleges that it was his duty to place himself in that position. It would also seem, in the absence of explanation, that the plaintiff could have avoided the consequences of the defendant's negligence, if it was negligent, by the exercise of proper care on his part, but the allegations in the petition are that the very acts which seem to show a want of prudence were done strictly in the discharge of the plaintiff's duty. We are not at liberty to disregard such allegations in construing the petition, and cannot, therefore, say that, notwithstanding such allegations, the plaintiff contributed to the injury, or that he could have avoided the same by the exercise of proper care, or that the injury was occasioned by his own negligence; nor can we rule, as a matter of law, that it was the plaintiff's duty to have known of the electric pole which caused his injury, and its proximity to the track. While the petition sets out the fact that the plaintiff at the time of the injury was yard master of the defendant in its railroad yards in the city of Augusta, it also sets forth the duties of such an employé; that is, it was his duty to switch and make up cars and trains of cars in the yard, superintend their transfer to the main line of road, and to do general yard work. What duties other than those enumerated this work imposed, we have no means of ascertaining. We of course recognize the principle that if the plaintiff had knowledge of the location of the electric pole, or if, from his duties as yard master, or his familiarity with the yard, he was chargeable with such knowledge, or

if he had charge and control of the yard in which the pole was located, with power, as the representative of the defendant, to place such pole in proper position, he would not be entitled to recover. But the petition does not contain any reference to these facts. On the contrary, it alleges that at the time the plaintiff received the injury he was in the discharge of his duty, and was wholly without fault, and that the injury sustained by him was occasioned by the negligence of the company in erecting and maintaining such pole at the place where it was located. Therefore we cannot say, as a matter of law, that, because he discharged all the duties of yard master, it was within his power to remove such pole, nor that he was chargeable with notice thereof, nor necessarily guilty of negligence in occupying the dangerous position in which he voluntarily placed himself at the time of the injury.

2. In setting out the manner in which the injuries were inflicted, the plaintiff alleged that he was struck by an electric light pole in the yard of the company on the side of the track of said road, and that said electric light pole was too near the track, and caused the injury which he sustained. If the plaintiff is entitled to recover, it is because of the negligence of the defendant or some of its agents, and such injury must have been sustained by the plaintiff without any negligence on his part. While the petition sets out as a fact that the injury was sustained because the pole was erected and maintained too near the track, these allegations are too general and indefinite to withstand the effect of a special demurrer. Whether or not the pole was too near the track is a question of fact to be determined by the jury. For some purposes it might be; for others, not; and when one is injured by coming in contact with some object near the track of a railroad, while in the performance of his duty in the running and operation of a train of cars, it is not sufficient to allege in general terms that such object was erected too near the track, because such allegation is a conclusion, and does not of itself show a specific act of negligence, in having erected and maintained such object. We do not mean to say that in the absence of a special demurrer directed to this general allegation the petition would not, when considered as a whole, be held to be good; but in this case the defendant specially demurred to this allegation as being insufficient, and, as the plaintiff counted solely upon the erection and maintenance of this pole too near the track as the only act of negligence on the part of the defendant, we must rule that the allegation was too general to withstand the effect of the special demurrer, and upon its interposition the defendant was entitled to have the facts as to this matter more fully and explicitly set out. The general allegation could of course have been cured by amendment, but that was not done, nor offered to be

done; and on this ground we think the demurrer was properly sustained, and find no error in the judgment of the trial judge in dismissing the petition. Judgment affirmed. All the justices concurring.

(102 Ga. 506)

KELLER v. STATE.

(Supreme Court of Georgia. Aug. 10, 1898.)

SEDUCTION—ACCOMPLICES—EVIDENCE—WITNESSES
—STATEMENT OF ACCUSED—REMARKS OF
COURT—INSTRUCTIONS—APPEAL.

1. Though, in the trial of an indictment for seduction, the accused requested the sequestration of the state's witnesses, it was not an abuse of discretion to allow the father and mother of the woman alleged to have been seduced, and who was the prosecutrix in the case, to remain in the court room, and testify as witnesses, the record disclosing no reason for concluding that so doing prejudicially affected the accused, and it also appearing that the case turned mainly upon the testimony of the prosecutrix herself.

(a) The grounds of the motion for a new trial filed in the present case, alleging improper communications between the parents and the daughter by means of signs or signals while the testimony was being elicited, were not only not verified by the judge, but his certificate in effect negatives the occurrence of any such misconduct.

2. There was no error in refusing to permit counsel, in examining a witness, to ask questions, the answers to which would apparently have been irrelevant to the issue on trial, when the purpose for which the questions were asked was not disclosed to the court, though the counsel asking the questions was requested to do so by the judge. This is true even though it may have subsequently appeared that the answers to these questions might, in connection with other evidence, have been admissible and material.

3. There being in the trial of an indictment for seduction evidence relating to an offer of marriage, either bona fide or pretended, alleged to have been made by the accused to the woman after the institution of the prosecution, and the record disclosing that counsel for the accused in his concluding argument "was discussing the legal effect of the alleged offer of marriage," this court cannot, in the absence of further light, undertake to say that the trial judge erred in inquiring of the counsel whether "the offer of marriage was still open"; the judge certifying that this question was asked "to learn from counsel his position in the case."

4. The victim of a seduction is not an "accomplice" to the offense committed, in the sense in which the word just quoted is used in section 991 of the Penal Code, requiring the testimony of at least two witnesses to convict of a felony, or corroborating circumstances, "where the only witness is an accomplice."

5. In a trial for seduction it is proper for the jury to take into consideration any evidence tending to show that the woman was of a lewd disposition or lascivious nature, this evidence being material in determining the question whether she was or was not in fact virtuous at the time of the alleged seduction, and, if so, in deciding whether she was really seduced by persuasion and promises of marriage, or yielded her virtue because of wanton and lustful desires.

(a) There was, however, in the present case, no error in refusing to give in charge to the jury a request substantially embodying the law as above stated, when there was no evidence upon which to base the same.

6. It is competent, in the trial of an indictment

for seduction, for the state to prove that more than one act of sexual intercourse had taken place between the accused and the woman alleged to have been seduced, and that upon each occasion after the first the accused continued to make promises of marriage. In drawing out such testimony it is within the discretion of the court to allow the woman to be asked leading questions.

7. It is not competent, in such a trial, for the accused to prove acts of sexual intercourse between the woman and any person or persons other than himself, occurring after the time when the alleged seduction took place.

8. A woman who has never been married, and who has never had sexual intercourse, is in law virtuous, in the sense that she may be the victim of seduction; but if she yields to a man, not because of persuasion and promises of marriage, or by reason of other false and fraudulent means, but because she is lustful, wanton, and desirous of the intercourse in order to gratify her own passions, she is not seduced. A woman of the character just indicated may nevertheless be seduced if, notwithstanding her passionate nature, she keeps her chastity, and surrenders it because of persuasion and promises of marriage, which, in connection with her love for and confidence in the man, overcome her virtue.

9. In passing upon the statement of the accused, the jury may consider whether or not it is consistent and true, and in determining what weight should be given to it may also take into consideration the testimony of the witnesses sworn in the case, and test the statement in the light thereof.

10. The ground of the motion for a new trial predicated upon alleged newly-discovered evidence presents no cause for setting aside the verdict, and does not commend itself to favorable consideration. When all the affidavits pro and con filed in connection with this ground are considered, no reason is afforded for believing that at another hearing the accused would be able to produce any credible evidence tending to show that the prosecutrix was unchaste at any time prior to the alleged seduction.

11. The numerous grounds of the motion for a new trial not specifically covered by the rulings above announced disclose no cause for reversing the judgment.

(Syllabus by the Court.)

Error from superior court, Chatham county.

Francis B. Keller was convicted of seduction, and he brings error. Affirmed.

Garrard, Meldrim & Newman, for plaintiff in error. W. W. Osborne, Sol. Gen., for the State.

FISH, J. In the case of Johnson v. State, 14 Ga. 62, this court stated the rule regarding the sequestration of witnesses to be that, while the state, before the examination commences, "may demand that the witnesses should retire, in order to each being questioned in the absence of the others," the court was not bound, at the instance of the accused, to take any action in the premises, though a request on his part that an order looking to this end be passed might very properly be granted "as matter of indulgence, and not of right." Since the adoption of our Code, a much more equitable practice has been of force, whereby the accused is put upon an equal footing with the state in this respect, and the court is enjoined to ef-

fect the object of the rule so "far as practicable and convenient." Pen. Code, § 1017; *Turbaville v. State*, 58 Ga. 545. As formerly, however, "it is in a great degree discretionary with the presiding judge whether he will allow some" of the witnesses to remain in the court room to assist in the conduct of the case, when he is requested so to do by one of the parties. *Carson v. State*, 80 Ga. 170, 5 S. E. 295; *Dale v. State*, 88 Ga. 557, 15 S. E. 287; *Betts v. State*, 66 Ga. 508; *May v. State*, 94 Ga. 76, 20 S. E. 251; *Hinkle v. State*, 94 Ga. 596, 21 S. E. 595; *Thomas v. State*, 27 Ga. 287, 296. Certainly, in the present case, there was no abuse of discretion in acceding to the request of the solicitor general that the prosecutrix might be permitted to remain in the court room to assist him in the prosecution. And, even though it may not have been likewise proper to also allow her father and mother to be present during the examination of the witnesses, it is equally certain that the error (if any) thus committed was one unattended with any injury to the accused. The record discloses that the case turned mainly upon the testimony of the prosecutrix herself, and that of the father and mother bore only indirectly upon the controlling questions at issue, and was of no great materiality. We therefore think it far from reasonable to assume that they were influenced in testifying as they did by what fell from the lips of other witnesses. The accused introduced in his behalf no evidence whatsoever, and accordingly no conflict as to even minor matters resulted, as might have been the case had these two witnesses been introduced in rebuttal to evidence elicited from witnesses testifying in his favor. Indeed, the record before us falls utterly to present any reason for concluding that the action of the court of which complaint is made in any way operated to his prejudice. It was insisted in the argument here that, although it may not have been improper, in the first instance, for the court to allow the prosecutrix and her father and mother to remain in the court room, it was manifest error to permit them to do so after counsel for the accused had called the court's attention to "signs" made by the former to her father while he was on the stand, and to similar "signs" made by the mother to the prosecutrix while the latter was testifying. It was also urged that the court committed error in not thereupon promptly declaring a mistrial. An inspection of the record shows, however, that the several grounds of the motion for a new trial setting forth the complaint of the accused concerning this alleged misconduct on the part of the prosecutrix and her mother cannot properly be considered by this court, as the same are not verified. The trial judge, in this connection, certifies that he "was looking directly at the parties in both instances, and saw no signs made"; yet, when attention was directed by counsel to

this alleged improper conduct, "declared with positiveness that anything of the kind was wrong, and must not be done. There was no request that a mistrial be declared." If counsel was satisfied that the prosecutrix and her parents were guilty of misconduct calculated to prejudice the accused, notwithstanding the court had failed to observe the same, the proper course to pursue would have been to request the court to then and there investigate into the truth of the matter, and, if the charge preferred against the witness was sustained, to declare a mistrial. See *Smalls v. State* (Ga.) 29 S. E. 153. It is too late, after verdict, to complain for the first time of matters which might have been made the basis of a motion for a mistrial. *Railroad Co. v. Powell*, 89 Ga. 601, 16 S. E. 118; *Edwards v. State*, 90 Ga. 143, 15 S. E. 744; *Farmer v. State*, 91 Ga. 720, 18 S. E. 987.

2. In another ground of his motion for a new trial, the accused complains that the court refused to permit his counsel to ask the prosecutrix, on her cross-examination, concerning her physical condition on a specified date some two years or more after her alleged seduction, or as to the birth of a second child, with which she was then pregnant. The purpose for which counsel sought to elicit testimony on this line was not stated to the court at the time, but was for the first time disclosed when the accused filed his amended motion for a new trial. As counsel therein undertakes to explain, he intended to follow up his questions to the prosecutrix by showing that her pregnancy was not known to the accused when he then made to her an offer of marriage; that she had stated to her attending physician, who was present in court as a witness for the accused, that the father of both of the children born to her was the same man; and that from the admitted absence of connection of the prosecutrix with the accused for over a year before the birth of the second child "it was a natural impossibility for the defendant to be father of the second child, and therefore, according to her admission, not the father of the first one." The questions which counsel proposed to ask the prosecutrix were apparently totally irrelevant to the issue on trial. That he was not allowed to put them to the witness can afford no just cause of complaint, as he voluntarily chose not to reveal to the court the supplemental evidence which he now claims it was in his power to produce (but which he did not thereafter offer), in connection with which the answers he expected to elicit from the prosecutrix might have had some bearing on the case. It appears rather that the accused did not deal fairly with the court than that the court did not deal fairly with the accused, with regard to the matter under discussion.

3. The circumstances under which the trial judge put to counsel the inquiry referred to

in the third headnote are not disclosed by the record, and, in the absence of fuller light on the subject, we are not prepared to say any error was committed. We confidently assert as an abstract proposition that it is not improper for the court to endeavor "to learn from counsel his position in the case," and to that end to inquire of him concerning any point in issue as to which counsel has not made his attitude free from doubt. We cannot assume that a trial judge has, with this object in view, unwittingly prejudiced the rights of the party before the court. On the contrary, it being incumbent on a party alleging error to make the same clearly to appear, we are bound to presume, where this requirement is not met, that the occasion called for the action taken by the judge, and that no injury to the party complaining resulted therefrom in point of fact.

4. Exception is taken to the refusal of the court to give in charge to the jury the following written request: "Under the law of Georgia, seduction is a felony, and by [statute] the testimony of an accomplice, uncorroborated, is insufficient to convict. I charge you in this case that the testimony of the prosecuting witness, Florence W. Marshall, must be corroborated, before there can be any conviction." No error was committed in declining to give to the jury this instruction. Where a virtuous unmarried female has been cruelly betrayed, it is evident that she has been much more sinned against than sinning; and the law regards her as the victim, rather than as an accomplice, of him who accomplishes her ruin, and brings about her downfall. Thus is she regarded even where she has given her consent, and voluntarily submits to an operation intended to produce an abortion. 1 Am. & Eng. Enc. Law (2d Ed.) 390, citing numerous decisions. "The test, in general, to determine whether a witness is or is not an accomplice, is the inquiry: Could the witness himself have been indicted for the offense, either as principal or as accessory? * * * It follows that a participant in an offense, however morally guilty he may be, whose connection with the forbidden transaction does not render him liable to an indictment therefor, is not an accomplice." *Id.* Applying this test, the conclusion seems irresistible that the prosecutrix in the case at bar is not to be deemed an accomplice of the accused.

5. Counsel for the defense further requested the court to charge: "While, as a general rule, unmarried females who are virgins are virtuous, and those who, by their own consent, have ceased to be virgins are not virtuous, still the question of moral chastity should be considered by the jury in determining the fact whether the woman be or be not virtuous. The jury have the right to consider further whether the woman was seduced by the accused, or joined with him in the gratification of lewd and lascivious desire, not excited by arts and importunities upon

his part." We recognize the fact that the above request was substantially in accord with the law announced in the fifth headnote, which follows the decision of this court in *O'Neill v. State*, 85 Ga. 409, 11 S. E. 856. In the present case, however, such a charge would have been highly improper, for there was no evidence before the jury upon which it could have been predicated.

6. Error is assigned "because the court permitted the state to prove, over the objection of defendant's counsel, that promises of marriage were made after the alleged seduction, the question being, 'Did he make promises each time?'" and the grounds of objection being that "the question was leading, and the evidence sought was irrelevant." As to the first point raised, suffice it to say that this court has uniformly held it to be within the discretion of the trial judge to permit leading questions to be propounded to a witness. There is no merit in the contention that the evidence was irrelevant. The present case has many of the features of, and is quite similar to that of, *McTyler v. State*, 91 Ga. 254, 18 S. E. 140, wherein it was held: "On a trial for seduction alleged to have been accomplished by persuasion and promises of marriage, promises of marriage made and letters written by the accused to the woman after the seduction, but pending the marriage engagement, are admissible in evidence."

7. It by no means follows, however, that it is competent, on such a trial, for the accused to prove acts of sexual intercourse between the female and a person or persons other than himself, occurring after the time when the alleged seduction took place. *Mann v. State*, 34 Ga. 1. That the victim of his lust thereafter follows a life of shame, if not traceable solely to the wrong he has perpetrated upon her, is a circumstance under which he cannot take shelter, for it is of no evidentiary value in determining whether or not she had maintained her virtue until deceived by him. Accordingly, we think the court properly ruled that the evidence concerning the birth of a second child born to the prosecutrix, of which the accused was certainly not the father, was inadmissible.

8. The meaning of the term "virtuous," as used in our statute (Pen. Code, § 387, declaring it penal to seduce "a virtuous unmarried female," is for determination by the court, not by the jury; though "whether a particular woman had parted with her virginity before the alleged seduction took place is a question for the jury." *O'Neill v. State*, 85 Ga. 383, 11 S. E. 856, followed in *McTyler v. State*, 91 Ga. 255, 18 S. E. 140. A woman who has never been married, and who has never had sexual intercourse, is in law virtuous, in the sense that she may be the victim of seduction. Whether such a woman has really been seduced, or only joined with her alleged seducer in the gratification of lewd and lascivious desire, not excited by his arts and importunities, but having its

roots in her own depraved and debauched mind, is a question the jury are to consider under all the facts and circumstances before them. Id. And, in any given instance, they are to decide whether she yielded to the accused, not because of persuasion and promises of marriage, or by reason of other false and fraudulent means, but because she was lustful, wanton, and desirous of the intercourse in order to gratify her own passions. Every virgin, however passionate her nature, may be seduced if, notwithstanding her lustful desires, she keeps her chastity, and surrenders it only because of persuasion and promises of marriage, which, coupled with her love for and confidence in her tempter, overcome her virtue, and cause her to yield to his importunities. For "the weakest of all weak virgins is under the protection of law against the seducer, and, if her fall can be traced to actual seduction, the law will be, and should be, her avenger." O'Neill's Case, 85 Ga. 410, 11 S. E. 858. Exception was taken to certain extracts from the charge of the court bearing upon this branch of the case, which were substantially in accord with the principles of law just stated. Without dealing specifically with the various criticisms thereon urged by counsel for the accused, we rule generally that no error was committed in this connection. As no new or specially important questions are thereby presented for determination, no further discussion or citation of authority would be profitable.

9. Another ground of the motion for a new trial assigns as error the following charge: "If you find the statement consistent and true, you have the right to believe it in preference to the sworn testimony in the case. You should not do so carelessly and capriciously, but under your oaths as jurors, considering the statement in connection with the sworn testimony in the case, and testing it in the light of that testimony, give it such weight as you think proper." The error assigned is "that said charge is illegal, in that the weight to be given to the statement of a prisoner is not to be tested in the light of the testimony; there being no test by which the jury shall determine the degree of belief that they shall give to the statement of a prisoner." All of us, except Mr. Justice LITTLE, are of opinion that there was no error in this charge. The statute provides that "the jury may believe such statement in preference to the sworn testimony in the case." Pen. Code, § 1010. The jury can do nothing carelessly, capriciously, or arbitrarily. The statute, interpreted according to the meaning of the words used, is the measure of their power. "Belief," is a persuasion of the truth, or an assent of the mind to the truth of a declaration, proposition or alleged fact. See Webster Dict. "Preference" means the act of preferring one thing above another; estimation of one thing more than another; choice of one thing rather than another.

Id. The jury cannot believe the statement of the prisoner unless they are persuaded of its truth, nor can they believe such statement in preference to the sworn testimony in the case until they have compared the one with the other, determined their preference, and decided which of the two they will accept as the truth. In no other way can they believe one in preference to the other. Surely, the statute never authorized the jury to accept the prisoner's statement without consideration of its own truth, and without regard to the existence of the sworn testimony.

10. We are unable to say that the court below committed error in refusing to set the conviction aside because of the alleged newly-discovered evidence presented in connection with the motion for a new trial filed by the accused. The showing made by him was fully met by counter affidavits presented in behalf of the state, and accordingly it does not satisfactorily appear that, if afforded the opportunity, the accused would be able at another hearing to produce credible witnesses whose testimony would outweigh that of the state's witnesses concerning the chastity of the prosecutrix previous to her alleged seduction. The rule is well settled that a new trial will not be granted because of newly-discovered evidence, unless it be of a character to influence the jury, upon another investigation, to reach a different conclusion concerning the controlling facts at issue.

11. A number of minor questions are also presented by the motion for a new trial, but none of them are of sufficient importance to require special notice. The foregoing discussion disposes of every assignment of error which could possibly be regarded as affording ground for a reversal of the judgment of the court below. The charge of the court was, as a whole, a clear and able exposition of the law governing the case, and fully covered every request to charge, in so far as it was legal and pertinent. The accused introduced no evidence in his own behalf, but chose to rely solely upon his unsworn statement. The jury credited rather the evidence in behalf of the state, and, for aught that appears, their verdict should be allowed to stand. Judgment affirmed. All the justices concurring.

LITTLE, J. (concurring specially). I concur in the judgment, but dissent from the proposition announced in the ninth headnote.

(103 Ga. 841)

MOHRMAN v. CITY COUNCIL OF AUGUSTA.

(Supreme Court of Georgia. July 28, 1898.)

CERTIORARI—CONVICTION OF MISDEMEANOR—
BOND.

Section 4639 of the Civil Code applies exclusively to civil cases, and therefore the provision therein which declares that a party applying for the writ of certiorari "shall give bond and good security, conditioned to pay the ad-

verse party in the cause the eventual condemnation-money," is not applicable where one convicted in a municipal court of a violation of a city ordinance is seeking to obtain a writ of certiorari.

(Syllabus by the Court.)

Error from superior court, Richmond county; E. H. Callaway, Judge.

A. H. Mohrman was convicted of violating an ordinance of the city council of Augusta, and from an order dismissing the writ of certiorari, she appeals. Reversed.

P. J. Sullivan, for plaintiff in error. M. P. Carroll and W. H. Barrett, for defendant in error.

FISH, J. Plaintiff in error was convicted in the recorder's court of the city of Augusta of violating an ordinance of that city, and fined \$100. Her certiorari from the judgment of the recorder was dismissed in the superior court upon the ground that the bond given by her, and attached to her petition for certiorari, did not appear to have been approved by the recorder who tried the case. The bond was for the payment of \$100, or the eventual condemnation money, "and all future cost in said case." Error is assigned upon the dismissal of the certiorari. Section 4639 of the Civil Code provides that "before any writ of certiorari shall issue . . . the party applying for the same . . . shall give bond and good security, conditioned to pay the adverse party in the cause the eventual condemnation-money, together with all future costs, . . . which bond shall be filed with the petition for certiorari," etc. While the language of this section seems sufficiently broad to cover all cases, we are confident it was never intended that the giving of an eventual condemnation money bond should be a condition precedent to the issuance of a writ of certiorari in a case where one has been convicted in a corporation court of the violation of a municipal ordinance. What would be the eventual condemnation money in such a case? We cannot believe that the statute means a person so convicted and fined shall give an eventual condemnation money bond for the payment of the fine, upon which bond judgment may be entered up against the principal and his sureties in the event his certiorari be overruled or dismissed. If so, what would be the procedure if an alternative sentence (fine or imprisonment) should be imposed, and the petition, upon the overruling of his certiorari, should elect to serve the term of imprisonment rather than to pay the fine? What would be the liability on the bond in such a case? Again, suppose the sentence should be to serve a term in prison or in the city chain gang, without the imposition of a fine; what then would be the eventual condemnation money? Evidently the provisions of the section under consideration as to giving the bond apply exclusively to civil cases, and not to a case where one convicted in a mu-

nicipal court of a violation of a city ordinance is seeking to obtain a writ of certiorari; the latter case being in its nature a criminal proceeding. *Cranston v. Mayor*, etc., 61 Ga. 572. We know of no law requiring any bond to be given as a condition precedent to the issuance of the writ of certiorari, where one has been convicted in a corporation court of the violation of a municipal ordinance. And, as the plaintiff in error was not required to give any bond in order to obtain the writ, it was immaterial whether or not the bond she did give had been approved by the recorder who tried the case. Therefore the court below erred in dismissing the certiorari for the want of such approval. Judgment reversed.

(102 Ga. 461)

DIXON v. BRISTOL SAV. BANK et al.

(Supreme Court of Georgia. Aug. 5, 1897.)

ESCROW—UNAUTHORIZED DELIVERY—RATIFICATION.

1. An escrow obtained from the depositary by a fraud practiced upon him by the grantee, who had not performed the conditions upon which delivery was to be made, the depositary being innocent of any wrong or bad faith, passes no title either to the grantee or to an innocent purchaser from the latter.

2. If, however, the grantor, after such improper delivery, ratified the same, the delivery was effectual to pass title from the grantor. (a) Whether or not in the present case there was ratification, as claimed, was a question which the judge ought to have submitted to the jury, instead of solving himself by granting a nonsuit.

3. "A grantor cannot deliver a deed to a grantee or his attorney as an escrow. Such a delivery would be equivalent to adding a parol condition to the instrument. To make the deed an escrow, it should be delivered to a third person, to be by him delivered to the grantee, upon the performance of any required condition." The agency implied in the above-quoted language is an agency, in behalf of the grantee, to obtain possession of the instrument for the latter, because, in a broad sense, every depositary of an escrow is the agent of both parties. (a) Whether, in the present case, the depositary was or was not the agent of the grantee named in the escrow, to procure its delivery from the maker, was also a question for the jury.

4. In view of the law laid down in the first head note, the question of possession in this case is immaterial, for the reason that the parties claiming under the grantee named in the escrow cannot be protected unless either the grantor ratified its delivery, or the depositary was the grantee's agent to procure delivery.

(Syllabus by the Court.)

Error from superior court, Fulton county; J. H. Lumpkin, Judge.

Action by Annie Dixon against the Bristol Savings Bank and others. From a judgment of nonsuit, plaintiff brings error. Reversed.

Alexander & Lambdin, for plaintiff in error. Thos. R. R. Cobb and Rosser & Carter, for defendants in error.

FISH, J. Annie Dixon was the owner of a lot of land in the city of Atlanta. A deed, signed by her, dated February 24, 1891, and purporting to convey the land to F. C. Hitch-

ens, was recorded March 2, 1891. On March 16, 1891, Hitchens made a conveyance of the same land to the Bristol Savings Bank, as security for a loan of \$2,000, and on the same day mortgaged the same property to one Barker, to secure an indebtedness of \$100. This latter deed and mortgage were recorded on March 25, 1891. On December 31st of the same year, Annie Dixon brought her petition against Hitchens, Barker, and the bank, alleging that the deed from her to Hitchens was procured by fraud and without consideration; that it was never in fact delivered by her to Hitchens, or to any one for him, but was left as an escrow with a named depository, from whom Hitchens had, by fraud and without performance of the conditions of delivery, obtained it; that, until two or three weeks before the bringing of the suit, she did not know of the existence of the two liens created on the property by Hitchens; that they were a part of Hitchens' scheme to defraud her of her property; that the property, at the date of the deed to the bank and of the mortgage to Barker, was in possession of certain parties as her tenants. She prayed for a cancellation of the deeds and of the mortgage, and for other appropriate relief. Hitchens denied all allegations of fraud or improper dealing on his part, and insisted that the land had been bought by him from plaintiff, and fully paid for. The bank and Barker answered that they had loaned to Hitchens the money represented by the deed and mortgage in good faith, and without notice or knowledge of any claim of plaintiff upon the property; that their conduct had been blameless and without fraud; that they had no notice or knowledge that plaintiff was in possession of the land by tenants or otherwise, and were informed that she was not so in possession and had no claim to the property. On the trial, the plaintiff introduced evidence tending to prove in substance the following: Plaintiff purchased the property in question in 1877, and subsequently made valuable improvements upon it, she and her tenants being in possession. Hitchens, by false and fraudulent representations of impending litigation, sought to persuade her to put the title to the property temporarily in him. To this end, he prepared a "note of obligation," "the substance of which was that he would restore the property to plaintiff upon the conclusion of the threatened litigation," as well as his promissory note for \$2,700, and desired plaintiff to make him a deed to the property. Instead of following exactly this plan, plaintiff and Hitchens went to the office of an attorney, where Hitchens handed plaintiff the promissory note, and she executed a deed conveying the property to Hitchens. This deed she delivered to the attorney, with the express understanding and agreement of all three that he "should hold the deed until Hitchens paid the money." It was also understood between plaintiff and Hitchens that

there was never to be any payment upon the note, or any delivery of the deed. Plaintiff had agreed to go with Hitchens to Texas as his housekeeper, and, within a day or two after the delivery of the deed to the attorney, she was sent to New Orleans by Hitchens, he following three days later. Before leaving Atlanta, plaintiff instructed Hitchens to place her property in the hands of a renting agent, which he did. One of her tenants was left in one of the houses upon the place. Between the time of plaintiff's arrival in New Orleans and the time when Hitchens joined her there, she received two letters, signed with the name of a friend of hers in Atlanta, but in fact sent by Hitchens, falsely stating that there was trouble in regard to her property, and that some of her furniture had been attached, and advising her to follow the advice of Hitchens in the matter. When Hitchens reached New Orleans, he took from plaintiff, by force and against her will, the "note of obligation" and the promissory note, and then returned to Atlanta. Plaintiff followed him to Atlanta, and called upon the attorney with whom the deed had been deposited. She asked where she could find Hitchens, and told of the theft of the papers. The attorney said that he was very sorry; that Hitchens had "given him \$5 as a fee if anything should come up"; and that he could do nothing for her. She found Hitchens, and he promised to return the stolen papers if she would go to New Orleans; and shortly afterwards, in that city, he executed a paper, and gave it to her, together with her "title papers." She could not read, and did not know the nature of the paper Hitchens signed, but it looked like a deed, and she was told, if she would record it, her property would be all right. Subsequently, in Texas, when she, at the instance of Hitchens, put the papers in her trunk, the trunk was broken open, and the papers stolen. In August, 1891, plaintiff went to Danville, Va., where she remained until December, and then first learned that the property had been mortgaged. She came directly to Atlanta, and employed attorneys to protect her rights. While in Texas, she had received, through Hitchens, some of the rent due on her place, but nothing was ever paid her on the promissory note or as the purchase money of the property. The deeds from her vendor to herself, from her to Hitchens, to the Bristol Savings Bank, and the mortgage from Hitchens to Barker, were introduced in evidence; also, certain letters and telegrams. At the close of the plaintiff's evidence, the trial judge awarded a nonsuit as to Barker and the bank, and to this ruling plaintiff excepted.

1. "Although it is well settled that an escrow delivered without authority or obtained fraudulently passes no title to the grantee or obligee, there is some conflict of opinion as to the right of an innocent purchaser from a grantee who has obtained possession of the escrow without performing the conditions;

but the better opinion seems to be that such a purchaser acquires no title." 6 Am. & Eng. Enc. Law (1st Ed.) 869. See cases cited in note 3. "When the instrument has been placed in the hands of the depositary, the grantee is not entitled to it, nor does he acquire any rights under it, until he has performed the condition upon which the depositary is to deliver it to him." Devl. Deeds, § 321. "Until the condition has been performed and the deed delivered over, the title does not pass, but remains in the grantor. * * * If the depositary deliver the deed without authority to do so from the grantor, or if the grantee obtain possession of it fraudulently, without performing the condition, the deed is void. The deed thus obtained conveys no title either to the grantee or purchasers under him." Id. § 322, and cases cited in note 4. "To maintain the plea of an innocent purchaser, a person must have acquired the legal title, which he seeks to protect against some latent equity or charge on the land. Hence this plea cannot avail a person who has bought on the faith of the possession of the escrow by the person named therein, where such possession has been obtained wrongfully. The conveyance made by the grantee in the escrow cannot affect the legal title, for that remains in the grantor or his heirs. And, as the equities of such purchaser and those of the heirs of the original grantor are equal, the legal title which is vested in such heirs must prevail." Id. § 323. In the leading case of *Everts v. Agnes*, 6 Wis. 453, 4 Wis. 343, it was held that "the fraudulent procurement of a deed deposited as an escrow, from the depositary by the grantee named therein, will not operate to pass the title; and a subsequent purchaser from such grantee, without notice, and for a valuable consideration, derives no title thereby, and will not be protected." The reasoning is that a delivery is essential to the vitality of a deed. The grantor must consent that the deed shall pass irrevocably from his control. It is this consent, express or implied, which gives the instrument efficacy. If there be a conditional delivery, by placing the instrument in the hands of a third person as an escrow, the condition must be strictly complied with before such delivery becomes effectual. Obtaining the instrument from the depositary by fraud, larceny, or any means other than the performance of the condition, is against the assent of the grantor; and as such assent is necessary to a delivery, and a delivery to the validity of the deed, the grantee gets no title, and can convey none. In the case we have under consideration, the uncontradicted testimony is to the effect that the grantor placed the instrument in the custody of the depositary with express instructions to him to deliver it to the grantee upon the payment, by the grantee to the grantor, of a certain note given by the former to the latter, and that the grantee fraudulently procured possession of the instrument from the depositary

without paying the note, the depositary being entirely innocent of any wrong or bad faith. If this be the truth of the case, we have no hesitancy in holding that the instrument passed no title, either to the grantee or to an innocent purchaser from him. The fact that the instrument was not technically an escrow, because of a secret understanding between the grantor and grantee that the note was never to be paid, and that the instrument was never to be delivered (there being no negligence or fraudulent design on the part of the grantor), does not alter the principle of the ruling above announced, but rather strengthens the argument that no title passed from the grantor, because she never intended that the instrument should be legally executed by a delivery to the grantee.

While it is true that the fraud of his grantee in procuring a conveyance cannot be set up by the grantor to defeat the title of a subsequent bona fide purchaser from such grantee, because of the consent of the grantor to the execution and delivery of the conveyance, thus passing the title, yet that is not the case we have to consider. There is evidently a fundamental distinction between a case where, by fraudulent representations, a grantor is induced to execute and deliver a deed, and one where the instrument is obtained from a depositary without the knowledge or consent of the depositor, or compliance with the conditions on which the delivery depends. In the former case the act of the grantor is voluntary; and, no matter what deception may have induced him to execute the conveyance, an innocent third person should not be made to bear the misfortune of the grantor or to suffer for his credulity. In the latter case, there is no assent of the grantor, consequently no delivery, and title never passes from him. See *Everts v. Agnes*, supra. If a deed delivered in escrow be fraudulently abstracted from the depositary by the grantee, without performing the conditions on which it was to be delivered to him, it is void, even in the hands of a bona fide purchaser. *Jackson v. Lynn* (Iowa) 62 N. W. 704. In the case at bar, according to the evidence submitted, Thomas, the depositary, was the special agent of petitioner, authorized by her to do one specific act, strictly ministerial in its character; that is, to deliver the instrument to Hitchens upon the payment of the note by him to petitioner. By the express and unequivocal instructions of his principal, this special agent only had authority to deliver the instrument upon the payment of the note; and a delivery in disregard of such instructions, induced by the fraud of the grantee practiced upon such agent, did not bind the principal, the evidence showing no negligence upon her part. A principal is bound only by the authorized acts of his agent. When Thomas, the special agent of petitioner, delivered the instrument to Hitchens, before the payment of the note, the event which she had prescribed as a condition precedent to

the delivery, it was an unauthorized act of such agent, and a nullity as to petitioner. The instrument never became her deed, because it lacked one of the requisites of a valid deed,—a delivery by the grantor or by some one authorized by her. The equitable rule that, where one of two innocent parties must suffer, he whose act has caused the loss must bear it, we do not think applies, in view of the evidence submitted in this case. There is no more equity in favor of the defendants, the bank and Barker, as innocent purchasers, than there is in favor of petitioner, whose special agent was fraudulently induced by Hitchens to deliver the instrument to him, without his having complied with the condition precedent to a delivery, prescribed by petitioner; and, their equities being equal, the legal title, which remained in petitioner, must prevail. *Devl. Deeds*, § 323, and cases cited in note 1. See *King v. Sparks*, 77 Ga. 285, 1 S. E. 266.

2. Where an escrow has been improperly delivered or obtained from the depositary by fraud, the grantor may ratify the delivery. An express ratification is not necessary, for ratification may be presumed where the grantor has recognized the validity of the delivery, or where he has remained silent when called upon to speak, and others have been injured. His conduct may be such as to create an estoppel in pais as to bona fide purchasers from the grantee. *Coitton v. Gregory*, 10 Neb. 125, 4 N. W. 939; *Reese v. Medlock*, 27 Tex. 120. In order that a ratification should be binding, it must have been made with a full knowledge of all the material facts. *State v. Southwestern R. Co.*, 70 Ga. 12 (3a); *De Vaughn v. McLeroy*, 82 Ga. 700, 10 S. E. 211, and cases cited at bottom of page. In the present case there is no evidence of an express ratification by the grantor of the delivery to Hitchens. Whether plaintiff's acts were such as to raise a presumption of ratification was, under the evidence submitted, a question for the jury. From the loss of most of the papers relating to the matters in dispute, the illiteracy of the plaintiff, and other causes, the evidence on the question of ratification or estoppel is not at all definite, and the inferences to be drawn from it should have been left to the jury. See *Burr v. Howard*, 58 Ga. 564. Where reasonable men might differ as to the inferences to be drawn from certain evidence, the matter should be left to the jury, although there may be no conflict in the evidence. And, under section 5347 of the Civil Code, a nonsuit should be granted only where "all the facts proved and all reasonable deductions from them" do not entitle plaintiff to recover. In the present case the jury might have thought that the meager evidence relating to the matter did not warrant a finding that there had ever been a ratification by the plaintiff. Further, we think that, in the absence of an express ratification, the defendants should have been required to show that they had been injured by plaintiff's al-

lence, inaction, or acquiescence before a ratification of the wrongful delivery could be presumed against her. The grant of the nonsuit cannot therefore be sustained upon the theory that the evidence showed a ratification by the plaintiff.

3. It was contended that, as the depositary was the attorney of the grantee, the deed could not be delivered to him as an escrow; that the result of an effort to do so would be to vest the title immediately in the grantee. In support of this contention was cited the case of *Duncan v. Pope*, 47 Ga. 445, where it was held: "A grantor cannot deliver a deed to the grantee or his attorney as an escrow. Such a delivery would be equivalent to adding a parol condition to the instrument. To make the deed an escrow, it should be delivered to a third person, to be by him delivered to the grantee upon the performance of any required condition." This language, we think, was not intended to apply to cases like the present. It meant that a delivery to the agent or attorney of the grantee, employed to obtain possession of the instrument or to make the purchase for the grantee, was tantamount to a delivery to the grantee. This, we think, is true, but the agency must include the very matter of obtaining the conveyance for the grantee. The rule laid down applies where the delivery is made to the agent of the grantee as such agent, but has no application where the depositary is, though an agent or attorney of the grantee, yet not an agent to procure the conveyance, and the delivery is to him as agent of both parties. The delivery to the solicitor of the grantee of an instrument executed by the grantor will not convert the instrument from an escrow into a deed, provided the delivery is of a character negating its being a delivery to the grantee. *Watkins v. Nash*, L. R. 20 Eq. 262. "The mere delivery of manual possession of the deed is not necessarily a delivery of the deed; and, in cases where the acceptance of an agency from both involves no violation of duty to either, it is competent for the releasor to make the agent of the releasee his own agent for the purpose of holding the deed as an escrow, and returning it to him, the releasor, in case of nonperformance of a stipulated condition. There is no such personal identity between the releasee and his agent as to preclude the latter from becoming the depositary of an escrow." *Railroad Co. v. Iliff*, 13 Ohio St. 235; *Ashford v. Prewitt*, 102 Ala. 264, 14 South. 663. In a broad sense, every depositary of an escrow is the agent of both parties. For the purpose of making delivery upon the performance of the conditions, he is no less the agent of the grantee than the agent of the grantor. *Everts v. Agnes*, supra; *Wellborn v. Weaver*, 17 Ga. 267.

(a) In the present case, Hitchens gave the depositary a small fee to represent him in case "anything should come up." It does not appear that the attorney represented

Hitchens in procuring the execution of the deed; nor that the grantor, at the time of the delivery of the deed to the depository, knew that the latter had been employed to represent Hitchens; nor even that he was so employed prior to that time. The evidence was not such that the trial judge could properly assume that the deed was delivered to the attorney as agent of the grantee. The evidence seems to indicate that the contrary is true, and that the intention was to make the attorney the depository of the escrow, to hold it until the performance of the condition, and then to deliver it to the grantee,—to make the attorney, as to this matter, the agent of both parties. Certainly, the evidence is sufficient to warrant such a finding by the jury, and the question should have been submitted to them.

4. The presumption of delivery, raised by the facts that the deed to Hitchens was given into his possession, and that it had been recorded, was rebutted by evidence that the deed had been placed in the custody of a depository, to be delivered only upon the performance of certain conditions, and that, through the fraud of the grantee, the delivery had been made without such performance. It seemed, therefore, that no title passed to the grantee, and he could pass none to purchasers from him. Such purchasers, claiming under the grantee, could not be protected unless it were shown either that the improper delivery of the deed had been in some way ratified by the grantor, or that the depository was the agent of the grantee to procure the conveyance, so that the delivery to him was, in effect, a delivery to the grantee. The question of possession is therefore not here material. If, however, the purchasers rely for protection upon acts of the grantor, which would estop her to set up her title against them (an estoppel in pais amounting to a ratification) they will have to show that they acted in good faith. Judgment reversed.

(102 Ga. 490)

O'BRIEN et al. v. SPALDING.

(Supreme Court of Georgia. Aug. 10, 1897.)

COMPETENCY OF WITNESS—PRIVILEGED COMMUNICATIONS—EVIDENCE OF ATTORNEY—WILLS—VALIDITY.

1. The act of August 4, 1887, now embodied in section 5271 of the Civil Code, which declares that "no attorney shall be competent or compellable to testify, in any court in this state, for or against his client, to any matter or thing, knowledge of which he may have acquired from his client, by virtue of his relations as attorney," has no application to the competency of an attorney as a witness with respect to essential facts attending the execution of a will in the preparation, and as to the attestation, of which he rendered professional services. In such a matter the attorney is not testifying "for or against his client," or for or against the interests of the client's estate.

2. The fact that the relation of attorney and client had, in a general way, existed for a considerable period of time between an attorney

at law and another person, even if it continued to exist at a time when the latter consulted the former as to the making of a will, does not, in the trial of an issue of *devisavit vel non*, arising upon a paper propounded as the will of such other person, and of which the attorney is the nominated executor, render him incompetent to testify as a witness to all pertinent facts within his knowledge, the witness not availing himself of his privilege as attorney to decline to testify, and the matters as to which he does testify not being such as are excluded from public policy. Accordingly, it is lawful at such a trial to prove by the attorney that the alleged testator conferred with him as to the making of the will, and gave instructions for its preparation (the nature of which the witness may state), and that these instructions were subsequently, by another attorney, to whom they were communicated by the witness, and who was the draftman of the instrument propounded, embodied therein.

3. An attorney at law who attested a will as a subscribing witness is, though he was employed to draft the same, and attend to its execution, competent, in the trial of an application for its probate, to testify as a witness concerning the alleged testator's mental condition; also as to facts showing the latter's knowledge or ignorance of the contents of the paper, and as to all other pertinent facts attending the signing and attestation of the instrument.

4. It is not essential to the validity of a will that the testator should understand the meaning of all the technical terms and legal phraseology therein employed; it is sufficient if he understands the meaning and effect of the instrument as a whole, if the same truly expresses his testamentary intentions as to the disposition of his estate. Even if it were otherwise, there would be, in a given case, no cause for setting aside a will because of the testator's alleged ignorance of the meaning of such terms, when there was ample evidence to warrant a finding that they were explained to and fully understood by him.

5. The evidence, though conflicting, warranted the verdict, and there was no abuse of discretion in denying a new trial.

(Syllabus by the Court.)

Error from superior court, Fulton county; J. H. Lumpkin, Judge.

Proceedings by J. J. Spalding to probate the will of Mrs. Flynn. From a judgment probating the will, Mary M. O'Brien and others bring error. Affirmed.

John L. Hopkins & Sons, Payne & Tye, and Jas. F. O'Neill, for plaintiffs in error. N. J. & T. A. Hammond and John T. Pendleton, for defendant in error.

FISH, J. 1. The record before us discloses that Mr. King, an attorney at law, drafted the instrument offered for probate as the will of Mrs. Flynn, called in person upon her at her home in order that he might read the paper over to her and explain its legal effect, and was subsequently present when she signed it, assisting in and supervising the execution and attestation of the instrument, which he himself signed as one of the attesting witnesses. Whether, under the peculiar circumstances attending and leading up to Mr. King's connection with this matter, the relation of attorney and client existed between him and Mrs. Flynn, is a question as to which the parties are at issue. We shall,

however, in dealing with certain other contentions on the part of the plaintiffs in error, based upon the idea that Mr. King was acting professionally in all that he did in Mrs. Flynn's behalf, assume this to be the truth of the matter, and thus give the plaintiffs the benefit of any doubt there may be in regard thereto. This course will not, on the other hand, be unfair to the defendant in error; for, as we shall endeavor to show, there is no merit in the plaintiffs' contentions above alluded to, even conceding the premise in dispute.

Complaint is made that on the trial of the present case Mr. King was introduced as a witness in behalf of the propounder of the paper offered for probate, and was allowed, over objection, to testify concerning its execution by Mrs. Flynn, as to her mental capacity to make a will, and as to what passed between them when he read over to her and explained the meaning of the instrument he had prepared for her to sign. It is contended by counsel for the plaintiffs in error that, as Mr. King sustained towards the testatrix the attitude of attorney and confidential adviser, he was an incompetent witness to testify concerning any facts or circumstances knowledge of which he had gained while attending to his professional duties in the premises. We do not, however, understand the law to be that the plaintiffs are at liberty to urge this objection. The purpose of the common-law rule declaring that communications between attorney and client are privileged is to protect the client. *Greenough v. Gaskell*, 1 Mylne & K. 98, 103. Strangers are not at liberty to invoke this rule in their behalf. Accordingly, it was early decided in England that "in a suit by next of kin of a testator, challenging a residuary gift made by his will to the executors, on the ground that it was made on a secret trust for an illegal purpose, * * * communications had between the testator and the solicitor employed by him to prepare the will, with reference to the will and the trusts thereof, were not privileged." *Russell v. Jackson*, 8 Eng. Law & Eq. 89, 15 Jur. 1117, and 9 Hare, 387. The correctness of this position has received the unqualified recognition of the supreme court of the United States. *Blackburn v. Crawford*, 3 Wall. 176. Indeed, the doctrine laid down by the English courts appears to have become the firmly-established law of this country. *Graham v. O'Fallon*, 4 Mo. 338; *In re Layman's Will*, 40 Minn. 371, 42 N. W. 286; *McMaster v. Scriven*, 85 Wis. 162, 55 N. W. 149; *Scott v. Harris*, 113 Ill. 447; *Doherty v. O'Callaghan*, 157 Mass. 90, 31 N. E. 726. In the case last cited, *Lathrop, J.*, in pronouncing the opinion of the court, said: "Undoubtedly, while the testator lives, the attorney drawing his will would not be allowed, without the consent of the testator, to testify to communications made to him concerning it, or to the contents of the will itself; but after his death, and

when the will is presented for probate, we see no reason why, as matter of public policy, the attorney should not be allowed to testify as to directions given to him by the testator, so that it may appear whether the instrument presented for probate is or is not the will of the alleged testator." In our investigation of this question, we have encountered numerous other authorities to the same effect, some of which may readily be found by reference to *Whart. Ev.* § 591, and 19 Am. & Eng. Enc. Law, 142. It would be unprofitable, however, to attempt to further sustain the position above announced by the citation of additional cases, more or less in point, for the reason that counsel for the plaintiffs in error, in their written argument presented to this court, very frankly say: "By weight of authority under the common law, it was held that the reason of the general rule does not apply to communications made to an attorney by a testator while giving instructions for drafting a will; that the protection which the rule gives, and is intended to give, is the protection of the client; and that it cannot be said to be for the interests of a testator, in a controversy between other parties, to have those declarations excluded which are relevant, and which were necessary to the proper execution of his will. * * * In other words, we concede the proposition that under the common law the courts have held that an attorney can testify as to what occurred between him and the testator, and that it does not violate the policy of the law which gave birth to the rule." The real contention of counsel is that the common-law rule in regard to privileged communications between attorney and client no longer obtains in Georgia, but has been changed by statute. The act relied on is that of August 4, 1887, which is now embodied in section 5271 of the Civil Code, and reads as follows: "No attorney shall be competent or compellable to testify in any court in this state, for or against his client, to any matter or thing, knowledge of which he may have acquired from his client, by virtue of his relations as attorney, or by reason of the anticipated employment of him as attorney, but shall be both competent and compellable to testify, for or against his client, as to any matter or thing, knowledge of which he may have acquired in any other manner." We are at a loss to perceive how the language employed in this statute can be construed as containing any intimation that it was designed to protect persons other than the client himself, and that, therefore, a stranger could invoke it in his behalf in a controversy to which the client was not even a nominal party. While the terms of this act may not be couched in the precise phraseology in which the common-law rule is usually stated, still any assumption that the legislature thereby intended to inaugurate and declare an entirely new and radically different policy in the respect just indicated must necessarily rest solely upon pure conjecture.

In *Freeman v. Brewster*, 96 Ga. 653, 21 S. E. 165, the act of 1887 was construed to mean what it in terms says, viz. that an attorney is incompetent to testify "for or against his client"; and it was accordingly said the statute had no application to a case in which the client himself was not before the court as a party in interest. To the present controversy, Mrs. Flynn, the "client," is neither a party plaintiff nor a party defendant. "In no sense of the word can the testatrix be called the 'other party,' in opposition to either the propounder or the caveators" in such a proceeding. *Brown v. Carroll*, 36 Ga. 570. Nor can it be said that, in a controversy of this nature, the attorney drafting the will is called upon to testify "for or against" the interests of his client's estate. On the contrary, the proceeding is simply one in which certain persons claiming under, and not adversely to, the "client," seek to have an investigation made into the circumstances attending the execution of the instrument offered for probate, in order that their rights in the premises may, as against the persons represented by the propounder, be finally adjudicated. It is a proceeding provided for and sanctioned by law, in which it is necessarily contemplated that the whole truth shall be elicited from every reliable source, to the end that full and complete justice may be done, not only to the living, but to the dead.

2. Objection was also raised to the competency of the propounder, Mr. Spalding, when offered as a witness in his own behalf. It appears that on various occasions, during a period of several years prior to the execution of the will, he had acted as the attorney and counselor of Mrs. Flynn. On the day the will was signed, she sent for him, with a view to having him prepare the instrument. He called at her house, and was then told she wished him to become her executor. He demurred at first, but finally consented that he should be so nominated, at the same time declining, however, to act as her attorney in drafting the will, or in advising her in regard thereto, or in supervising its execution. He suggested that she procure his partner, Mr. King, to perform this office, and she consented to this arrangement. Thereupon, acting in the capacity of friend, and not as her legal adviser, he consulted with her as to her wishes in respect to the disposition of her property, made the memorandum from which the will was subsequently drafted, and delivered the same to Mr. King, with the request that he act for Mrs. Flynn in the matter. Under the circumstances above recited, we have no hesitation in saying that, so far as the preparation of her will is concerned, the relation of attorney and client did not exist between her and Mr. Spalding. "Although consulted by a friend, because he was an attorney, yet he refused to act as such, and was therefore only applied to as a friend" in the con-

sultation which followed between him and Mrs. Flynn, in which he took part only upon the express understanding that he should be so regarded. *Story, Eq. Pl. (9th Ed.) § 602; 1 Greenl. Ev. § 244.* "The true principle in reference to privileged communications between attorney and client is that, where the attorney is professionally employed, any communication made to him by his client with reference to the object or the subject of such employment is under seal of professional confidence, and is entitled to protection as a privileged communication. * * * But, to set the privilege in operation, the professional relation must exist, and some kind of professional employment is necessary. * * * So, where the attorney is consulted merely as a friend, and not in a professional character, and neither the attorney nor the person consulting supposes the professional relation to exist between them," or where a communication is "voluntarily made to counsel after he has refused to be employed by the party making it," the rule first above stated has no application. *Weeks, Attys. § 153.* This distinction is unquestionably recognized and clearly expressed by our statute. Obviously, therefore, there is no merit in the contention of counsel for plaintiffs in error that Mr. Spalding was an incompetent witness concerning anything that occurred at the interview he had with Mrs. Flynn on the morning of the day she executed her will, even were the plaintiffs in error at liberty to urge this objection. As to the interview with Mrs. Flynn, some two years previously, in the presence of other persons, testified to by the witness, it may be remarked that there is abundant and respectable authority to the effect that testimony in regard to what then transpired should not be considered as coming within the rule relating to privileged communications. But, be this as it may, we are of the opinion that, for the reasons stated in the first division of this opinion, the trial judge did not err in admitting any of the evidence in this connection to which objection was offered.

3. Still another exception taken alleges error on the part of the trial judge in admitting in evidence the paper offered for probate as the will of Mrs. Flynn, "to the reception of which caveators objected, on the ground that it had not been attested nor properly proved by three competent witnesses, as required by law; A. C. King being incompetent as a witness to attest or prove it, because of the relation of attorney and client between himself and Mrs. Flynn." If the objection urged be meritorious, this is a matter of which advantage may be taken by the plaintiffs in error; for, though it is not their right to object to testimony given in this particular litigation by Mr. King, still if, as contended, he was an incompetent attesting witness at the time the will was executed, it never became a valid instru-

ment, because attested by only two other persons, whereas our statute requires that there shall be at least three competent attesting witnesses to every will. We shall therefore deal with the question presented as if Mrs. Flynn herself were in life, and sought to attack the validity of an instrument signed by her on the ground that her attorney was an incompetent attesting witness thereto, and accordingly it had not been attested by the number of witnesses prescribed by law. The practice of attorneys attesting deeds, wills, and like instruments which they have drafted in accordance with instructions received by their clients, to be executed by the latter, has certainly long prevailed, both in England and in this country. It is equally certain that, at common law, attorneys have always been considered competent so to do. *Doe v. Andrews*, Cowp. 846. And, accordingly, it was held by the supreme court of South Carolina, in a somewhat recent case, that "an attorney who signs his name as a witness to the execution of a mortgage prepared by himself may be called upon to testify as to what occurred at the time of such execution." *Bay Co. v. Dickson*, 39 S. C. 146, 149, 17 S. E. 686, 697, citing a number of pertinent authorities. For the rule regarding privileged communications cannot properly be said to apply where an "attorney, having made himself a subscribing witness, and thereby assumed another character for the occasion, adopted the duties which it imposes, and became bound to give evidence of all that a subscribing witness can be required to prove. In all such cases it is plain that the attorney is not called upon to disclose matters which he can be said to have learned, by communication with his client, or on his client's behalf, matters which were so committed to him, in his capacity of attorney, and matters which in that capacity alone he had come to know." 1 Greenl. Ev. § 244; Story, Eq. Pl. (9th Ed.) § 602.

Counsel for the plaintiffs in error suggest that all of these authorities proceed upon the theory that, in assenting to the execution of a will or other instrument by his attorney, a client "waives" all right to thereafter invoke in his behalf the rule in regard to privileged communications, so far as that particular transaction is concerned. In support of this position, a number of New York decisions (among them, *In re Will of Coleman*, 111 N. Y. 220, 19 N. E. 71) were cited, wherein a statute of that state (providing, in effect, that all communications between attorney and client are privileged, and cannot be divulged "unless with the consent of the client") was under consideration. It seems that the courts of New York have construed this statute to cover every kind of communication, including instructions as to the drafting of a will; and, unless the consent of the client to the disclosure thereof be secured while he is in life, the right to un-

seal the lips of his attorney dies with him, and can never thereafter be exercised. In order that this construction may not lead to embarrassment in a proceeding where a will is offered for probate, it is held that, where a testator assents to his attorney attesting a will, this amounts to a full waiver, and the demands of the statute are satisfied. Following up this line of argument, counsel then undertake in their brief to point out that none of the various statutes on this subject of force in Georgia prior to 1887 were "simply declaratory of the common-law doctrine," and conclude by saying that "therefore all authorities cited, coming from other states or England, have no bearing upon this question, which is to be determined solely by the statute law of this state. Under the statute of 1887, a waiver of the privilege by the client is a legal impossibility, because it was never contemplated by the lawmaking power, and that is very clearly shown in the case of *Lewis v. State*, 91 Ga. 168, 16 S. E. 986." We quite agree with counsel in this construction of the act of 1887. What may or may not have been the effect of prior statutes is now immaterial. Granting that none of them were "simply declaratory of the common-law doctrine," it by no means follows that, after numerous statutory experiments and blunders, we have not finally, by our latest enactment, returned to the sound policy upon which that doctrine was based. Nor do we understand that the decisions above referred to, with the single exception of those construing the New York statute, proceed upon the idea that a client, by procuring the signature of his attorney as an attesting witness, "waived" the right to object to "privileged communications" being thereafter offered in evidence in a controversy respecting the transaction to which the client is a party. On the contrary, the real question at issue was whether communications made under such circumstances were privileged, not whether, conceding them to be so, the client had "waived" all right to protection in regard thereto. In other words, it has been held, and we think correctly, that a client cannot truthfully and honestly claim that he understood such communications to have been received by his attorney professionally, and under the seal of confidence, when the services of the latter as an attesting witness were avowedly rendered and accepted with a view to enabling him to testify in the event he might thereafter be called upon to do so. This, certainly, is the understanding sought to be conveyed by the extracts we have quoted from Greenleaf and Story. By no means is a client permitted, under our statute, to waive the protection it affords. The act of 1887 is clear upon this point. But this fact is not helpful in determining what really are or are not "privileged communications." The determination of this question must necessarily depend upon the circumstances under which the particular "matter or thing"

claimed to be privileged came to be known to the witness. If "by virtue of his relations as attorney," he may not testify; otherwise if "he may have acquired in any other manner" knowledge thereof. This is the test which our statute prescribes.

While a client has no power to waive his right to exclude this sort of incompetent testimony, still the law leaves it largely to him to render information which he imparts competent or incompetent as evidence to be used "for or against" him. For instance, a person may decline altogether the services of an attorney, or may employ him to attend to various different matters. A client may likewise confine his attorney's professional zeal to one branch only of a single subject-matter, or to a specified act in connection with a particular transaction. Evidently, in the present instance, Mrs. Flynn did not contemplate that her counselor should belong absolutely to her, body and soul, from the moment he entered her house up to his departure therefrom; nor could she have understood, under the circumstances, that everything he might hear or see while there would be forever locked under the sacred seal of confidence. On the contrary, she accepted his services as an attesting witness, doubtless under the belief and with the desire that, if ever called upon after her death, he would conscientiously and truthfully testify to everything that then and there occurred in connection with the execution of her will. That he has undertaken to do so involves no breach of propriety even. Certainly, the policy our statute was intended to subserve has not been defeated. It follows that, if Mr. King was competent to testify to such matters as could properly be elicited from either of the other attesting witnesses, his signature to the instrument has the same legal effect as would that of a person whose competency to attest a will was beyond question. This being so, the paper offered in evidence could not be attacked on the ground of his alleged incompetency to attest it. Whether, on the trial not under review, he may have been permitted to go further in his testimony than he would have been authorized to do in a proceeding to which his client was a party, is utterly immaterial. Suffice it to say he was at liberty to testify to everything essentially material to the inquiry whether the paper offered for probate was really the will, duly executed, of a person capable, under the law, of disposing of her property.

4. Another source of complaint is that the trial judge instructed the jury: "It is not necessary that he [the testator] should comprehend the provisions of his will in their legal form, or that he should be skilled in the law. It is sufficient if he have such mind and memory as to enable him to understand the elements of which it is composed, and the disposition of his property in its simplest form." The language above quoted is al-

most identically the same as that used in a charge in the case of *Stancell v. Kenan*, 33 Ga. 56, 64, which this court pronounced free from error. Read in connection with its immediate context, we are unable to perceive how the jury could possibly have failed to understand the instruction to which objection is made. But, even were it open to serious criticism, we would not feel warranted in the present case in setting the verdict aside on this ground alone. It appears by uncontradicted evidence that the instrument signed by Mrs. Flynn was read over to her by the attorney who drafted it; that its legal terms and its practical effect were by him fully explained; and that she stated unequivocally to him that she fully understood its provisions, and that they were in accord with her wishes.

5. The vital issue in the case was whether the testatrix was mentally capable of intelligently making a disposition by will of her property. Upon this vital point, as well as upon incidental issues involved, the evidence was conflicting. The jury were, however, fully warranted in returning a verdict in favor of the propounder; and, consequently, we are not prepared to say there was any abuse of discretion on the part of the trial judge in refusing to grant a new trial. Judgment affirmed.

ATKINSON, J., absent for providential cause.

(102 Ga. 480)

LEVENS v. SMITH.

(Supreme Court of Georgia. Aug. 5, 1897.)

TRIAL—OPENING AND CLOSING—OBJECTIONS TO EVIDENCE—RECOUPMENT.

1. Under the decision of this court in *Montgomery v. Hunt*, 21 S. E. 59, 93 Ga. 438, the defendant in an action upon a promissory note payable to the plaintiff or bearer is entitled to open and conclude when by his plea he admits the execution of the note sued on, and that the plaintiff is the legal holder of the same.

2. There was no error in overruling an objection to the admissibility of evidence on the ground that "there was better evidence"; it not being stated, at the time of making the objection, of what the "better evidence" consisted.

3. The verdict for the defendant upon his plea of recoupment being palpably wrong, in that the sum found was totally unwarranted by the evidence, the certiorari ought to have been sustained, and a new trial ordered.

(Syllabus by the Court.)

Error from superior court, Heard county; S. W. Harris, Judge.

Action by J. E. Levens against P. B. Smith. Judgment for defendant. Plaintiff brings error. Reversed.

Cobb & Bro. and D. B. Whitaker, for plaintiff in error. F. S. Loftin and T. B. Davis, for defendant in error.

FISH, J. 1. It appears from the record that at the trial of this case, on appeal to a jury in the justice's court, the defendant

amended his pleading by admitting that he executed the note, and that the plaintiff was the legal owner and holder of it. In his petition for certiorari the plaintiff complains that thereupon the defendant was allowed, over objection, to open and conclude the argument before the jury. We do not think there is any merit in this complaint. In *Montgomery v. Hunt*, 93 Ga. 438, 21 S. E. 59, this court held that: "Where suit was brought by the holder of a promissory note payable to the order of a named person, and indorsed by the payee in blank, and the defendant in his plea admits the execution of the note, and the ownership of it by the plaintiff, a prima facie case for the latter is made out. The burden of proof to establish his defense is upon the defendant, and consequently he is entitled to open and conclude." If, as we confidently believe, the decision therein rendered correctly lays down the law applicable under the state of facts there presented, it is to be regarded as controlling upon the question raised in the case at bar.

2. Further complaint is made that the defendant was permitted to testify that the consideration of the note in suit was a portion of the purchase money he had agreed to pay for a certain engine, the price of which was \$150, payable in three installments of \$50 each. The objection urged to this testimony was that "there was better evidence" of the facts thus elicited. Of what the "better evidence" referred to by counsel consisted, the court was not, however, informed, so far as the record before us discloses. Clearly, no error was committed in overruling an objection so vague and indefinite.

3. Under the evidence submitted, it is a matter of grave doubt whether the defendant's plea of recoupment was sufficiently sustained, either by showing a breach of the express warranty alleged to have been made by the plaintiff, or by proving the breach of any implied warranty raised by law. At all events, the amount of the verdict found in his favor by the jury was totally unwarranted, under any view of the evidence. Accordingly the plaintiff's petition for certiorari ought to have been sustained, and a new trial ordered. Judgment reversed.

(105 Ga. 504)

SHIRLEY v. HICKS et al.

(Supreme Court of Georgia. July 19, 1898.)

SECONDARY EVIDENCE—INJUNCTION—HEARING—HARMLESS ERROR.

1. When a certified copy of a deed is tendered in evidence, and a showing is made from which it may reasonably be inferred that the original is in the custody of a person beyond the limits of this state, who is not a party to the pending case, the foundation for the introduction of the secondary evidence is well laid.

2. A sworn answer to a petition for injunction may, at an interlocutory hearing, be considered by the judge as evidence, though offered as such without tendering therewith the plaintiff's petition, and though not offered at all

until after the evidence in the case had been formally closed.

3. Even if any error was committed in admitting testimony in the defendants' behalf, the evidence, as to the admissibility of which there could be no doubt, warranted the judgment denying the injunction.

(Syllabus by the Court.)

Error from superior court, Habersham county; J. J. Kimsey, Judge.

Action by M. J. Shirley against E. C. Hicks and others. Judgment for plaintiff. Defendants bring error. Affirmed.

J. C. Edwards and Chas. L. Bass, for plaintiffs in error. Geo. P. Erwin, for defendant in error.

PER CURIAM. Judgment affirmed.

(105 Ga. 388)

BUCHANAN v. SIMPSON GROCERY CO.

(Supreme Court of Georgia. July 19, 1898.)

EXECUTION OF NOTE—EVIDENCE.

While it is incumbent upon a party offering in evidence a paper the execution of which he is required to prove, and which purports to have been attested by a subscribing witness, to introduce or account for such witness, if the latter upon his examination does not remember or denies that he attested the instrument the execution thereof may be then procured by any other competent evidence.

(Syllabus by the Court.)

Error from superior court, Carroll county; S. W. Harris, Judge.

Action by the Simpson Grocery Company against R. H. Buchanan. Judgment for plaintiff. Defendant brings error. Affirmed.

The following is the official report:

This was a suit in a justice's court upon a promissory note, to which a plea of non est factum was filed. The note purported to have been signed by the defendant by his mark, and the signature was followed by that of Ben Buchanan, as witness. At the trial the plaintiff tendered the note in evidence, and the defendant objected to its introduction, on the ground that there was a subscribing witness, and its execution was not proven. Ben Buchanan testified that he did not sign the note, nor authorize any one else to do so for him; that he had never seen it, and could not read or write, and would not know a note if he were to see one; that W. A. Widner (the payee of the note) went to where the witness and the defendant were at work; that "they" had some papers, but he did not remember any books, and did not sign any note as a witness. Widner did not call his attention to any note or the signing of the same. Other witnesses testified that Ben Buchanan admitted to them that he had witnessed the note. Widner testified that the defendant signed the note by making his mark in the presence of Ben Buchanan, whom he called to witness the note, and the witness said to him, "You just sign my name, and it will be all right," and he did

so. Ben Buchanan was recalled as a witness, and denied this. The plaintiff again offered the note in evidence, and the defendant objected to its introduction, on the ground that the execution of the note was not proven by the subscribing witness. The court sustained the objection. The plaintiff then offered to prove by the original payee that he saw the note executed. The defendant objected to this, and the court sustained the objection. No further evidence was offered. The jury rendered a verdict for the defendant, and the plaintiff took the case to the superior court by certiorari, alleging that the court erred in not allowing the note sued on in evidence, in restricting the proof to the witness on the note as to its execution, and in not permitting other proof of its execution. The judge of the superior court sustained the certiorari, and the defendant excepted, alleging that the judgment sustaining the same was contrary to law and the evidence.

Oscar Reese, for plaintiff in error. S. Holderness, for defendant in error.

FISH, J. It will be seen from the reporter's statement of the case that the question for determination is whether the execution of a promissory note to which there appears to be a subscribing witness can be proven by evidence other than that of such witness, when he, upon being called to prove its execution, testifies that he never saw the note before, and did not sign it as a witness, nor authorize any one else to sign it for him. Where a writing has a subscribing witness, such witness, if living, sane, competent, and accessible, must in all cases where proof of execution is required, save those enumerated in section 5244 of the Civil Code, be produced and examined before the instrument can be legally admitted in evidence; but if the subscribing witness does not recollect the transaction, or denies having attested the instrument, its execution may be proved by other competent testimony. The Code itself provides that, if the subscribing witness does not recollect the transaction, "then proof of the actual signing by, or of the handwriting of, the alleged maker shall be received as primary evidence of the fact of execution; and if such evidence be not attainable, the court may admit evidence of the handwriting of the subscribing witness, or other secondary evidence, to establish such fact of execution." Civ. Code, § 5245. This court decided in *Reinhart v. Miller*, 22 Ga. 418, that, "if the subscribing witness to an instrument denies or forgets his attestation, circumstances may be resorted to for proof of its execution." Even in the case of a will, if a subscribing witness denies its attestation by himself, or by the other subscribing witnesses, or denies its execution by the testator, or that the testator was mentally capable of making a will, the fact or facts de-

nied by such subscribing witness may be proved by any competent witness having knowledge thereof, although the latter was not a subscribing witness to the instrument. *Gillis v. Gillis*, 96 Ga. 1, 23 S. E. 107, and cases cited on this point. Certainly, the rule with reference to proof of execution by subscribing witnesses cannot be more rigid in the case of an ordinary promissory note, the attestation of which is not at all necessary to its validity, than it is in regard to a will, the proper execution of which is so carefully provided for by the law. The two decisions of this court above cited are in accordance with the rule which has been long recognized in England. The case of *Ley v. Ballard*, tried in 1790, and which is cited in the note to *Park v. Mears*, 3 Esp. 173, was an action of debt on bond, against two defendants, one of whom (*Ballard*) pleaded non est factum. "There were two subscribing witnesses to the bond. They were called; but neither of them saw it executed by the defendant *Ballard*." The plaintiff proved the handwriting of *Ballard*, and that he had been heard to say that he had signed the instrument, and was afraid he would have to pay it. Lord Kenyon held: "The subscribing witnesses to a bond must be called to prove it. If they disavow having seen it executed, other persons who saw it executed, or can prove the party's handwriting, may be called. So, if the subscribing witnesses prove contrary to what their attestation purports, namely, that the party did not execute it, it is open to the party to establish the instrument by other evidence. This was done in the case of *Jolliffe's Will*." In the celebrated case of *Lowe v. Jolliffe*, 1 W. Bl. 365, to which Lord Kenyon refers, the three subscribing witnesses to a will, and the two surviving ones to a codicil, executed four years after the will, all swore that the testator was incapable of making a will at the time of the signing of the will and when the codicil was executed, or at any intermediate time; yet the will was established upon the testimony of other witnesses. In *Abbot v. Plumbe*, 1 Doug. 216, Lord Mansfield said: "It was doubted formerly whether, if the subscribing witness denies the deed, you can call other witnesses to prove it; but it was determined by Sir Joseph Jekyl, in a cause which came before him at Chester, that in such case other witnesses may be examined; and it has often been done since." In *Lemon v. Dean*, 2 Camp. 636, note, where the action was on a promissory note, upon which there appeared to be a subscribing witness, who, when called, swore that he did not see the defendant subscribe the note, it was held that the plaintiff could prove the execution by other means. To the same effect are *Fitzgerald v. Elsee*, 2 Camp. 635, and *Talbot v. Hodson*, 7 Taunt. 251. See, also, *Starkie, Ev. 511*; *Taylor, Ev. § 1844*. For cases in which the same principle has been recognized by our American state

courts, see *Duckwall v. Weaver*, 2 Ohio, 13; *Whitaker v. Salisbury*, 15 Pick. 534; *Jackson v. Christman*, 4 Wend. 282. The court below committed no error in sustaining the certiorari. Judgment affirmed. All the justices concurring.

(102 Ga. 474)

COLE v. ATLANTA & W. P. R. CO.

(Supreme Court of Georgia. Aug. 5, 1897.)

CARRIERS—MISCONDUCT OF CONDUCTOR.

It is unquestionably the duty of a railroad company to protect a passenger against insult or injury from the conductor of the train on which the passenger is riding; and, this being so, the unprovoked use by a conductor to a passenger of opprobrious words and abusive language, tending to cause a breach of the peace, or to humiliate the passenger, or subject him to mortification, gives to the latter a right of action against the company.

(Syllabus by the Court.)

Error from superior court, Coweta county; S. W. Harris, Judge.

Action by William H. Cole against the Atlanta & West Point Railroad Company. Judgment for defendant. Plaintiff brings error. Reversed.

W. H. Bingham, W. L. Stallings, and D. B. Whitaker, for plaintiff in error. Dorsey, Brewster & Howell, for defendant in error.

FISH, J. The plaintiff's petition set forth a cause of action. "Railroad companies are liable for torts committed by their servants in the prosecution and within the scope of their business, whether the same be by negligence or voluntary." *Railroad Co. v. Turner*, 72 Ga. 292, 294. Accordingly, a plaintiff is entitled to recover damages for an assault made upon him, and "when to this are added other wrongs and violations of rights and duties; when he was insulted and vilified by their agents while under their protection; when they failed to exercise the 'extraordinary diligence' which the law requires at their hands for his safety and comfort,—surely these are circumstances entitling him to compensatory damages, as well for wounded feelings as for the inconvenience, pain, and suffering for this wanton and cruel violation of his rights by the conductor and his assistants." *Railroad Co. v. Olds*, 77 Ga. 681; *Railroad Co. v. Condor*, 75 Ga. 55; *Gasway v. Railroad Co.*, 58 Ga. 216, 220. "Wounding a man's feelings is as much actual damage as breaking his limbs. The difference is that one is internal and the other external; one mental, the other physical." *Head v. Railway Co.*, 79 Ga. 360, 7 S. E. 217. "The carrier's obligation is to carry his passenger safely and properly, and to treat him respectfully; and, if he intrusts the performance of this duty to his servants, the law holds him responsible for the manner in which they execute the trust. The law seems to be now well settled that the carrier is obliged to protect his passenger from violence

and insult, from whatever source arising. * * * He must not only protect his passenger against the violence and insults of strangers and co-passengers, but, a fortiori, against the violence and insults of his own servants. If this duty to the passenger is not performed, if this protection is not furnished, but, on the contrary, the passenger is assaulted and insulted, through the negligence or the willful misconduct of the carrier's servant, the carrier is necessarily responsible. And it seems to us it would be cause of profound regret if the law were otherwise. The carrier selects his own servants, and can discharge them when he pleases, and it is but reasonable that he should be responsible for the manner in which they execute their trust. To their care and fidelity are intrusted the lives and limbs and comfort and convenience of the whole traveling public, and it is certainly as important that these servants should be trustworthy as it is that they should be competent. It is not sufficient that they are capable of doing well, if in fact they choose to do ill; that they can be as polite as a Chesterfield, if, in their intercourse with the passengers, they choose to be coarse, brutal, and profane. The best security the traveler can have that these servants will be selected with care is to hold those by whom the selection is made responsible for their conduct." *Goddard v. Railway Co.*, 57 Me. 213, 214, followed and approved in *Hanson v. Railway Co.*, 62 Me. 84. The greater part of the above extract is quoted and adopted as the text in *Hutchinson on Carriers* (section 596). See, also, *Ray, Neg. Imp. Duties* (Pass. Carr.) 340; *Booth, St. Ry. Law*, § 372. "The carrier's liability is not confined to assaults committed by its servants, but it extends also to insults, threats, and other disrespectful conduct. Thus, a street-railway company is liable for the act of its driver in falsely charging a passenger, in the hearing of others, with passing counterfeit money in payment of fare, and in threatening him with arrest. So, if the master of a vessel forcibly drives the passengers out of the cabin; if he compels them to lodge with the common hands; if, by his indecency, rudeness, or brutality, he shock the modesty of a female passenger, so as to oblige her to quit the cabin, or as to render the passage comfortless, by a continued series of vexation, misery, and torment,—both he and his employers are liable." 2 *Fetter, Carr. Pass.* § 366, citing *Laffite v. Railroad Co.*, 48 La. Ann. 34, 8 South. 701; *Keene v. Lizardi*, 5 La. 431; *St. Amand v. Lizardi*, 4 La. 244. In this connection, see, also, *Campbell v. Car Co.*, 42 Fed. 484, affirmed by United States supreme court in 154 U. S. 513, 14 Sup. Ct. 1151; *Railroad Co. v. Blocher*, 27 Md. 277; *Craker v. Railway Co.*, 36 Wis. 657; *Bryant v. Rich*, 106 Mass. 180; *Railroad Co. v. Whitman*, 79 Ala. 323; *Railroad Co. v. Flexman*, 103 Ill. 546; *Railroad Co. v. Jackson*, 81 Ind. 19.

On the argument here, it was practically conceded by the distinguished counsel who represented the railroad company that, under the facts alleged, there had been a violation and disregard of the duty which the company owed to its passengers. Yet it was contended the plaintiff did not allege facts "showing any assault, and the only thing charged is that the conductor used insulting words, making no assault, and the only injury claimed to have been received [was] injury to feelings"; and accordingly the argument was presented that, although "wounded feelings may be treated as an element of damage," where a passenger has been wrongfully ejected or assaulted, still an action will not lie unless "there has been an injury to the 'person or purse,'" of a passenger who has been ill treated at the hands of the carrier's agents. In other words, counsel stated their understanding of the question presented by the present record to be: "Does the law afford any redress for wounded feelings, unaccompanied by any injury to the person or purse?" They strenuously insisted to the contrary, and in this connection relied on the case of *Chapman v. Telegraph Co.*, 88 Ga. 763, 15 S. E. 901, wherein it was held that "a person to whom a telegraphic message was addressed and sent, informing him of the desperate illness of his brother, and requesting him to come, is not entitled to recover of the telegraph company damages on account of mental pain and suffering, alleged to have resulted to the plaintiff from failure of the company to deliver him the message in due time, and from delaying delivery till too late to take the last train available for reaching the brother before his death occurred."

We recognize the soundness of the doctrine laid down in that case, and that it directly sustains the proposition for which it is cited. Obviously, however, it has no application to a case such as the one at bar. Conceding that the plaintiff entirely fails to allege facts showing that an actual, physical assault was made upon him, still the allegations of his petition affirm, in unequivocal terms, a most wanton and inexcusable injury to his person, viz. a flagrant attack directed towards his reputation. The right to personal security comprehends and includes security in one's reputation, as well as in his life, limb, or liberty. Clearly, under the facts alleged, a suit would lie against the company's servants themselves for malicious slander, and the company has utterly failed in its duty to protect its passenger from insult, abuse, and ill treatment of a nature which the law thus recognizes as furnishing the basis of an action calling for damages calculated to deter a wrongdoer. The gist of the present complaint is that the company, though legally bound to protect and shield from attack the plaintiff's person, suffered him to undergo the pain and mortification of being publicly denounced, in coarse and brutal language,

as one who was dishonestly attempting to "dead-beat" his way, and who had gone through the form of swearing to what he knew to be wholly false in order to effect his purpose. While this was a wanton act of commission by a servant of the company, it was also a negligent omission on the part of its servants to perform towards the plaintiff a duty imposed by law upon their master.

The distinction just pointed out is clearly recognized in *Chapman's Case* (page 772, 88 Ga., and page 903, 15 S. E.), wherein it is said: "The law protects the person and the purse. The person includes the reputation. *Johnson v. Bradstreet Co.*, 87 Ga. 79, 13 S. E. 250. The body, reputation, and property of the citizen are not to be invaded without responsibility in damages to the sufferer. But, outside these protected spheres, the law does not yet attempt to guard the peace of mind, the feelings, or the happiness of every one, by giving recovery of damages for mental anguish produced by mere negligence." Again, on page 767, 88 Ga., and page 902, 15 S. E., it is expressly said that the doctrine contended for did not apply to actions for libel or slander, for "malice [express or implied] is an essential element in such cases"; and, "where the words are actionable per se, they have a sure tendency to degrade the citizen in the estimation of his fellows, which results in damage to his social influence and business efficiency."

We do not, of course, wish to be understood as dealing with the present action as though it were an attempt to sue the company for a slander committed by its agents. On the contrary, we merely mean to hold that a carrier is liable in damages for failure to perform its public duty to protect a passenger from abusive language which amounts to slander, not as the perpetrator of the outrage itself. Indeed, it matters not whether a servant or a stranger was the real wrongdoer, if the company has failed to furnish the passenger with the proper protection against such misuse; for, in either event, its liability will result from its breach of a public duty, not because the real wrongdoer's act is in law imputable to it. As has been seen, when the company's servant to whom it intrusts the performance of its duty to protect its passengers is himself the tortfeasor, it is bound to respond in damages simply because it cannot escape liability by delegating its duties to another, who abandons his office at the critical moment, and thus places the company in the attitude of having no one on the scene to perform for it the duty, it having entirely failed to provide for the emergency by choosing to rely solely upon a servant who proves unworthy of the trust. In a word, the company's liability arises from an act of omission, and it is not chargeable with the wanton act of commission on the part of its servant from which the passenger suffers injury to his reputation. For the rea-

sons above stated, we think the trial judge erred in dismissing the plaintiff's petition, which certainly was good as against a general demurrer. Judgment reversed.

(106 Ga. 504)

STORY v. EPPS.

(Supreme Court of Georgia. July 19, 1898.)

LANDLORD AND TENANT—EVIDENCE OF RELATIONSHIP.

1. Where, in resistance to a dispossessionary warrant sued out by a father against his daughter to evict her from land, she filed a counter affidavit denying the existence of the relation of landlord and tenant between the plaintiff and herself, and on the trial of the issue thus formed it appeared from the undisputed testimony on both sides that she took possession of the land under a parol agreement with her father whereby she became bound to pay to him annually \$30, and to board him four months of every year, while he lived, neither, however, treating or regarding this agreement as a contract of rental, and the only controversy respecting its terms being that the father contended she was not to become the owner of the land until his death, and she contending that her ownership was to begin with her possession, *held* that, in any view of the evidence, the relation of landlord and tenant did not exist between the parties, and therefore a verdict in the plaintiff's favor was contrary to law.

2. The foregoing lays down the law by which, upon the facts as disclosed by the record, the determination of the present case should be controlled.

(Syllabus by the Court.)

Error from superior court, Marion county; W. B. Butt, Judge.

Action by C. W. Epps against Ada F. Story. Judgment for plaintiff. Defendant brings error. Reversed.

W. D. Crawford and Geo. P. Munro, for plaintiff in error. Brannon, Hatcher & Martin, for defendant in error.

PER CURIAM. Judgment reversed.

(106 Ga. 368)

HUGHIE v. HAMMETT.

(Supreme Court of Georgia. July 19, 1898.)

VERDICT—SPECIAL ISSUES—INSTRUCTIONS—EVIDENCE—AMENDMENT.

1. Where counsel for both sides assisted the judge in preparing questions to be answered by the jury in order that they might find a special verdict upon the facts of the case, and agreed that these questions only should be submitted to the jury, the court properly restricted them to a consideration of the issues thus presented.

2. Even if a charge as to duress was wanting in fullness or accuracy, the giving of it would not be cause for a new trial when there was no evidence to prove the duress alleged.

3. It does not appear that the court erred in rejecting evidence presumably offered to show duress. The more especially is this true, since it was not proved that the party whose title was sought to be thereby invalidated had any notice or knowledge thereof.

4. There was no error in allowing an amendment to an answer especially designed to meet one of the plaintiff's contentions, and which was not only appropriate to this end, but was also adapted to bring about a just and lawful solution of the case.

5. The preceding notes cover all the questions of law properly presented for determination by the motion for a new trial, and the evidence warranted the verdict.

(Syllabus by the Court.)

Error from superior court, Clayton county; J. S. Candler, Judge.

Suit by Mrs. N. C. Hughie against L. H. Hammett. Judgment for defendant. Plaintiff brings error. Affirmed.

J. P. Chatfield, J. L. Doyal, and J. L. Travis, for plaintiff in error. W. M. Wright and Watterson & Kimsey, for defendant in error.

LUMPKIN, P. J. This was an equitable petition brought by Mrs. Hughie against Hammett to restrain him from evicting her, as his tenant, from a house and lot in the town of Jonesboro, and for the cancellation, as a cloud upon her title, of a certain mortgage and deed executed by herself, the latter of which purported to convey to Hammett the title to the property in dispute. Her contentions were that this mortgage and deed were executed to secure a debt due to Hammett by her husband, that she had signed the deed under duress, and that the debt in question was infected with usury. On the other hand, the defendant contended that the mortgage was given to secure the aggregate amount of a number of loans of money, none of which were usurious, which he had made to Mrs. Hughie herself; that the deed was originally executed for the same purpose, but had been converted into a deed of bargain and sale by a contract between himself and Mrs. Hughie whereby he purchased from her a bond for title he had previously delivered to her, thus becoming the absolute owner of the premises. When the case came on for trial, counsel for both sides assisted the judge in preparing questions to be answered by the jury in order that they might return a special verdict upon the facts of the case, and agreed that these questions only should be submitted to the jury. They were as follows: "(1) Was the debt in question the debt of Mrs. N. C. Hughie? (2) Was the interest charged usurious? (3) Was the deed in question made voluntarily by Mrs. Hughie?" The jury answered the first and third questions, "Yes," and the second question, "No," and judgment was entered accordingly. Mrs. Hughie moved for a new trial, and complains that the court below erred in overruling her motion.

1. Exception is taken to the following charge: "The reason [Mrs. Hughie] alleges in her bill that [the deed] is void is—First, that it was made in payment of a debt of her husband; and, second, that there was usury in that debt, and for that reason the deed was void. Now that, of course, makes certain questions of fact for you. And these questions of fact are all that are to be submitted to you to pass upon." This charge is

assigned as error, "because there were other issues of grave import made by the pleadings, and upon which much evidence was submitted." The record discloses that in immediate connection with the above-quoted charge the judge also submitted to the jury the question whether or not the deed from Mrs. Hughie to Hammett was made voluntarily. While, therefore, the judge inaccurately stated to the jury that the two questions referred to in the foregoing extract from his charge were the only ones to be passed upon, it plainly appears that he did submit to the jury the remaining question, as to whether or not Mrs. Hughie freely and voluntarily executed the deed under which Hammett claimed; and the verdict shows that the jury not only considered, but answered, this identical question. It will thus be seen that the three questions agreed upon by counsel for Mrs. Hughie as being all that were essential were actually submitted to, and passed upon by, the jury. Surely, then, there is no just foundation for the complaint that the judge omitted to submit additional questions.

2. The motion further alleges that the judge committed error in the submission of the third question to the jury, because the language he employed for this purpose did not sufficiently define and explain to them what constituted duress. That language was as follows: "Was the deed in question made voluntarily by Mrs. Hughie to Hammett? You will examine the evidence in this case, and see what is the truth of it. Was she under constraint? Was she forced to make that deed? Was she compelled to make the deed? If so, under this evidence, then, of course, it would be your duty to answer that question, 'Yes;' if not, to answer it, 'No.'" This charge may be open to the criticism made upon it, but the giving of it cannot be treated as cause for a new trial, because a careful examination of the record discloses that the duress alleged was not proved. It does appear that Mrs. Hughie signed the deed reluctantly and under protest, but there was no testimony which would have warranted the jury in finding that threats of bodily or other harm, "or other means amounting to or tending to coerce" her will, and actually inducing her to sign, contrary to her wishes, were employed. See Civ. Code, § 3536.

3. The court rejected certain evidence presumably offered to show duress, but we would not be authorized to hold that any error was thus committed, because, at most, this evidence would only have tended to show that the husband of Mrs. Hughie "cursed and abused her for refusing to sign papers in this matter, and threatened to take her children and leave her if she did not." The record discloses that Mrs. Hughie had signed quite a number of papers "in this matter," and it does not, therefore, appear with certainty that the rejected evidence re-

lated to the deed under which Hammett claimed. Moreover, there was no evidence whatever to show that he had any notice or reason to apprehend that Hughie had in any manner coerced his wife into executing this instrument. Clearly, then, the rejection of the evidence could not, in any view of the matter, have been, in a legal sense, injurious to Mrs. Hughie. See *Bazemore v. Freeman*, 58 Ga. 276.

4. The court allowed Hammett to file an amendment to his answer, wherein he offered to reconvey the property to Mrs. Hughie, and permit a decree to be taken in her favor for the same upon payment to him of what he had advanced. We see no error in allowing this amendment. It was designed to meet one of the plaintiff's contentions, viz. that her deed to Hughie was merely given as security for a debt; and if, as she insisted, the property was actually worth more than the total amount advanced to her by Hammett, exact justice in the case could have been done by allowing her to take back the property and pay the debt.

5. One of the grounds of the motion for a new trial alleges error in admitting testimony, but entirely fails to state what, if any, objection was urged to it when offered.

The foregoing discussion covers all the material questions of law properly made and presented for determination. While the evidence was conflicting, the conclusions reached and expressed by the jury were fully warranted by that introduced in behalf of the defendant. The record discloses no reason which would warrant this court in setting aside the verdict. Judgment affirmed. All the justices concurring.

(105 Ga. 384)

SNOWDEN v. WATERMAN et al.

(Supreme Court of Georgia. July 20, 1898.)

SALES—IMPLIED WARRANTY—BREACH—WAIVER—
DAMAGES—PLEADING—EVIDENCE—
INSTRUCTIONS.

1. A vendee of personal property, by making a personal examination and inspection of the same before the purchase, with the view of determining for himself the quality and condition of the property, does not thereby waive an implied warranty by the vendor that the article sold is merchantable, and reasonably suited to the use intended; and the vendee can maintain a suit for such breach of the warranty growing out of a latent defect which could not, in the exercise of due caution, have been detected; and this is true notwithstanding the vendor was ignorant of the existence of such defect.

2. In a suit for damages growing out of a breach of an implied warranty in the sale of personalty, it is error for the court to admit testimony, over the objection of the defendant's counsel, which tends to show an item of expense incurred by the plaintiffs in consequence of such breach that is not set forth in the petition as constituting any part of the damages sought to be recovered.

3. Where a case is closely contested on a material and vital issue of fact, which plaintiffs seek to establish from other facts and circumstances proven in the case, it is error for the court to charge the jury that they can infer

from such facts and circumstances the existence of the main fact in issue.

4. Where one purchases a lot of mules, some of which are infected with a contagious disease, that they soon afterwards, without fault of the purchaser, communicate to others in the lot, and the disease is of such a nature as to render the stock infected with it absolutely worthless, such a defect is covered by an implied warranty; and the vendee, in a suit for damages growing out of a breach of such warranty, is entitled to recover the purchase price of all the stock thus lost, together with expenses that he has properly and reasonably incurred in quarantining stock to prevent a spread of the disease, and in doctoring and in otherwise taking care of them.

5. It is error in the court to refuse to charge a special written request made by defendant's counsel, which is legal and adjusted to a distinct matter in issue, involving plaintiffs' right to recover, although the principle of such request may be covered in general and abstract terms by other instructions of the court; the case being a close one, under the evidence, and its pressure being to a considerable extent upon the matter as to which the request was made.

6. Other than as above indicated, there was no material error in any of the grounds of the motion for a new trial.

(Syllabus by the Court.)

Error from city court of Richmond county; W. F. Eve, Judge.

Action by Waterman & Co. against J. W. Snowden. There was a judgment for plaintiffs, and defendant brings error. Reversed.

E. B. Baxter and J. R. Lamar, for plaintiff in error. Fleming & Alexander and P. J. Sullivan, for defendants in error.

LEWIS, J. Waterman & Co. sued Snowden for breach of implied warranty as to the soundness of certain live stock sold by defendant to plaintiffs, the suit being brought by attachment upon the ground that defendant resided out of the state. In the petition and the amendment thereto it was alleged that the defendant sold plaintiffs a car load of stock for the sum of \$2,035, which sum was paid in cash by plaintiffs; that the sale of the stock was made without any warranty whatever, but under a general warranty implied by law as to soundness, etc.; that after the delivery of the stock to Waterman & Co., and without fault on their part, the disease of glanders, or other similar deadly disease, appeared in said car load of stock, and rendered the same wholly and utterly worthless, and that the disease had already infected the stock before they were sold to Waterman & Co., and at the time of the sale they were unsound and utterly worthless, but that this defect was not then patent; that Waterman & Co. had been to an expense of about \$500 in doctoring and keeping said stock, by reason of its diseased condition; and that the defendant, at the time of said sale, knew, or ought to have known, of the defects in the stock. The defendant answered, admitting the sale of the stock and payment therefor as alleged, but denied that they were infected with glanders, and that if they ever did become so infected it was after the sale, and while they were in the custody of the

plaintiffs, defendant being in no way in fault. By amendment to his answer, the defendant alleged that, if the stock was so infected as charged at the time of sale, the fact was wholly unknown to him, and before plaintiffs accepted the stock they personally inspected them, for the purpose of discovering if they were sound and merchantable; that they relied on their own judgment as to their condition in making said purchase, and thereby waived the implied warranty against latent defects. The defendant also traversed the ground of the attachment. The jury returned a verdict finding against the traverse, and further finding the sum of \$2,035 in favor of the plaintiffs. The defendant made a motion for a new trial on several grounds, which were overruled, and he excepted.

1. Among the grounds of the motion for a new trial was alleged error in refusing to charge the jury the following request of counsel for defendant below: "Where the seller himself has no knowledge of a defect in the thing sold, and where the seller is free from fraud, the law implies no warranty of quality upon the sale of a specific article then present and actually inspected and examined by the purchaser at and before completing the sale. If you believe from the evidence that Snowden was not guilty of any fraud in the sale of the mules, and did not know or suspect that they were affected with glanders or other disease, and that Waterman & Co., during the progress of the negotiation, actually inspected and examined the mules for themselves, and relied upon their own judgment, the law implies no warranty upon which Waterman & Co. can recover after the sale was actually executed by the delivery of the mules to Waterman & Co., and the payment of the money by Waterman & Co. to Snowden." When this case was here before (see 100 Ga. 588, 28 S. E. 121) it was decided by this court that "a breach of an implied warranty that goods sold are 'merchantable and reasonably suited to the use intended' may arise when the goods, because of a defect which could not, in the exercise of due caution, be detected, are totally useless and worthless, though in point of fact the seller was ignorant of the existence of such defect." It is not contended in this case that there was any express warranty by the vendor, but section 3555 of the Civil Code declares that in all cases, unless expressly or from the nature of the transaction excepted, the vendor warrants that the article sold is merchantable and reasonably suited to the use intended. The decision above cited settles the question that the ignorance of the vendor of a defect which renders the goods totally worthless cannot relieve him of his obligation arising under this implied warranty imposed by the statute. The same section of the Code cited declares that, if there is no express covenant of warranty, the purchaser must exercise

caution in detecting defects. It is not contended that the plaintiffs could, by the exercise of any sort of diligence, have detected, when they purchased these mules, that they were infected with glanders or other deadly disease. It is insisted, however, by the plaintiff in error, that, inasmuch as they made a personal inspection and examination of the stock before purchasing, this was equivalent to buying upon their own judgment, and amounted to a waiver of the implied warranty. The law imposes upon the vendee the duty of exercising caution in detecting defects, and hence it is a well-established rule that where the defect is patent, or could have been ascertained by the exercise of diligence, there can be no recovery upon the ground of an implied warranty. In all such cases the doctrine of caveat emptor applies. But, in cases of latent defects, the existence of which cannot be ascertained by an examination of the property, the law protects a purchaser, by imposing upon the vendor an implied warranty, whenever the defect is of such a nature as to render the article sold unsuited to the use intended. In cases of latent defects, therefore, the doctrine of caveat venditor applies. To contend that when a purchaser, in the exercise of the caution imposed upon him by the statute, makes a personal examination of the property before trading, in order to ascertain if any patent defects exist, he thereby waives the right to plead an implied warranty growing out of a latent defect, would be contrary to the spirit, reason, and letter of the law. In the case of *Miller v. Moore*, 83 Ga. 684, 10 S. E. 360, it was decided by this court that inspection by the vendee of goods before acceptance will exclude from the warranty all patent defects, but it will have no influence on those which are latent. It is true, one of the plaintiffs stated in his testimony that he purchased on his own judgment, but he also stated that he waived nothing; and a fair construction of his evidence on this point is that he simply meant, so far as the condition and quality of the mules appeared at the time of the purchase, he bought upon his own judgment, but that he did not mean thereby to waive a fatal defect so latent in its nature that it could not be disclosed by a personal examination of the property. We think, therefore, that the court did right in refusing to give in charge the above request.

2. Counsel for defendant, upon the trial of the case, objected to testimony showing what were the expenses incurred by plaintiffs in having to isolate stock, growing out of the fact that they had sent six of their mules bought of defendant, directly after the purchase, with other stock of theirs, to another section of the state, and, after learning that some of the mules remaining on hand were infected with a deadly disease, fearing that these six sent off were likewise infected, they incurred an expense of eight or nine

hundred dollars in keeping them isolated, so as not to spread the disease. The only allegation in the petition with reference to any expense incurred by plaintiffs is that about \$500 were expended in doctoring and keeping the stock by reason of its diseased condition. It appears from the testimony that there were twenty-two mules purchased of defendant. Directly after this purchase, six of these mules were sent from Macon further south, with other stock owned by the plaintiffs. These six mules never became infected with the glanders, but plaintiffs, fearing that they had in their system the seeds of the disease, kept them and the other stock shipped with them isolated, and would not put them upon the market for sale, or otherwise use or dispose of them, until all danger from the disease had disappeared. The sixteen mules that remained on their hands in Macon developed glanders, or some other deadly disease which was infectious. All these mules were lost in consequence of the disease. They either died from the disease, or were killed in consequence of it, to prevent its spread. The veterinary surgeon's bill and other expenses, incurred in doctoring and isolating these sixteen mules, by reason of their diseased condition, amounted to between four and five hundred dollars. Manifestly this was the expense sued for by the plaintiffs in their declaration, which has no reference whatever to expenses incurred in attending to that portion of the stock bought which had never become diseased, and also in attending to other stock of the plaintiffs not included in the purchase. It was, therefore, manifest error for the court to admit testimony showing what such expenses were. The only reply made to this by counsel for defendants in error was that the admission of this testimony worked no harm to the defendant below, for the reason that the amount of the verdict found by the jury could have been reached by them without including this additional expense of eight or nine hundred dollars. It is contended that the verdict was reached in this way: The testimony shows that \$2,085 was paid for 22 mules, or \$92.50 each; 16 of them died from glanders, entailing a loss of \$1,480; \$416 was expended in taking care of the 16 mules that died, making a total loss of \$1,896; interest on this last amount, from the time of the loss to the date of the verdict, would more than equal the difference between the \$1,896 and the amount of the verdict. The answer to this, however, is that the jury by their verdict expressly stipulated that it was without interest, and, in order to reach their finding, they necessarily had to include some other item of damages besides those sustained by the plaintiffs and sued for in their declaration.

3. Another ground in the motion is that the court, after giving in charge the following request: "I charge you that the plaintiffs cannot, in an action for breach of warranty,

recover the value of any stock which was not infected at the time of the sale and warranty, but which became infected afterwards, even though that infection resulted from contact with a portion of the stock which was infected at the time of the sale,"—qualified the same by charging as follows: "I give you that, with the qualification I gave you before, that if, after the disease became apparent, the plaintiffs exercised all ordinary care and diligence in preventing the spread of the disease, and its being communicated to others not infected, then they have complied with all that the law requires, and, if the disease developed a short time after the sale and after the exposure, then you can infer from these facts the existence of the seed in those then developed." Error is assigned on the qualification of the charge upon the ground, first, that it contained an expression of opinion on the evidence. A material issue between the plaintiffs and defendant was whether or not this stock, or any portion of it, was infected with the disease at the time of the purchase; it being contended by the plaintiffs on the one hand that it was, and by the defendant on the other that it was not, and that, if the stock had glanders, the disease was contracted after the sale. If the disease developed a short time after the sale, that was a circumstance for the jury to consider in determining the question for themselves as to whether or not the seeds of the disease existed when the sale was made. But as to whether or not the jury could infer from these facts and circumstances the existence of the main fact in issue was a question for them to decide. The expression of the court, if not an opinion as to what had been proven, certainly was an opinion upon the weight which the jury could give to circumstantial evidence in the case in establishing the main fact in issue.

4. It was further contended by counsel for plaintiff in error that the court should have given the above request without any qualification at all. The charge requested was not a correct measure of damages, for it limited the jury to a consideration only of damages to such of the stock as had the disease at the time of the sale, and precluded them from considering damages resulting to the other mules not infected at the time of sale, but which caught the disease after the sale from those that were diseased when the purchase was made. All damages which accrue as a direct and natural consequence of a breach of warranty, whether express or implied, are recoverable. A natural consequence of stock infected with glanders is to communicate it to all other stock with which the diseased animal comes in contact. In 2 Sedg. Dam. 768, it is declared: "Where animals sold are warranted free from disease, loss, through communication of disease to other animals of the purchaser, may be recovered. It is not necessary to the recovery of such damages to show that the vendor knew that the

diseased animal was to be placed with others belonging to the plaintiff. The defendant is presumed to anticipate that the animals he sells will be placed with others, as a natural consequence of his act. The expense of nursing and curing other animals, which contract disease from those sold, may be recovered." If any of the stock sold, therefore, was infected with a deadly and contagious disease, which was communicated to other stock of the plaintiffs, whether before or after the sale, it would give a right of action for damages for all the stock of the plaintiffs that had thus been lost from the effects of the contagion, provided the plaintiffs, by the exercise of ordinary care, could not have avoided the injury thus sustained. Plaintiffs would further be entitled to recover, not only for such loss, but also any expenses that were properly and reasonably incurred in taking care of the stock, trying to cure them, and endeavoring to prevent them from spreading the disease to other animals. While damages resulting from a spread of the disease and its communication to those animals not infected at the time of the sale are not specifically set forth in the petition, yet the case on the trial seems to have been treated by both parties as if this matter was in issue.

5. Error is assigned upon the refusal of the court to charge the following request of defendant's counsel: "If you believe that proper prudence required that each of the mules should be isolated from every other in the suspected lot bought, it was the duty of Waterman & Co. so to isolate them; and if, as a result of failing so to isolate them, you find that the disease was spread from one mule to the other, then I charge you that Waterman & Co. cannot recover for the damages occasioned by such spread of the disease." We think this request should have been given. It appeared from the testimony in the case that the six mules which were removed from the lot soon after the purchase never contracted the disease. It would have been a most remarkable coincidence if, at the time of the sale, sixteen of the mules were diseased and six were sound, for plaintiffs to have happened to have selected from the lot, without any knowledge whatever of the diseased condition of the stock, the six sound mules to be shipped, and left the sixteen diseased ones on hand. It was therefore contended with great force by the plaintiff in error that such a thing was impossible, under the law of probabilities, and that some, at least, of the sixteen mules must have been perfectly sound when sold. It was further contended that due diligence required that the plaintiffs, as soon as they discovered that any of the stock was infected with a contagious disease, deadly in its nature, should have isolated the mules and kept them separate, so as to prevent a spread of the disease. As to what due diligence required, under all the circumstances of the case, was a question

of fact for the jury. No damages should have been recovered that resulted from the negligence of the plaintiffs. The specific charge requested was legal, and was adjusted to a very material and distinct matter in issue. The case was a close one, under the evidence on this particular point, and its pressure was upon the matter as to which the charge was asked. In such a case this court has decided in *Railroad Co. v. Johnson*, 90 Ga. 501, 16 S. E. 49, that the refusal to give such a request in charge is ground for a new trial, although in principle, and in general and more abstract terms, it may be covered by other instructions given by the court.

Error was also assigned upon the refusal of the court to give in charge the following request of defendant's counsel: "If you find that proper prudence required that each mule should have been separated from every other, and if you find from the evidence that it was improper to allow them to run in a pen together, and that after Waterman & Co. suspected that the mules were infected with glanders they were allowed to remain together, and that by reason thereof the disease was communicated from one to the other, and thereby more mules died than would otherwise have died, then Waterman & Co. cannot recover, even though they may have turned the matter over to a veterinary surgeon, who let the mules remain in a pen together without this individual separation or isolation." We do not think there was error in refusing this request as made, because it embodies the idea that if the spread of the disease was the result of plaintiffs' negligence, and thereby more mules died than would otherwise have been lost, then there could be no recovery at all. Of course, this would not preclude a recovery for the loss of such of the animals as were infected with the disease at the time of the purchase, but would only prevent a recovery of such damages as were occasioned by a communication of the disease to others which were not infected at the time of the sale.

6. There were several other grounds in the motion, but we do not think they involve sufficient merit to require any consideration, except to say that, other than as herein indicated, there was no material error in any of the rulings of which complaint is made. Judgment reversed.

(105 Ga. 371)

KERR v. GEORGIA R. CO.
(Supreme Court of Georgia. July 20, 1898.)

CARRIERS—DAMAGE TO GOODS SHIPPED.

An action for damages to goods brought against a railroad company under section 2298 of the Civil Code is not maintainable when it affirmatively appears that the goods in question were consigned from a point beyond the limits of this state under a contract stipulating for their delivery at a point within this state which could not, in the usual and ordinary course of transportation, be reached, and was not intended to be reached, by the defendant's railroad.

If it incurred liability for damaging the goods while being transported on its line from the point to which they had been consigned under a contract of that kind to one of its stations, such liability could be established only by bringing a proper action, and supporting the same by appropriate evidence.

(Syllabus by the Court.)

Error from superior court, Dekalb county; J. S. Candler, Judge.

Action by J. B. Kerr, by his next friend, against the Georgia Railroad Company. Judgment for defendant. Plaintiff brings error. Affirmed.

J. N. Glenn and J. L. O. Kerr, for plaintiff in error. Jos. B. & Bryan Cumming and M. A. Candler, for defendant in error.

LUMPKIN, P. J. The St. Louis, Alton & Terre Haute Railroad Company undertook and agreed with one J. N. Hall to transport a car load of goods from Murphysboro, Ill., to Atlanta, Ga., the consignee being J. B. Kerr. It was, in behalf of the company above mentioned and its connecting lines, expressly stipulated in the bill of lading that the contract therein embraced "will be accomplished, and the liability of the companies as common carriers thereunder will terminate, on the arrival of the goods or property at the station or depot of delivery." Kerr, the consignee, resided at Decatur, Ga., a station on the line of the Georgia Railroad, and really desired the goods to be delivered to him at that place. It appears, however, beyond question, that Atlanta, the point of destination designated in the original contract of shipment, could not conveniently be reached, and was not by the terms of that contract intended to be reached, by transporting the goods over any portion of the line of the Georgia Railroad Company. In other words, the company last mentioned was not one of the connecting lines over which it was contemplated by the parties the goods should be transported in order to reach the point of destination named in the bill of lading. When the goods reached Atlanta, this company took charge of the car, and transported it to Decatur. The evidence does not disclose why or at whose instance it did this, except that in a receipt acknowledging payment of its own freight charges and those which had accrued up to the time when the car reached Atlanta, the Southern Railway Company is designated as the consignor which delivered the car to the Georgia Railroad Company. Whether the goods were in bad order when received by the latter company does not appear, nor is there any evidence showing that it receipted for them as in good order, or, indeed, receipted for them at all. Upon opening the car at Decatur, the goods were found to have been very seriously damaged, but when, where, or by what means was not shown.

Kerr brought in the city court of Dekalb county an action against the Georgia Rail-

road Company, and obtained a verdict, which was, on certiorari to the superior court of that county, set aside; and of this he complains in his bill of exceptions. The record discloses with certainty that his action was predicated upon section 2298 of the Civil Code, which reads as follows: "When there are several connecting railroads under different companies, and the goods are intended to be transported over more than one railroad, each company shall be responsible only to its own terminus and until delivery to the connecting road; the last company which has received the goods as 'in good order' shall be responsible to the consignee for any damage, open or concealed, done to the goods, and such companies shall settle among themselves the question of ultimate liability." We are quite clear that, if Kerr had any cause of action at all against the Georgia Railroad Company, it was not maintainable under this section. It unquestionably refers to shipments over connecting lines of railroad over each of which the goods must pass, and are intended to pass, in order to reach the point of destination specified in the contract of shipment. As to this consignment from Murphysboro, Ill., to Atlanta, Ga., the Georgia Railroad could not possibly have been intended to be one of such connecting lines, and therefore the phrase "the last company which has received the goods as 'in good order,'" as used in the section cited, can have no bearing upon a case of this kind. The decision of this court in *Railroad Co. v. Gann*, 68 Ga. 350, is not applicable here, for it appeared in that case that the goods for injury to which the action was brought were billed from St. Louis, Mo., to Athens, Ga., and the contract of shipment contemplated that they should reach the latter place by being transported over the Georgia Railroad. The case of *Western & A. R. Co. v. Exposition Cotton Mills*, 81 Ga. 522, 7 S. E. 916, is directly in point, and supports the conclusion reached in the case at bar. Judgment affirmed. All the justices concurring.

(105 Ga. 38)

KENDRICK v. KENDRICK.

(Supreme Court of Georgia. July 21, 1898.)

DIVORCE—TEMPORARY ALIMONY.

1. When the evidence in an application for temporary alimony filed by a wife pending a libel for total divorce instituted by her husband shows that the wife has no separate estate, it is error to refuse to grant an order fixing alimony and allowance for counsel fees, unless there be evidence relating to the cause and circumstances of the separation showing facts which would authorize the judge, in the exercise of a sound discretion, to relieve the husband of his obligation to support and maintain his wife.

2. When the evidence introduced is to the effect that prior to the marriage the wife had been a prostitute, and, with full knowledge of her character and surroundings, her husband voluntarily entered into a contract of marriage with her, and fully condoned a subsequent act

of impropriety on her part by keeping her in his home and continuing to live with her as his wife, and there is no evidence of acts or circumstances which occasioned the separation other than those so within his knowledge, and which he had voluntarily and fully condoned, it is error to refuse to grant temporary alimony and allowance for counsel fees.

(Syllabus by the Court.)

Error from superior court, Cobb county; George F. Gober, Judge.

Suit by Lilla P. Kendrick against Charles H. Kendrick for divorce and alimony. From an order refusing temporary alimony, plaintiff brings error. Reversed.

Fred Morris and H. B. Moss, for plaintiff in error. Morris & Green and C. D. Phillips, for defendant in error.

LITTLE, J. "Alimony is an allowance out of the husband's estate, made for the support of the wife when living separate from him." Civ. Code, § 2456. And "on the hearing of an application for alimony pending a libel for divorce by the husband against the wife, the fact of the marriage and the ability of the husband to support his wife as she had been accustomed to live with him, were controlling questions." *Jenkins v. Jenkins*, 69 Ga. 483. Counsel fees are allowed as a part of her necessary maintenance. On the hearing of an application for temporary alimony, the merits of the cause are not in issue. Civ. Code, § 2460. These are the plain mandates of the law, instituted to protect the wife. They arise from the necessity of the case, and for the purpose of insuring her a support and maintenance pending litigation; and, when she is without separate property, this necessary maintenance is to be provided by him who alone is charged by law with her support. These principles are alike applicable where suits for divorce have been instituted by either husband or wife, and such provision for her support should be continued until, after legal inquiry, the facts on which the application for divorce is predicated have been determined by the jury, and the marriage relation, which is not to be lightly entered into by any man, shall have been dissolved. In the present case a libel for divorce was instituted by the husband, the grounds of which the record does not disclose. The institution of the action was followed by an application by the wife for the allowance of temporary alimony, and a reasonable sum as fees of her counsel to defend the divorce suit and procure an order for alimony. An allowance for either purpose was refused by the presiding judge after hearing the evidence of the wife as to the facts of the separation, and of counsel as to the amount necessary to procure proper representation for her defense of the action for divorce. In so refusing, under the facts as they appear in the record, we think the court erred. It is true that the wife testified she had been a prostitute and the inmate of a house of ill fame in the city of

Atlanta prior to her marriage with the defendant; but it is also true that she testified that he knew these facts, visited her and cohabited with her, prior to the marriage. It is true that she testified that at Christmas succeeding their marriage, and preceding the suit for divorce, she became intoxicated from drinking whisky, tore off her clothes, and was carried to bed by her husband and another man; but it is also true that she testified that after this, and until the month of April succeeding, he kept her in his home and lived with her as his wife, and that it was only after her return from a visit, during the latter month, that the door of her husband's home was barred to her entrance. For what? If it was because she had been a prostitute before her marriage, who knew it better than he when from her immoral surroundings he took her for better or for worse? When he gave her his name and made her his wife, he had a right to do so. With questions of taste in this regard the law does not interfere, but holds the husband, even under such circumstances, to the obligation into which he had entered to support and maintain her if he is able; and it is only for her improper acts occurring since he assumed that obligation, which he has not condoned, that he will be relieved of this duty, if she is in a dependent condition. It is true that her conduct at Christmas afforded a reason sufficient to have excluded her from any decent home, but if, with a full knowledge of her conduct, he continued to live with her, he had a right also to do this; but in exercising that right he put the past behind him, and could look only to her future misconduct for a legal cause of complaint. Civ. Code, § 2429. A judgment rendered on an application for temporary alimony involves the exercise of a judicial discretion, and it is provided that "the judge, in fixing the amount of alimony, may inquire into the cause and circumstances of the separation rendering the alimony necessary, and in his discretion may refuse it altogether." Id. § 2460. Now, we are to ascertain what the cause and circumstances of the separation were, from the evidence alone of the wife, because she was the only witness examined on this point. She testified that there was no cause for the separation, and the circumstances were that she was denied entrance to her husband's home after a visit to her mother, of which visit the husband had knowledge. We do not know that these things are true. Possibly the presiding judge may not have thought them so to be; but, if he did not, then the evidence was silent as to the cause and circumstances of the separation, and, such being the case, the temporary alimony and allowance for counsel fees must be granted, under the statute, as the judge is only authorized to refuse to grant alimony when the cause and circumstances of the separation are such as to make it proper that none should be allowed

in the exercise of a sound judicial discretion. We are of the opinion that, under the proof submitted, the application for temporary alimony and an allowance for counsel fees should have been granted. Judgment reversed. All the justices concurring.

(105 Ga. 396)

BARNWELL v. HANNAGAN.

(Supreme Court of Georgia. July 21, 1898.)

CROSS-EXAMINATION—IMPEACHMENT OF WITNESS.

1. "The right of cross-examination, thorough and sifting," which "belongs to every party as to the witnesses called against him" (Civ. Code, § 5282), should not be abridged, especially where the witness is the opposite party to the cause on trial, and has testified for the purpose of making out his own case.

2. Where an effort has been made to impeach a witness by proof of his general bad character, and another witness is offered for the purpose of sustaining him, the questions to be asked the sustaining witness on his direct examination are those which are prescribed in section 5293 of the Civil Code.

(Syllabus by the Court.)

Error from city court of Brunswick; S. C. Atkinson, Judge.

Action by James Hannagan against N. H. Barnwell. Judgment for plaintiff. Defendant brings error. Reversed.

Johnson & Krauss, for plaintiff in error.
J. D. Sparks, for defendant in error.

FISH, J. We are not disposed to disturb the judgment below upon the ground that the verdict rendered was contrary to the evidence, and, but for the errors committed by the court during the progress of the trial, we should let the verdict stand. The plaintiff in the lower court sued the defendant upon an open account, a part of which was for 224 days' work, at one dollar per day. The bill of particulars attached to the petition, and the plaintiff's evidence, showed that he did not claim that he was hired by the defendant for a definite period of service, nor that he was employed by the week, by the month, or the year; but his claim was that he was to work for the defendant whenever his services were desired by the latter, and to be paid, at the rate of one dollar per day, whenever he did so work. It is alleged in the motion for a new trial that the court erred in excluding certain questions which were propounded, on cross-examination, by counsel for the defendant to the plaintiff, who was a witness in his own behalf. Counsel for the defendant asked the plaintiff the following question: "You say that the first work you did for Captain Barnwell was putting up a fence? Where was it and how long were you engaged in building it, and what work did you do on the fence?" The court refused to have the question answered, upon the ground that the defendant, Barnwell, had no right to go into particulars of the work of the plaintiff. Counsel for defendant also asked this witness: "What work did you

do for the defendant, under the contract which you claim in this case, during the month of February, 1895?" The same question was asked with respect to each of the other months in which the plaintiff claimed to have worked for the defendant. The court refused to compel or allow said witness to answer any or either of the said questions. The court made the same ruling with reference to the following questions: "What labor or work did you perform for the defendant in order to earn the money you claim in this case as due you?" "What was the character of the work you did for the defendant for which you say he was to pay you one dollar per day?" It does not appear that either of these questions was ruled out because it covered ground which had already been gone over upon cross-examination, but the court seems to have put its rulings upon the ground that the defendant had no right to go into particulars of the work which the plaintiff claimed to have performed. We think the court erred in excluding these questions. "The right of cross-examination, thorough and sifting, belongs to every party as to the witnesses called against him." Civ. Code, § 5282. The rulings complained of tended to abridge, if not destroy, this right. The questions were not irrelevant. A part of the plaintiff's cause of action was 224 days' work for the defendant, performed at irregular times, at one dollar per day. According to the plaintiff's own theory, he was only entitled to recover for actual work performed by him for the defendant. He sued for 18 days' work in February, 1895, 21 days' work in March, 1895, and so many days' work in each of several other months. The defendant denied that the plaintiff worked for him at all. Whether the plaintiff worked during the month of February, 1895, and, if so, whether he worked for the defendant, and, if during that month he worked for the defendant, how many days he actually so worked, were all material questions. To force the defendant to accept the witness' statement that he worked, without allowing any details as to what he really did to be drawn from him on cross-examination, was to deny to the defendant the right to a thorough and sifting cross-examination upon the very matter in issue, viz. whether the plaintiff really worked for the defendant when he claimed to have so worked, or not. The defendant was not bound to accept the witness' statement or conclusion that he worked for him, but was entitled to a disclosure of facts as to what the plaintiff really did; so that the jury trying the case might determine whether what the witness called work was in fact work, and also, if work, whether it was for the defendant. Suppose the plaintiff had testified that he worked for the defendant upon a certain day; would not the defendant then have had the right to ask him where he was on that day, what he did, and questions of a similar character? Possibly it might be

developed by such questions that the plaintiff did not work at all on that day, or, if he did work, he worked for himself or for some person other than the defendant. "It is the duty of the court both to protect the witness under cross-examination from being unfairly dealt with, and to allow a searching and skillful test of his intelligence, memory, accuracy, and veracity. As a general rule, it is better that cross-examination should be too free than too restricted." *Harris v. Railroad Co.*, 78 Ga. 525, 526, 3 S. E. 355, 358. This general rule is particularly applicable where the witness under examination is a party to the cause of action, and is undertaking to make out his case by his own testimony.

2. One ground of the motion for a new trial is: "Because the court erred in refusing to allow the movant to sustain the witness Alice Westmoreland by proof of her good character for truth and veracity merely, it not being contended that her character in other respects was good. That movant produced a number of witnesses, and offered to prove by them that they knew the said Alice Westmoreland, and knew her character for truth and veracity; that her character for truth and veracity was good; and that from that character they would believe her upon oath." Section 5293 of the Civil Code provides that "a witness may be impeached as to his general bad character. The impeaching witness should first be asked as to his knowledge of the general character of the witness, and next as to what that character is, and lastly he may be asked if, from that character, he would believe him upon his oath. The witness may be sustained by similar proof of character." We understand the words, "The witness may be sustained by similar proof of character," taken in connection with the preceding part of this section, to mean that as the impeaching evidence must be in reference to the general bad character of the witness, and not as to his bad character for veracity, honesty, or any other separate element of character, the sustaining evidence must be as to his general character, and not as to his character for truthfulness, honesty, or any other distinct constituent of character; and that the sustaining witness must, on direct examination, be asked the same question which the law prescribes shall be propounded to the impeaching witness. As the party introducing the impeaching witness cannot ask him what the general character of the witness sought to be discredited is for veracity, so the party introducing the sustaining witness cannot propound to him this question. We know that in the United States courts and in other jurisdictions an impeaching or a sustaining witness, upon direct examination, may be asked whether he is acquainted with the general reputation of the other witness for veracity, what that reputation is, and whether, from that reputation, he would believe him upon oath; but our

Code specifies the questions to be propounded, and impliedly excludes all others. There was no error in the ruling of the court complained of in this ground of the motion. Judgment reversed. All the justices concurring.

(105 Ga. 30)

GLISSON v. HEGGIE et al.

(Supreme Court of Georgia. July 21, 1898.)

MORTGAGE—FORECLOSURE—RESCISSION OF CONTRACT.

A note of \$200 was given for the purchase money of two mules, with reservation of title to the property in the vendor until the purchase money was paid. In the same instrument a mortgage was given upon land by the vendee to secure the note. One of the mules died before maturity of the note, and at its maturity a credit of \$110.75 was made on the note. Afterwards the vendor brought bail trover for the recovery of the remaining mule, which, not being replevied, was, on petition of plaintiff, sold under order of court; and the proceeds of the sale, \$87, less costs, were awarded by the court to the plaintiff, who claimed no hire for the property. Subsequently the plaintiff proceeded to foreclose his mortgage on the land for the balance he claimed due upon the note. *Held*, that the bail-trover proceedings constituted a rescission of the contract as to the balance of the purchase money, if any, due, and the court erred in granting a rule absolute foreclosing the mortgage.

(Syllabus by the Court.)

Error from superior court, Burke county; George F. Gober, Judge.

Action by Heggie Bros. against E. O. Glisson. Judgment for plaintiffs. Defendant brings error. Reversed.

Lawson & Scales and R. O. Lovett, for plaintiffs in error. Callaway & Fullbright, for defendant in error.

LEWIS, J. The contract entered into between the plaintiffs and defendant is rather a novel one in its nature. It reserved in the vendors title to the property sold, and in another clause of the instrument creates a lien upon that property, and certain lands of the vendee. We are inclined to think that under the instrument the vendors, at their election, could have treated it as an absolute sale, and have proceeded to foreclose their mortgage upon the property sold, as well as the land, or they could have relied upon their right of title to the mules, and have brought trover therefor. This is, however, a question not made by the record. The vendors elected to bring trover for the remaining mule, and of course would be estopped from denying their right to do so. It is a well-settled rule of law that where property is sold with the condition that the title is to remain in the vendor until the purchase price is paid, unless otherwise stipulated, the risk is on the seller, and, in case of loss of the property without fault of the buyer, no action can be maintained for the purchase price. *Randle v. Stone*, 77 Ga. 501. See opinion of Chief Justice Jackson, and author-

ities therein cited. It does not appear definitely from this record whether the credit on the note made at its maturity was allowed on account of the death of the mule, or was actually paid in cash by the vendee. We think a fair inference from the record, however, is that the payment was made by the purchaser. If this be true, then that credit should have been applied to the purchase price of the remaining mule, and, if it amounted to its value according to the contract price, it was really a cancellation of the debt. This would have constituted a defense to the bail-trover proceeding. But it seems no defense was filed to that action, and the plaintiff recovered the proceeds of the sale of the mule. However this may be, we think the trover proceedings and their result amounted to a rescission of the whole contract, so far as the purchase price for the property was concerned. When the vendor of personal property reserves title in himself until the purchase money is paid, his sale is only a conditional one; and when he elects to take the property, either by taking possession of it under his contract, or by claiming it in an action of trover, the measure of his recovery is the property itself, and its value for hire, if any is claimed. In the case of *Tidwell v. Burkett*, 81 Ga. 84, 6 S. E. 816, it was decided that where a note for the purchase money of a mule, reserving title in the seller, had been transferred by him to third parties, and was in their hands when action of trover for the mule was brought, and at the time the verdict was obtained for the same, the verdict was unwarranted by the facts, and that the bringing of the action was equivalent to a rescission of the whole contract, and that there was no right to recover the value of the property from the vendee before the note had been delivered up to him. The case of *Hays v. Jordan*, 85 Ga. 741, 742, 11 S. E. 833, was where there was a contract for the conditional sale of a piano, title to which was reserved in the seller until the purchase price was paid. Certain payments were made by the purchaser, and, having defaulted, the seller brought an action of bail trover for the piano, and elected to take it. It was held by this court that before it could be recovered the seller should return the amount paid him. We do not mean to say that on the trial of such an action of trover, when the plaintiff elects to take damages in lieu of the property, or when the defendant sets up an equitable defense, asking that a recovery be had only for the balance of the purchase money due, the court should not instruct the jury to so mold their verdict as to protect the substantial equities and rights of the parties. What we do rule is that when an election is made to take the property itself, and it has been recovered by the plaintiff, this is a rescission of the contract of purchase, and no subsequent action can be had for any further recovery. In the

present case, it is true, the property itself was not awarded to the plaintiffs, but the action had was equivalent to the same thing. There was a failure to replevy the property seized under bail process, and upon application of the plaintiffs it was sold in accordance with the provisions of section 4607 of the Civil Code. It is provided in that section "that in case the property is sold, the plaintiff, in case of recovery, shall only be entitled to a money verdict for the amount of the proceeds of such sale, together with hire or interest from the date of conversion to the date of seizure, if the jury shall so find." Manifestly, then, the proceeds of the sale, in contemplation of law, stand in lieu of the property itself, and the recovery of such proceeds has the same legal effect on the rights and liabilities of the parties as if the property had been replevied, and then upon the trial of the trover proceedings had been recovered by the plaintiffs. Judgment reversed. All the justices concurring.

(105 Ga. 26)

SORRELLS v. SORRELLS.

(Supreme Court of Georgia. July 21, 1898.)

ERROR—MOTION TO DISMISS—MARRIED WOMAN—WARRANTY IN DEED—LIABILITY FOR BREACH.

1. There was no merit in the motion to dismiss the writ of error.

2. A married woman cannot be made liable for the breach of a warranty of title contained in a deed executed jointly by her husband and herself, describing and undertaking to convey as one tract two separate and distinct parcels of land, one of which belonged to her and the other to him, when these facts were known to the grantee at the time he took the deed, and when it appears that the breach of warranty occurred by reason of the fact that he was compelled to pay off a mortgage given by the husband upon his parcel of the land before the execution of the joint conveyance.

3. Irrespective of other questions presented by the record, the verdict in the present case was, upon the undisputed facts thereof, contrary to law.

(Syllabus by the Court.)

Error from superior court, Madison county; S. Reese, Judge.

Action by H. P. Sorrells against S. H. Sorrells and wife. Verdict for plaintiff. The wife brings error. Reversed.

D. W. Meadow, for plaintiff in error. R. H. Kinnebrew and J. P. Shannon, for defendant in error.

LUMPKIN, P. J. A motion was made in this court to dismiss the writ of error. It was not well taken, and presented no new question. On December 7, 1892, S. H. Sorrells and his wife, M. E. Sorrells, by their joint warranty deed conveyed to H. P. Sorrells 129 acres of land, described in the deed as one tract. The record discloses that, in point of fact, S. H. Sorrells owned 50 acres of the land thus conveyed, and Mrs. Sorrells owned the remaining 79 acres. These par-

cels of land were priced separately, and H. P. Sorrells paid to S. H. Sorrells the price agreed upon for his 50 acres, and to Mrs. Sorrells the price agreed upon for her 79 acres. Her husband, previous to the execution of this joint deed, had mortgaged his 50 acres to one Ginn. After the purchase by H. P. Sorrells from S. H. Sorrells and wife, the mortgage held by Ginn was foreclosed, and H. P. Sorrells was compelled to pay off the same in order to relieve from the incumbrance thereof the 50 acres of land. He then brought an action against S. H. Sorrells and his wife for a breach of the covenant of warranty contained in their joint deed to him. The husband filed no defense. On the trial of this action the above-stated facts were shown, and it also appeared that H. P. Sorrells, at the time he purchased the 129 acres of land, not only knew the facts concerning the ownership thereof, but that the joint deed was made at his special instance and request. The jury, under the charge of the court, returned a verdict in his favor against both of the defendants. Mrs. Sorrells moved for a new trial, and her motion was overruled. Without dealing specifically with the grounds of this motion, it is sufficient to say that upon the undisputed facts of the case the verdict against Mrs. Sorrells was contrary to law, and ought to have been set aside. A sale of her property under a judgment in favor of H. P. Sorrells would, in effect, be making the same liable for the payment of a "debt, default or contract of the husband," which is forbidden by section 2474 of the Civil Code. She could, of course, bind herself by a contract warranting the title to the 79 acres of land which she owned and sold; but to hold her liable upon her husband's warranty of title to the 50 acres owned and sold by him would be binding her, either upon a contract of suretyship, which section 2488 of the Civil Code declares would be absolutely void, or else would be adjudging her liable upon a contract for which there was no consideration whatever. In so far as the contract of warranty related to the 50 acres, it was absolutely void as to Mrs. Sorrells. We are therefore clearly of the opinion that the trial judge erred in overruling the motion for a new trial. Judgment reversed.

(105 Ga. 26)

WHITE et al. v. JONES.

(Supreme Court of Georgia. July 21, 1898.)

TRIAL—EVIDENCE—HEARSAY—WITNESSES—COMPETENCY—BILLS AND NOTES—PLEADING AND PROOF.

1. An answer to a general and final interrogatory propounded to a witness may be excluded when such answer contains material and important testimony of the nature of which the opposite party was not reasonably put upon notice either by the question embraced in that particular interrogatory or by the same when taken in connection with preceding interrogatories.

2. One who, by mere delivery, acquires title to a promissory note payable to a deceased person or bearer, from another who in like manner acquired title to the note from the payee while in life, is not, within the meaning of paragraph 1 of section 5269 of the Civil Code, an "indorsee," "assignee," or "transferee" of the deceased payee; and consequently the maker of the note, when sued thereon by the last holder, is not incompetent to testify in his own favor as to transactions or communications with such deceased.

3. There was no error in excluding from evidence a deed of assignment, the parties to which were strangers to the action on trial; nor in allowing the defendant to prove the correctness of the account with which the answer alleged the note sued upon had been settled.

(Syllabus by the Court.)

Error from superior court, Washington county; E. H. Callaway, Judge.

Action by J. B. White & Co. against Mrs. M. F. Jones. There was a judgment for defendant, and plaintiffs bring error. Affirmed.

Rawlings & Hardwick, for plaintiffs in error. J. N. Gilmore and J. K. Hines, for defendant in error.

LUMPKIN, P. J. An action was brought by White & Co. against Mrs. M. F. Jones upon a promissory note, due one day after its date, payable to J. Floyd Jones, or bearer, who had died before the suit was begun. The defense set up in the defendant's answer, in substance, was that Mrs. Jones, in the lifetime of J. Floyd Jones, had settled and paid off this note under an agreement with him whereby she credited him with the amount thereof upon an open account against him for board, and that the plaintiffs had acquired possession of the note after his death, and long after its maturity. There was a verdict for the defendant. The plaintiffs' motion for a new trial was overruled, and they excepted. The following questions are presented by the record:

1. The plaintiffs offered in evidence answers to interrogatories propounded to Mrs. Hattie McMillan, who had been the wife of J. Floyd Jones, but who after his death had again married. The last of these interrogatories was in the following language: "State anything further that you may know that would benefit plaintiffs, as if specially interrogated thereto." After testifying that her deceased husband had given her the note now in controversy as soon as he received it, this witness, in answer to the last interrogatory, stated that Mrs. Jones, after the death of J. Floyd Jones, promised witness to pay the note to her. The court, on motion of counsel for the defendant, excluded the answer to this last interrogatory, "because the question asked was too vague and indefinite, and not sufficiently explicit to put defendant's counsel on notice," etc. The interrogatories preceding the last do not appear in the record before us; and, as the burden of showing error rests upon the party alleging it, it will be presumed in favor of the cor-

rectness of the ruling made by the judge that none of the interrogatories were so framed as to put Mrs. Jones or her counsel upon notice that the plaintiffs expected to prove by Mrs. McMillan a promise to her by Mrs. Jones to pay the note. Thus viewing the matter, we cannot undertake to say that the court erred in rejecting the answer of the witness to the last interrogatory. In *McBride v. Publishing Co.*, 102 Ga. 422, 30 S. E. 999, this court held that, "if the evidence contained in such answer was of a nature not suggested by any of the other interrogatories, this fact would of itself be a good ground for not allowing the answer to be read in evidence." The reason for this holding is obvious, viz. that, when a party sues out interrogatories for the examination of a witness, the opposite party is entitled to be put on reasonable notice of what the party suing out the interrogatories expects to prove. This is essential to a proper cross-examination of the witness.

2. There was no contention on the part of the plaintiffs that J. Floyd Jones had ever made any written transfer or assignment of the note in suit. Their contention was that the deceased had given the note to his wife as soon as he received it, and that she, in turn, had sold it to them, the title in each instance passing by mere delivery. Upon this state of facts, the plaintiffs objected to the competency of Mrs. Jones to testify as a witness in her own behalf regarding any transactions had between herself and the deceased relatively to this note, the objection being based upon paragraph 1 of section 5269 of the Civil Code. That paragraph declares: "Where any suit is instituted or defended by a person insane at the time of trial, or by an indorsee, assignee, transferee, or by the personal representative of a deceased person the opposite party shall not be admitted to testify in his own favor against the insane or deceased person, as to transactions or communications with such insane or deceased person." This paragraph was taken from the evidence act of 1889, as amended by the act of December 9, 1893 (Acts 1893, p. 53). The latter act introduced into the statute the words "by the indorsee, assignee, transferee, or," immediately before the words "or by the personal representative of a deceased person." The codifiers changed the word "the," before the word "indorsee," to "an." If the amending act had described the indorsee, assignee, or transferee to which it referred as the indorsee, assignee, or transferee of paper which had belonged to a deceased person, this case would present a different question; but taking the law as actually amended, its literal meaning is that the indorsee, assignee, or transferee against whom the opposite party shall not be permitted to testify is the indorsee, assignee, or transferee of the "deceased person" whose transactions with such party are in question. It may not be strictly accurate to speak of

a person who has acquired title to a promissory note or other chose in action from another as the indorsee, assignee, or transferee of the latter, rather than as the indorsee, assignee, or transferee of the paper; but this is done colloquially every day, and we feel certain that the general assembly, in passing the act of 1893, intended that the words "indorsee, assignee, or transferee" should refer to the immediate indorsee, assignee, or transferee of a deceased person. At any rate, the effect of so holding will, as above remarked, be to give to the law as amended its literal meaning, which it is our plain duty to do under the legislative mandate contained in the evidence act of 1889, and now embodied in section 5270 of the Civil Code. This court has steadfastly adhered to the policy of enforcing this act literally, in no instance undertaking to extend its provisions by construction. It is obvious that White & Co. were not indorsees, assignees, or transferees of the deceased, Jones. They held under a verbal transfer from Mrs. McMillan, and did not derive title to the note as immediate transferees of the deceased. The court allowed Mrs. Jones to testify as to the transactions referred to, and in so doing did not, in our judgment, commit any error.

3. The plaintiffs offered in evidence an assignment for the benefit of creditors which had been made by J. Floyd Jones in his lifetime. In this assignment no mention was made of the note sued on in the present case, nor did the name of Mrs. Jones appear in the list of creditors of J. Floyd Jones attached to this assignment. The plaintiffs' purpose in offering this paper was to show inferentially that the deceased was not indebted to Mrs. Jones in any manner, and that at the time of making the assignment he had parted with the title to this note. These inferences, at best, would be quite remote; but, be this as it may, the paper was not admissible against Mrs. Jones. Whatever it contained was, as to her, hearsay, and the court properly rejected it. There was some evidence tending to show that J. Floyd Jones had contracted to pay Mrs. Jones \$20 per month for board. In addition to this, the court allowed her to testify that the board of J. Floyd Jones was reasonably worth this amount per month. This evidence was objected to on the ground that, as the defendant had pleaded and attempted to prove an express contract, "evidence in the nature of a quantum meruit was inadmissible." In point of fact, the defendant did not plead that J. Floyd Jones expressly agreed to pay her any stated monthly sum for board. Her defense was that she had settled the note he held against her with the account for board which she held against him. Accordingly, it was competent for her to prove the origin of her demand against him, either by showing an express or an implied contract on his part, as the plaintiffs had not,

by special demurrer, called upon her to state specifically in her plea the precise manner in which her alleged claim against the deceased arose. Judgment affirmed. All the justices concurring.

(105 Ga. 34)

BARRIE v. SMITH.

(Supreme Court of Georgia. July 21, 1898.)

SUBSCRIPTIONS—PAROL EVIDENCE.

It was, in the trial of an action upon a contract of subscription for certain books, signed at the solicitation of an agent of the plaintiff, and stipulating that "no other conditions or representations than those herewith printed will be binding upon the subscriber or publisher," erroneous to admit parol evidence of representations made by the agent as to matters not mentioned in the contract as executed.

(Syllabus by the Court.)

Error from city court of Elberton; P. P. Proffitt, Judge.

Action by George Barrie against Mrs. W. C. Smith. Judgment for defendant. Plaintiff brings error. Reversed.

S. N. Evins and C. P. Harris, for plaintiff in error. W. D. Tutt, for defendant in error.

LUMPKIN, P. J. An action was brought by Barrie against Mrs. W. C. Smith upon a contract of subscription for a specified edition of Balzac's "Comedie Humaine," which the defendant was induced to sign by the plaintiff's agent. The edition consisted of 46 volumes. After taking and paying for 7 volumes at the contract price, Mrs. Smith refused to receive or pay for any more of them. Her defense to the action was, in substance, that she had subscribed for the books upon the faith of representations made by the plaintiff's agent that they were suitable for a family library, but that upon reading a portion of the same she ascertained that they were immoral, and unfit for females or children to read. She paid for the 7 volumes before she had time to read the same or investigate their character, but after being informed thereof she offered to rescind. The court, over the objection of the plaintiff, permitted the defendant to testify, "The agent represented the books to be of a very high order, and that only a thousand copies would be sold, when the plates would be destroyed," and that he was allowed to sell only three copies in a place as small as Elberton, the town where the subscription was taken. The contract was, in its terms, plain and unequivocal, and, among other things, contained a stipulation that "no other conditions or representations than those herewith printed will be binding upon the subscriber or publisher." It contained no representation whatever as to the moral character of Balzac's works. We are satisfied the court erred in admitting this evidence. The stipulation above quoted was manifestly designed to prevent the plaintiff's

agent from binding his principal by any representations whatever, other than those expressed in the contract itself. This evidence was therefore inadmissible, because it directly contradicted and varied the terms of the written instrument. In the case of *Gorham v. Felker*, 102 Ga. 280, 28 S. E. 1002, a somewhat similar question was presented, and the ruling of this court thereon is in point in the present case. It is proper to state, in this connection, that there was no contention on the part of Mrs. Smith that she was ignorant of the contents of the instrument when she signed it, or that any fraud was used to mislead her as to its true meaning and effect. The case therefore differs materially from that of *Barrie v. Miller* (decided during the present term) 30 S. E. 840. There it appeared that the publisher's agent falsely and fraudulently misrepresented to the subscriber the meaning of certain technical terms used in the contract, and consequently the latter was induced to sign an instrument meaning one thing, which he, because of the agent's fraud, honestly believed meant another. Judgment reversed. All the justices concurring.

(105 Ga. 505)

MARTIN et al. v. CAMPBELL PRINTING-PRESS & MANUFACTURING CO. et al.
(Supreme Court of Georgia. July 22, 1898.)

APPEAL—REVIEW.

Upon a careful consideration of the evidence contained in the record, it does not appear that any error was committed by the trial judge in passing the interlocutory order complained of in the bill of exceptions.

(Syllabus by the Court.)

Error from superior court, Fulton county; J. H. Lumpkin, Judge.

Action between J. E. Martin and others and the Campbell Printing-Press & Manufacturing Company and others. From the judgment, Martin and others bring error. Affirmed.

Walter R. Brown, for plaintiffs in error. Harvey Hatcher, Jr., E. M. & G. F. Mitchell, Glenn & Rountree, J. A. Noyes, and R. B. Blackburn, for defendants in error.

PER CURIAM. Judgment affirmed.

(105 Ga. 54)

MILLER v. CROZIER.

(Supreme Court of Georgia. July 22, 1898.)

HOMESTEAD OR WIDOW'S ALLOWANCE—ELECTION.

Where a husband, as the head of a family, has a homestead set apart for himself and wife, and afterwards dies, his widow may elect either to allow the homestead to remain for her benefit, as the sole beneficiary, or to take a year's support out of the homestead property.

(Syllabus by the Court.)

Error from superior court, Burke county; George F. Gober, Judge.

Amarintha Crozier applied for an allowance as widow of her deceased husband. From an order granting the same, R. J. Miller, executor, brings error. Affirmed.

W. K. Miller, for plaintiff in error. Phil P. Johnson, for defendant in error.

SIMMONS, C. J. It appears from the record that Crozier in 1877 applied for, and had set apart for the benefit of his wife, a homestead in a certain lot or tract of land; that in 1897 he died; that a few weeks after his death the widow applied to the ordinary to have set apart to her a year's support out of the homestead property; that his application was resisted by a judgment creditor of the husband. The ordinary allowed the year's support. The creditor appealed to the superior court, and on the trial in that court the judgment of the ordinary was affirmed. The creditor excepted.

When a person owning real estate has it set apart as a homestead for the benefit of his family, he does not thereby lose the fee to the land. The law imposes a use upon it for the beneficiaries during the life of the wife and the minority of the children. After the death of the wife or widow, and the majority of the children, the use ceases, and the land and its use revert to the husband and father, or to his estate, and become subject to his debts. The Code of this state gives to the widow of a deceased husband and, if there be any, to his minor children, a year's support out of his estate, and gives this year's support precedence of all debts and liens. Upon the death of the husband the right to the year's support becomes vested in the widow, and, if there be any, in the minor children. If the widow die before the year's support is set apart, her administrator can have it set apart as a part of her estate. *Brown v. Joiner*, 77 Ga. 232, 3 S. E. 157; *Id.*, 80 Ga. 498, 5 S. E. 497. These propositions being true, the question arises, can a widow, after a homestead has been set apart in the lifetime of her husband for her benefit, take a year's support out of the homestead property? It is claimed by the plaintiff in error that according to the decisions in the cases of *Roff v. Johnson*, 40 Ga. 555, *Adams v. Adams*, 46 Ga. 630, *Robson v. Lindrum*, 47 Ga. 250, and *Singleton v. Huff*, 49 Ga. 582, she cannot do so. In our opinion, these decisions do not control this question. They all hold, in effect, that a widow, or widow and children, after a homestead has been taken, cannot supplement the homestead by dower or year's support out of the other property of the estate; or that, after taking dower or year's support, she cannot take out a full homestead; that, if she has taken dower or year's support, this must be deducted from the amount allowed by law for a homestead. The particular question now under consideration has never been decided by this court. The case nearest in point is that of *Lowe v. Webb*, 85 Ga. 731.

11 S. E. 845. There the widow, without objection, took a year's support out of the homestead property; and the point decided was that, when this had been done, the homestead estate, being the lesser, was merged into the year's support, which, as we have shown, is an absolute estate, and therefore the greater, and that the property was therefore subject to the debt of the widow. This decision does not control the present case, and we are left free to decide it as an original question. The law giving to the widow a year's support, in preference to all claims, demands, or liens against the husband's estate, and she having an absolute title in the year's support set apart to her, where there is no minor beneficiary, we see no reason, in law or equity, why she is not entitled to elect between the estates the law has provided for her. The law gives her an estate in the homestead property for life, or during widowhood, and an absolute estate in the year's support. She can elect either the one or the other. Her election of the one will amount to a relinquishment of the other. If the whole of the homestead estate be allowed her as a year's support, then, according to *Lowe v. Webb*, supra, the lesser estate is merged into the greater, and she has the fee to the whole. It is argued that this would be an injustice to her husband's creditors, because, if she were not allowed to take the year's support out of the homestead property, she could only have a life estate therein, and at her death or marriage the property would be subject to their claims; to allow her to take the year's support would vest the title in her, and free the property forever from the debts of her husband. This may be unjust under the old dispensation of "an eye for an eye and a tooth for a tooth," but according to the law now of force in this state it is not so. If the husband had never set apart the homestead, and had died leaving this property, his widow would be entitled to a year's support out of it, regardless of all claims against the husband. The state, in its solicitude for helpless widows and orphan children, more than a half century ago, by its legislature, passed the first act "for the relief and support of widows and orphans, out of the estates of their deceased husbands and parents." The act provided that the executor or administrator should allow "a reasonable support and maintenance for the space of twelve months next ensuing, immediately after the death of such testator, or intestate, notwithstanding any debts, dues, or obligations of said testator or intestate." Act 1838 (Cobb, Dig. p. 296). The law humanely allows a support to the widow and children for 12 months after the death of the husband and father. Prior to the passage of these acts, creditors could seize and sell the last morsel of the estate, leaving the widow and children utterly unprovided for. Since that time, whoever has extended credit

to the husband has done so with the knowledge that the widow has the right to a year's support out of the husband's estate in preference to all other claims or demands against him. There is therefore no injustice to this creditor in allowing this widow to elect between the year's support and the homestead estate, and freeing the year's support from the lien of the creditor's judgment. It appears from the record that the income from the homestead estate is not sufficient to support her. When it is set apart to her as a year's support, she will have absolute title, and may sell all or a portion of the land, and invest the proceeds in such other property as will bring her a greater income. For these reasons the judgment of the court below is affirmed. All the justices concurring.

(105 Ga. 48)

UNDERWOOD v. WESTERN & A. R. CO.

(Supreme Court of Georgia. July 22, 1898.)

NEGLIGENCE — MOUNTING ON MOVING FREIGHT CARS.

A petition filed against a railroad company for damages, in which it is alleged that the plaintiff, a boy of 10 years of age, was injured while attempting to get upon the ladder of a moving freight car, it not alleging, however, that this attempt was known to any of the employes in charge thereof, sets forth no cause of action. The foregoing is true notwithstanding the fact that upon previous occasions he had been in the habit of climbing upon, and riding on, the moving trains of the defendant, with the knowledge and permission of its agents and employes.

(Syllabus by the Court.)

Error from city court of Atlanta; H. M. Reid, Judge.

Action by Dominick Underwood, by his next friend, against the Western & Atlantic Railroad Company. Judgment for defendant. Plaintiff brings error. Affirmed.

Maddox & Terrell, for plaintiff in error. Payne & Tye, for defendant in error.

COBB, J. Dominick Underwood, by his next friend, brought suit against the Western & Atlantic Railroad Company. The petition alleged, in substance, that petitioner, a child of 10 years of age, and without the capacity to comprehend the danger to which he was exposing himself, attempted to get upon the steps of a ladder attached to a coal car of the defendant's freight train, which was in motion, when his right foot was caught under the car wheel, which passed over him, causing serious injuries. For a great length of time prior to the injury, he had been in the habit of climbing upon, riding on, and getting down from, passing and moving trains belonging to and in control of the defendant, and on its line of railroad, at or near the point where the injury occurred; and this fact was known to the defendant, its agent and employes, and they negligently failed to warn him of the

danger attending such attempts, and negligently failed to require him to cease from so doing, but negligently permitted him to climb upon its moving trains, and upon the date of the injury negligently permitted him to attempt to do so, with no effort to prevent the same, and without warning him of the danger incurred, and without requiring or attempting to require him to desist. The defendant owed him the duty of warning him, and of requiring him to remain away from the trains entirely, because of his youth, incapacity, and indiscretion. At the time of the injury, he was earning by his labor a stated sum per day; and he was thereby disabled from pursuing his usual avocation and performing usual manual labor, and injured permanently. Upon motion at the trial term, the case was dismissed, on the ground that the petition set forth no cause of action.

There is no averment in the petition that the plaintiff had business about the train, or any connection whatever with the railroad company, nor that the presence of the plaintiff near the train, or his attempt to swing upon it, on the occasion of the injury, was known to any of the employes in charge of the train, nor any averment which could be construed to charge that the injury was wantonly inflicted upon the petitioner. The case, briefly stated, as made by the petition, is simply this: A boy, 10 years old, sees a moving freight train, attempts to swing upon the ladder attached to it while the train is in motion, loses his hold, falls under the wheels, and is injured. The ground upon which he seeks to make the company liable is that he had been previously known by the employes of the company to have been guilty of similar conduct. It is not pretended in the present case, so far as the allegations are concerned, that any agent or employé of the company knew that the plaintiff had placed himself in a perilous position. The plaintiff being a trespasser, the only duty which the railroad company, through its employes in charge of the train, owed him, was not to injure him wantonly or willfully after his presence in a perilous position became apparent to them. That he was in a perilous position being unknown to them, there was no duty owing to the plaintiff in the present case. A railroad company is under no obligation to station watchmen about its crossings and rights of way to prevent boys from swinging on its moving trains, and a failure to do so is therefore not negligence. The fact that the boy in this case had been permitted by certain employes of the railroad company to do acts similar to that which he was attempting to do when injured cannot be construed as an invitation on the part of the company to do so on other occasions.

It is contended, however, that the plaintiff is entitled to recover under the allegations made upon the doctrine of what are known

as the "Turntable Cases." The principle of these cases is that where any person has dangerous machinery, stationary in its character, which is calculated to interest and attract children, it is the duty of the owner of such machinery to so guard it that children allured by it will not be able to injure themselves in any way. *Ferguson v. Railroad Co.*, 75 Ga. 637. While the doctrine of the Turntable Cases is well settled in some of the states, this being among the number, in others it has been severely criticised, and in some entirely repudiated; but, no matter what may be the opinion entertained in regard to the rule laid down in the Turntable Cases, in no jurisdiction, so far as we know, has this doctrine been applied to a moving car upon the track of a railroad company. The application of it to moving trains would, it seems to us, impose upon the railroad companies a burden which it is not reasonable that they should bear. Nothing is more alluring to a child than a passing vehicle, whether it be a buggy, carriage, dump cart, wagon, or a railway train; and if railroads are to be liable because boys, without the knowledge of the employes in charge, attempt to swing upon their passing trains, then the owners of the other vehicles named would be equally liable if a boy, without the knowledge of the person in charge, was injured while attempting to swing upon the rear axle or other part of such vehicles. See the case of *Catlett v. Railway Co.*, 57 Ark. 461, 21 S. W. 1062, where the facts appear to be very similar to the case under consideration. Judgment affirmed. All the justices concurring.

(105 Ga. 42)

BURRUS et al. v. CITY OF COLUMBUS et al.

(Supreme Court of Georgia. July 22, 1898.)

RAILROADS—SIDE TRACKS IN STREET—INJUNCTION.

1. Where a railway company, by an act of the general assembly, is duly authorized to construct and operate a side track of its railroad in a given street of a city, the fee to which street is in the state, a court of equity will not enjoin it from so doing, merely to prevent consequential damages to the property of a private citizen which is located upon such street.

2. Upon the hearing of an application for injunction to prevent alleged irreparable injury, it is not erroneous to refuse to grant the same, when neither the petition nor the evidence sets forth facts sufficient to enable the court to determine the necessity for an injunction.

(Syllabus by the Court.)

Error from superior court, Muscogee county; W. B. Butt, Judge.

Action by G. J. Burrus and others against the city of Columbus and others. Judgment for defendants, and plaintiffs bring error. Affirmed.

C. J. Thornton and E. A. Thornton, for plaintiffs in error. Jno. D. Little, F. D. Peabody, and C. E. Battle, for defendants in error.

FISH, J. At the trial the case was heard by the court upon the petition, demurrers, answers, and the evidence. Each of the several defendants having, in its answer, denied the charges of combination and confederacy, and no evidence being offered in support of the same; the Empire Mills Company having, in its answer, denied that it intended to lay the side track in question, and the plaintiffs offering no evidence to substantiate this charge; and the Central of Georgia Railway Company having admitted that it intended to build this track, and that at the time of the service of the temporary restraining order it had actually begun to do so,—the real issue, at the interlocutory hearing, was between the plaintiffs and the railway company. It is unnecessary to consider whether or not there is a misjoinder of parties defendant in the case, for, in our opinion, in no view of the case, as made by the petition or the evidence, were the plaintiffs entitled to an injunction. It is perfectly clear, from the evidence, that the railway company is duly authorized by the law to build and operate the side track in question. The fee to the streets in the city of Columbus is in the state. Dawson, Comp. pp. 470, 474; *Kavanagh v. Railroad Co.*, 78 Ga. 271, 2 S. E. 636. By an act of the general assembly of this state, the Mobile & Girard Railroad Company was authorized to construct, maintain, and operate this side track. Acts 1890-91, p. 254. The evidence shows that, under and by virtue of a regular judicial sale, had in accordance with a decree of the United States circuit court for the Middle district of Alabama, the decree of the court confirming such sale, and a deed in pursuance thereof, executed on the 7th day of March, 1896, the Central of Georgia Railway Company became the owner of all the property, rights, and franchises of the Mobile & Girard Railroad Company. The right to construct, maintain, and operate this side track was a franchise of the Mobile & Girard Railroad Company, and passed to and became a franchise of the Central of Georgia Railway Company, by virtue of the judicial sale and the decree of the court confirming the same. *Railroad Co. v. Delamore*, 114 U. S. 501, 5 Sup. Ct. 1009; *People v. Kerr*, 87 Barb. 393.

It is to be presumed, in the absence of any allegations or evidence to the contrary, that the defendant railway company is proceeding to avail itself of the rights conferred by this franchise in a legal manner and in compliance with the requirements of the law. It is therefore clear that it cannot be deprived of these rights by injunction. To hold that, upon such allegations as are contained in the plaintiffs' petition and such evidence as was offered in its support, the railway company can be prevented from building and operating this track, would be to hold that a court can destroy the lawful franchise of a railroad company, in order to prevent the consequential damages which

will ensue to private property by reason of its exercise. Such is not the law. It is true that the legislature cannot confer upon a railroad company the power to take or damage private property without compensation, but no such question is made in the case at bar. The law applicable to cases where property is taken or damaged by the exercise of the power of eminent domain is not the law that is invoked in this case. So far as can be ascertained from the meager allegations of the petition and the scanty facts contained in the evidence offered to sustain it, the plaintiffs seem to be proceeding upon the theory that the laying and operating of the side track in the street upon which their property is located will be a nuisance, which will subject their property to irreparable injury, and that they are therefore entitled to an injunction which will perpetually prohibit the railway company from constructing the track. But that which the law authorizes to be done, if done as the law authorizes it to be done, cannot be a nuisance. 1 High, Inj. 767, and cases cited; *Hinchman v. Railroad Co.*, 17 N. J. Eq. 75; *Hogencamp v. Same*, Id. 83; *Elliott, Roads & S.* p. 484, and cases cited. See, also, *Davis v. Railway Co.*, 87 Ga. 611, 13 S. E. 567; *Railroad Co. v. Woodruff*, 86 Ga. 98, 99, 13 S. E. 156.

2 But, aside from this, we do not think that the allegations of the petition or the facts developed by the evidence were such as to require the grant of an injunction, and consequently, for this reason, there was no abuse of discretion in denying it. It is well established that the mere allegation of irreparable injury is not sufficient to authorize the granting of an injunction, but facts must be alleged upon which the charge of irreparable injury is predicated, in order that the court may be satisfied as to the nature of the injury. 1 High, Inj. § 84, and cases cited. In 10 Enc. Pl. & Prac. 954, the rule is thus stated: "A general allegation that the acts apprehended will be irreparable, unattended by such a statement of facts as enables the court to see that such will be the result, is insufficient. The pleader must not content himself with a mere averment of his conclusions, but must show how the irreparable injury apprehended is to arise, by giving a full and detailed statement of the facts, the nature and condition of his property, etc., so as to enable the court to determine the necessity for an injunction." In *Bailey v. Simpson*, 57 Ga. 525, this court said: "The allegation that, without injunction, the complainant's injury would be irreparable, is of no value, for a state of facts is not presented from which such injury is likely to accrue." Whether the damage is or is not irreparable is a conclusion of law which the court draws from the facts and circumstances as set forth in the petition. *Justices of Inferior Court v. Griffin Road Co.*, 11 Ga. 246. Hence, "facts must be set forth, specifications of the injury made, so that an intelligent mind

may understand how and to what extent there will be injury." *Railroad Co. v. Cohen*, 50 Ga. 462. If it is necessary for the pleadings to set forth the facts, so as to enable the court to determine the necessity for an injunction, most assuredly it is necessary that the evidence should do so. As to Threatt, one of the two plaintiffs in the case, the evidence did not even sustain the allegation that he owned property upon the street in question. Only two witnesses testified for the plaintiffs, and there was nothing in the testimony introduced by the defendants which tended to strengthen the plaintiffs' case. One of the witnesses, Kincaid, simply testified that "he was a citizen of the city of Columbus, and that he lived upon Ninth street, and that the placing of the track upon the said street would be a great damage to property owners, and would result in irreparable loss to the property owners on Ninth street." It will be seen that he stated a mere opinion of his, without stating any fact upon which he predicated it, except the isolated fact of the placing of the track upon the street, and that his conclusion, that irreparable loss would result from the placing of the track there, is applied, indiscriminately, to all the property owners upon that street. Clearly, his evidence was of no value to the plaintiffs. Burrus, the other witness and one of the plaintiffs, testified that "he was a citizen of Columbus, and that he lived on Ninth street, in said city; that he was the owner of and possessed of property on Ninth street; that the track proposed to be laid was immediately opposite his residence, and in front of his residence; and that the placing of the track there would be to his great damage, and be an irreparable loss." While he stated that he owned and possessed property on Ninth street, he did not state any particular whatever as to the nature or condition of this property. So far as appears from his evidence, he may not own the property which he occupies as a residence. Granting, however, that he really owns the property upon which he resides, how the track is to be constructed in the vicinity of this property, what are the particulars in which it will affect this property or the use of the same, how near the track would be to his residence,—in short, how and in what way it "would be to his great damage and be an irreparable loss,"—are all matters which are left to conjecture. The facts upon which he bases his conclusion of irreparable loss, as contained in his evidence, are too meager. We do not think that a court would be authorized to conclude that the mere "placing" of a railroad track, in any manner, anywhere in a street of unknown width, immediately opposite and in front of a private residence, which is situated at any conceivable distance from the street, would necessarily cause the owner and occupier of the residence to sustain irreparable damages. The evidence wholly failed to present to the

court a state of facts from which it could intelligently determine whether or not irreparable damages would ensue to the property of this plaintiff, if the railway company constructed the track in question upon Ninth street. If, therefore, there had been no evidence in the case except that offered by the plaintiffs, the court below would not have abused its discretion by refusing the injunction applied for. Judgment affirmed. All the justices concurring, except LITTLE, J., disqualified.

(105 Ga. 67)

RODGERS v. PRICE.

(Supreme Court of Georgia. July 22, 1898.)

PARTITION—RIGHT TO JURY.

In an action by one of several tenants in common for the partition of lands, where the only question before the court is whether or not a fair and equitable division of the land can be made by metes and bounds, the judge has the legal right, under section 4793 of the Civil Code, to determine this question without the intervention of a jury.

(Syllabus by the Court.)

Error from superior court, Bibb county; W. H. Felton, Jr., Judge.

Action between J. T. Rodgers and E. R. Price. From the judgment, Rodgers brings error. Affirmed.

H. F. Strohecker, for plaintiff in error.
Ryals & Stone, for defendant in error.

LEWIS, J. The solution of the question raised by the assignment of error in this record depends upon what construction should be given the word "court," as used in section 4793 of the Civil Code. Sometimes this word, as applied to a particular branch of the judiciary, is used in its comprehensive sense, and embraces all the official machinery of a particular court, including judge and jury, if a jury should be one of its tribunals in determining issues. But we have never known the word applied so as to designate a jury alone. Where the term is used in the statute that is intended to designate what official shall determine and pass upon certain issues in the court, it invariably means the presiding judge. Whenever it is the legislative intent that the issues in any proceeding should be submitted to a jury, the word "jury" is used, and not "court." In the latter part of the section cited it is stated, "The court shall order a sale of such lands," etc. Evidently this applies to the judge, for no one ever heard of a jury ordering a sale of property. We can see no reason for giving the same word one meaning in the first part of the section, and an entirely different one in the last. This view is strengthened by the provision of section 4791, which declares when an issue shall be made up and tried by a jury. The word "jury" is there used, and not "court." Where objections are filed to the right of an applicant for partition, showing by way of defense any mat-

ter in bar of the partition asked for, or that the applicant is not entitled to so much of the land as is awarded to him, or to any part thereof, then this presents the issue for a jury trial; but, under section 4793, when the only issue, as in this case, is whether a fair and equitable division of the land can be had by metes and bounds, this issue must be determined by the court (that is, by the judge), and, if it shall appear to him that such a division cannot be had, then he shall order a sale of the lands.

The question of the constitutionality of this provision in the act is not directly made by this record. The plaintiff in error seems to claim the right of trial by jury under the statute, without calling directly in question the validity of the statute on account of its depriving him of the right of trial by jury. We do not think, however, there is any trouble on this score under previous adjudications of this court upon the subject of this important right of a litigant. The effect of these rulings is not to extend the right beyond the limits as they existed prior to the adoption of the constitution. As stated by Justice Atkinson in *Stewart v. Sholl*, 99 Ga. 537, 26 S. E. 758, "The limitations upon this right are to be found in the common law, and, except only in so far as it has been modified by the constitution, it remains of force in this state to the same extent only as it existed at common law." No such right existed at common law in equitable proceedings. In *Griffin v. Griffin*, 33 Ga. 109, Lyon, J., said: "The proceedings, under that act, for partition of lands, are in the nature of a proceeding at equity, in which the court has all the power and jurisdiction for hearing and determining the various matters in dispute between the parties, in respect to their respective titles, and awarding a partition, according as he shall find the parties entitled, as fully and completely as if it were a bill in chancery for that purpose." This is cited approvingly in *Hamby Mountain Gold Mines v. Calhoun Land & Min. Co.*, 83 Ga. 317, 9 S. E. 833. It has been directly decided that in proceedings to partition land there exists no constitutional right of trial by jury. *Flaherty v. McCormick*, 113 Ill. 538; *Pillow v. Improvement Co.*, 92 Va. 144, 23 S. E. 32. The right of trial by jury on this particular issue seems never to have existed in Georgia. Under the provincial act of March 26, 1767 (*Watk. Dig.* p. 315), which provides for a partition of lands and tenements held in coparcenary, joint tenancy, and tenancy in common, not a word is said about a jury trial, not even when title to the property is involved in the partition proceedings; and manifestly no such right existed under the act. So it appears that when the first constitution of the state was adopted no right of trial by jury in such cases existed at all, and when the present constitution of the state was adopted no such right existed by statute for a jury trial on the particular is-

sue involved in this case. Section 4793 of the Civil Code is simply a codification of the act of December 26, 1837 (*Cobb's Dig.* pp. 583, 584). The original act makes it still clearer that it was the purpose of the legislature to confer upon the judge the power of ordering a sale of lands, should it be made to appear to him that a fair and equitable division could not be had in kind; for it states that when either of the parties in interest may, by his or her affidavit, or other proof, make it satisfactorily appear to the court that a fair division cannot be had by metes and bounds, then the court shall order a sale of the lands and tenements. Such a thing as trying the issue before a jury by affidavits is unheard of in the practice. In any view, then, that we take of this case, we think the court did right in refusing to submit the issue to a jury. Judgment affirmed. All the justices concurring.

(105 Ga. 505)

CITY & SUBURBAN RY. CO. v. LEAPYEAR.

(Supreme Court of Georgia. July 22, 1898.)

APPEAL—REVIEW.

There was no error in the charge of the court complained of when construed in the light of the context. There was some evidence to authorize the verdict; it was not excessive; and this court will not interfere with the discretion of the trial judge in overruling the motion for a new trial.

(Syllabus by the Court.)

Error from city court of Savannah; A. H. MacDonell, Judge.

Action by Ann M. Leapyear against the City & Suburban Railway Company. Judgment for plaintiff. Defendant brings error. Affirmed.

Barrow & Osborne, for plaintiff in error. T. M. Norwood and McAlpin & La Roche, for defendant in error.

PER CURIAM. Judgment affirmed.

(105 Ga. 62)

BACON v. MAYOR, ETC., OF SAVANNAH.

(Supreme Court of Georgia. July 22, 1898.)

CONSTITUTIONAL LAW—RETROACTIVE STATUTES—MUNICIPAL IMPROVEMENTS—PROPERTY—ASSESSMENTS—REDUCTION—DEFENSES—INTEREST.

1. Legislation which does not impair vested rights, but is purely remedial in its operation on pre-existing rights and liabilities, is not within the inhibition of the constitution which forbids the passage of retroactive laws. It follows from this principle that where a city has passed an ordinance under legislative authority directing the pavement of a street, and an assessment of two-thirds of the cost thereof against abutting landowners, and in pursuance of this ordinance the street is thus improved, but the ordinance was defective on account of an illegal apportionment of the assessment among the several abutting parcels of real estate, it was competent for the city to so amend its ordinance, after the completion of the work upon the street, as to conform to the sta-

ute in its provisions touching a legal apportionment of the assessment.

2. The fact that some of the property owners under the original ordinance paid less than that required by the last assessment constitutes no valid defense to those property owners who are required to pay according to the apportionment fixed in the amended ordinance; especially where the invalidity of the original ordinance was attacked by such property owners, and, as the result of such litigation, the first apportionment was declared to be illegal, and a new apportionment required.

3. The fact that some of the improvements made upon the street are incidentally beneficial to other streets in the city furnishes no reason for an abatement or a reduction of the assessment against persons owning property abutting the street upon which the work was done.

4. Where execution is lawfully issued by a city to collect of a property owner an assessment against him for such improvement, it is entitled to interest on the amount due at least from the date of such execution.

5. Questions touching the necessity for improvements placed upon a street, and the nature and terms of the contract entered into by the city with contractors who undertake the work, are in the sound discretion of the municipal authorities, and their action will not be controlled by the courts, unless such discretion is manifestly abused.

6. Applying the above principles of law, and others heretofore decided by this court in the present case, to the facts disclosed in the record, the verdict of the jury was demanded by the evidence, and there was no error in overruling the motion for a new trial.

(Syllabus by the Court.)

Error from superior court, Chatham county; R. Falligant, Judge.

Proceeding by the mayor and aldermen of the city of Savannah against D. C. Bacon to enforce an assessment for a municipal improvement. There was a judgment for plaintiffs, and defendant brings error. Affirmed.

R. R. Richards and Saussy & Saussy, for plaintiff in error. S. B. Adams, for defendants in error.

LEWIS, J. This case is here for the third time, former adjudications of it appearing in 86 Ga. 301, 12 S. E. 580, and 91 Ga. 500, 17 S. E. 749. On the third trial of the case below, a verdict was again rendered for the city, and the defendant filed his motion for a new trial, and assigns error on the judgment of the court below in overruling the same. Counting the subdivisions in the motion, there are over 75 grounds of complaint alleged. These grounds seem to cover, not only most of the questions which have previously been adjudicated by this court in this identical case, but also every conceivable point which might suggest itself to the ingenious and analytical mind of learned counsel. Many of the propositions contended for by plaintiff in error in his motion are subdivided into almost infinitesimal particles, among most of which there does not appear to exist "the shade of a shadow" of a difference. Through this voluminous record we have patiently toiled, and have endeavored by such winnowing mental powers as we have had opportunity and time to com-

mand to separate from the immense chaff of immaterial matter before us the few solid grains of legal propositions that remain in this case, and are worthy to be considered. Our decision upon which is embodied in the foregoing headnotes, and our reasons for these rulings we will now proceed to give.

1. When the case was last here, it was ruled that that part of the ordinance apportioning the assessment which directed leaving out of the calculation both the frontage and the costs of the street intersections was contrary to the statute, and that the assessment against an abutting owner upon the plan of the ordinance was illegal. That decision contained the direction or suggestion of how this defect in the ordinance might be remedied by municipal legislation. The record shows that the views of the court in this particular were minutely and fully followed by the municipal authorities. The ordinance was amended, a legal apportionment of the assessment made, and an execution issued accordingly. It is contended by counsel for plaintiff in error that this amended ordinance, in so far as it undertakes to levy a charge upon him for improvement of the street that had been completed, was retroactive legislation, and therefor unconstitutional, null, and void. It is a well-established principle of constitutional law that legislation may be retroactive whenever its purpose is not to destroy or impair a vested right, but to provide remedies for the purpose of enforcing existing rights of parties. Many authorities have extended the rule to cases where retroactive legislation has been had for the purpose of providing a remedy for enforcing the discharge of a moral obligation, even where no legal duty had been imposed by the law. Such seems to be the effect of the ruling in the case of *New Orleans v. Clark*, 95 U. S. 644, where it is decided that "It is competent for the legislature to impose upon the city the payment of claims just in themselves, for which an equivalent has been received, but which, from some irregularity or omission in the proceedings creating them, cannot be enforced at law. A law requiring a municipal corporation to pay such a claim is not within the provision of the constitution of Louisiana inhibiting the passage of a retroactive law." Black, in his work on *Constitutional Prohibitions* (section 175), says: "The strongest prohibition against retroactive laws is found in the constitution of New Hampshire, where they are denounced as 'highly injurious, oppressive, and unjust.' Yet in that state it is held that any statute which changes or affects the remedy merely, and does not destroy or impair vested rights, is not unconstitutional, though it be retrospective, and although in changing or modifying the remedy the rights of parties may be incidentally affected." See a number of authorities cited in that work. For further authority directly in point on this question, see *Bell v.*

Perkins, 14 Am. Dec. 745-749; *End. Interp.* St. 291; 2 Beach, Pub. Corp. § 1065; 6 Am. & Eng. Enc. Law (2d Ed.) p. 940, and citations. This question was so fully discussed by Justice Lumpkin in *Pritchard v. Railroad Co.*, 87 Ga. 294 et seq., 13 S. E. 493, which decision was approved and reaffirmed in *Baker v. Smith*, 91 Ga. 142, 16 S. E. 967, that any further discussion on the subject is entirely unnecessary. Counsel for plaintiff in error, to sustain his contention as to the unconstitutionality of this amended ordinance, cited the case of *Holliday v. City of Atlanta*, 98 Ga. 377, 23 S. E. 406; but that case is entirely different from the one we are now considering. There the whole ordinance was declared void, because there was no compliance with the condition precedent as to notice, and the municipality had no right to pass any ordinance at all on the subject without such notice. The city was a mere trespasser upon the land of the plaintiff. Its entry was unlawful. After showing that the first ordinance was entirely void, Justice Lumpkin, who delivered the opinion in that case, says: "Therefore the act of 1893 was not one which merely cured a defect in remedy, or affirmed an existing right of the city, but was one which injuriously affected a vested right of the citizen. It could not therefore be constitutionally passed." In the case at bar it was not decided by this court that the original ordinance was null and void, but only that portion of it which related to the apportionment of the assessment. This apportionment was a remedial provision in the ordinance, having reference to an enforcement of the city's legal claims against the property owners. The improvement of the street had been legally made. The benefits had accrued to those owning abutting lands. The amended ordinance related purely to the city's remedy in enforcing its just and legal claims against such owners. Instead of destroying or impairing any vested right of theirs, its purpose was to prevent a destruction of the rights of the city. The ordinance, therefore, clearly does not fall within that class of mischiefs which the constitutional provision on the subject of retroactive legislation was intended to prohibit. This disposes of several of the grounds in the motion for a new trial.

2. Some of the grounds in the motion are apparently based on the fact that property owners who paid under the original ordinance had paid something less than that required by the last assessment. On account of this difference, plaintiff in error contended that the assessment against him was unjust. The evidence, however, fails to show that his property was assessed for one cent more than was authorized by the legal apportionment had under the amended ordinance. This change in the apportionment being brought about as a result of the proceedings he himself instituted, attacking the illegality of the first assessment, he cannot

now be heard to complain of such alleged inequality. So far as he is concerned, it is entirely immaterial whether the city can require of the other property owners assessed under the original ordinance the payment of the difference or not.

3. Some of the grounds of the motion complained that certain cesspools, catch basins, etc., were of benefit to other streets. It appears, however, that the city regarded all these as necessary to a proper drainage and pavement of Liberty street, the one embraced in the ordinance. The fact that other streets were incidentally benefited thereby can furnish no sound reason for any reduction of the assessment against persons owning property on Liberty street. The improvement on the street itself is especially beneficial to those holding real estate adjacent thereto. Such improvement is also beneficial to the public generally, and hence the statute requires that the property owner should not pay for the entire cost of paving, but simply a certain proportion thereof.

4. Complaint is also made as to interest being allowed on the claim of the city. But this is in accordance with the statute, which expressly provides that executions issued on assessments for permanent improvements of streets or sewers of a municipal corporation shall bear interest at the rate of 7 per cent. per annum from the time fixed by law for issuing the same. See section 887 of Political Code; *Sparks v. Lowndes Co.*, 98 Ga. 284, 25 S. E. 428.

5. Complaint is further made in the motion that some of the improvements placed upon Liberty street were unnecessary, and the contract entered into by the city for paving the street was attacked upon the ground that it provided for the contractors keeping the street in repair for five years. Section 4 of the act of 1887 (Acts 1887, p. 538) empowers the mayor and aldermen of the city of Savannah to renew or repair any pavement now laid or that may hereafter be laid in the city at the expense of said city and of the owners of real estate abutting on such street, etc. The question touching the necessity for such improvement, and the nature and terms of the contract entered into by the city with the view of making the improvement, is necessarily left to the sound discretion of the municipal authorities, and is never interfered with by the courts unless manifestly abused. *Speer v. Mayor of Athens*, 85 Ga. 49-56; *Regenstein v. City of Atlanta*, 98 Ga. 167, 25 S. E. 428; *Martin v. Town of Statesboro*, 100 Ga. 419, 28 S. E. 450; *Burckhardt v. City of Atlanta* (Ga.) 30 S. E. 32.

6. Applying the above principles of law to the facts disclosed by this record, we think that the verdict of the jury in favor of the city was not only sustained, but was really demanded, by the evidence. The court did right, therefore, in overruling the motion for a new trial. Judgment affirmed. All the justices concurring.

(106 Ga. 72)

WILLINGHAM v. RUSHING et al.(Supreme Court of Georgia. July 22, 1898.)
FACTOR—REIMBURSEMENT FOR ADVANCES—EXECUTOR DE SON TORT.

1. A factor who has made advances to his principal, or incurred expense in taking care of the property of such principal, is authorized to sell a sufficient amount of the property to reimburse himself, but the sale must be had according to the usage of trade and in the exercise of a sound discretion. (a) The power of sale above referred to is not revoked by the death of the principal.

2. If a person is lawfully in possession of and sells the goods of a deceased person, under a bona fide claim of right, and without any intention to take upon himself the exercise of those duties which appertain to the office of a legal representative only, though he may not be able to make out a completely strict and legal right, it is sufficient to exempt him from being charged as an executor de son tort.

(Syllabus by the Court.)

Error from city court of Macon; J. P. Ross, Judge.

Action by Martha Rushing and others against C. B. Willingham. Judgment for plaintiffs, and defendant brings error. Reversed.

Hardeman, Davis & Turner, for plaintiff in error. M. G. Bayne, for defendants in error.

COBB, J. Mrs. Rushing, for herself and as next friend of certain of her children, brought suit against C. B. Willingham, alleging in the petition that the plaintiffs were heirs at law of James R. Rushing, deceased; that at the time of his death the defendant was in possession of nine bales of cotton belonging to the deceased, which the defendant, a few days after, sold, and converted the proceeds to his own use; that the deceased died intestate, and that there was no administration on his estate; and that the defendant, by his wrongful conversion of the money, became an executor de son tort as to the cotton, and liable to the heirs at law of the deceased in an amount double the value of the cotton. The defendant answered, denying the indebtedness, and averring that he was a cotton warehouseman and factor, and as such received from James Rushing, in his lifetime, the nine bales of cotton, which were shipped to the defendant on the railroad; that he had paid the freight on the same, and had also made advancements to Rushing, for which advancements, as well as his charges for storage and commissions, he had a lien upon the cotton, and, to the extent of the lien, claimed an interest in the cotton, and was authorized to sell for the purpose of reimbursing himself; that he had sold the same in the exercise of a sound discretion, and in accordance with the usage of trade, in the open market; that, after deducting the amount due him for his advances and expenses, the remainder of the proceeds was turned over to the widow of Rushing, one of the plaintiffs, she claiming

authority to collect the same, the amount so received by her having been applied to the use of herself and children as a part of their year's support. Upon the trial it was admitted that the advances had been made on the cotton as claimed by the defendant, and that the various amounts which had been retained by him for advances and expenses were correct, if his claim was allowable. There was evidence for the plaintiffs tending to show that the deceased, during his last illness, had sent a message to the defendant, directing him not to sell his cotton. The persons to whom this message was claimed to have been sent testified that, to the best of their recollection, no such message was ever delivered. The defendant testified that his best recollection was that Rushing left it entirely discretionary with him to sell the cotton when he (defendant) thought it a good time. He sold the cotton for the highest price reached during that or the next cotton season. The court directed the jury to return a verdict for the plaintiffs for a sum which was double the amount of the proceeds of the sale which the defendant had retained in payment of his advances and expenses. To the ruling of the court directing the jury so to find, the defendant excepted.

It is contended by the defendants in error that a factor has no right, after the death of his principal, to sell the property in his possession upon which he has a lien for advances and expenses; and it was further contended that, even if the factor had such a right that, in the present case, the deceased in his lifetime had restricted the authority as to selling, so as to make the sale by the factor after the principal's death a violation of the latter's instructions. It was contended by the plaintiff in error that a factor has a right to sell after the death of the principal, and that, even if this were not true, under the facts of the present case, the sale, having been made in good faith, according to the general usages of trade at the place where the sale was had, was not such an act as would render the factor liable to the heirs of the deceased as an executor de son tort. A factor has a lien upon the property of his principal for expenses incurred by him and advances on the particular property, as well as all balances on general account. The Civil Code deals with the subject of a factor's lien, and the duty of a factor to his principal, in section 2923, which is as follows: "A factor's lien extends to all balances on general account, and attaches to the proceeds of the sale of goods consigned, as well as to the goods themselves. Peculiar confidence being reposed in the factor, he may, in the absence of instructions, exercise his discretion according to the general usages of the trade; in return, greater and more skillful diligence is required of him, and the most active good faith." The factor had a lien at common

law for advances and expenses, and the Code provision is a simple recognition of the common-law lien of the factor. His lien is a strict common-law lien; that is, one asserted by retention of the property upon which the lien is claimed, and lost by a surrender of the property. It can only be enforced by a sale in accordance with the usages of trade, there being no statutory provision authorizing the foreclosure of such a lien, as is true of other liens. A factor is a mere agent, and his power is governed by the general rules which prescribe the power of an agent. An agency is generally revoked by the death of the principal, but, where the agency is coupled with an interest in property upon which the agency is to operate, a revocation does not result from the death of the principal. Civ. Code, § 3003. The authority of a factor to sell the property in his possession is therefore revocable at any time, unless coupled with an interest. When advances have been made or expenses incurred, the power to sell is irrevocable to the extent of the lien for such expenses and advances. Such is the general rule. In a case where there is a special contract made between the factor and his principal, in which the powers of the former are defined, the parties will be bound by its stipulations, although contrary to the general rule. In any case where the general rule is applicable, the only way in which the principal can defeat the right of the factor to sell a sufficient amount of the property to discharge the sum due him for expenses and advances is to pay or tender to him such an amount as would discharge the indebtedness. *Heard v. Russell*, 59 Ga. 25. See, also, *Brown v. McGram*, 14 Pet. 479. In the case of *Feld v. Farrington*, 10 Wall. 141, it was held that, where factors have made large advances and incurred expenses on account of the property of the principal in his possession, "the principal cannot, by any subsequent orders, control their right to sell at such a time as in the exercise of a sound discretion, and in accordance with the usage of trade, they may deem best to secure indemnity to themselves and to promote the interests of the consignor; they acting, of course, in good faith and with reasonable skill." When a factor has made advances and incurred expenses, the principal cannot revoke his authority to sell for reimbursement. The question, therefore, is whether the death of the principal will work a revocation of the factor's authority. The power conferred upon an agent to sell is generally revoked by the death of the principal. If, however, the power to sell be coupled with an interest, death does not work a revocation, but the interest must be in the thing itself, and not merely an interest in the proceeds of the sale. In the case of *Lathrop v. Brown*, 65 Ga. 312, it was held that a power of sale in a mortgage was revoked by the death of the

mortgagor. This ruling was followed in the cases of *Miller v. McDonald*, 72 Ga. 20, and *Wilkins v. McGehee*, 86 Ga. 764, 13 S. E. 84. These cases hold that the mere execution of a mortgage upon realty, giving to the mortgagee the right to sell the property in payment of his debt after maturity, did not vest in the mortgagee any interest in the property itself, and that, therefore, such a power was not irrevocable. A similar ruling was made in the case of *Hunt v. Rousmanier*, 8 Wheat. 174. In the opinion, Mr. Chief Justice Marshall uses this language: "This general rule, that a power ceases with the life of the person giving it, admits of one exception. If a power be coupled with an 'interest,' it survives the person giving it, and may be executed after his death. As this proposition is laid down too positively in the books to be controverted, it becomes necessary to inquire what is meant by the expression, 'a power coupled with an interest.' Is it an interest in the subject on which the power is to be exercised, or is it an interest in that which is produced by the exercise of the power? We hold it to be clear that the interest which can protect a power after the death of a person who creates it must be an interest in the thing itself. In other words, the power must be ingrafted on an estate in the thing. The words themselves would seem to import this meaning. 'A power coupled with an interest' is a power which accompanies, or is connected with, an interest. The power and the interest are united in the same person. But if we are to understand by the word 'interest' an interest in that which is to be produced by the exercise of the power, then they are never united. The power, to produce the interest, must be exercised, and by its exercise is extinguished. The power ceases when the interest commences, and therefore cannot, in accurate law language, be said to be 'coupled' with it." In the case of *Knapp v. Alvord*, 10 Paige, 205, it was held that where a person, upon going abroad, employed an agent to carry on his business, and gave him the full and entire possession and control of his property, with a written power to sell all or certain portions of the same which might at any time be in his hands, and apply the proceeds to the security or payment of a specified note, indorsed by such agent and a third person, the agent had a power coupled with an interest, which survived the death of the principal, and authorized the agent to sell the property for his protection and indemnity after the principal's death. Chancellor Walworth in his opinion, referring to the case of *Hunt v. Rousmanier*, cited *supra*, says that in that case "there was no actual pledge of the property, but a mere power of attorney was executed authorizing the plaintiff to transfer it in the name of Rousmanier. It was upon this ground, as I understand the case, that Chief Justice Marshall held that the

power was not coupled with any interest in the vessels. And I presume his opinion upon that point would have been different if the power had been accompanied by an actual delivery of the vessels as a pledge for the payment of the debt." In the case of *Hammonds v. Barclay*, 2 East, 227, the right of a factor who has made advances and incurred expenses to sell after the death of his principal is fully recognized. In *Mechem*, Ag. § 1052, the proposition is stated in this way: "The factor's power to sell for his own reimbursement is a power coupled with an interest, and is therefore not revoked by the principal's death or other disability." See, also, *Russ. Fact.* p. 317 (*Law Lib.* vol. 48); 3 *Am. & Eng. Enc. Law*, p. 324, note 3. Possession of the property by the factor is absolutely essential to the creation of this character of agency. The moment expense is incurred or advances made, the factor obtains an interest in the property in his possession. His right in the property is something more than a mere lien. As stated by Mr. Justice Strong in *Felld v. Farrington*, supra: "They [the factors who had made advances] had, therefore, acquired a special property in the cotton, and they held it for their own indemnity as well as for the benefit of the defendant." While it is true that a factor's rights are those secured by a lien, the fact that his lien is, as has been stated, a strict common-law lien, existing only when he is in possession of the property upon which it is claimed, and lost if it is surrendered, distinguishes his case from liens which are creations of statutory law. The actual "holding" which was absolutely essential to the common-law lien does not in fact exist in the case of statutory liens, but the "holding" which constitutes the latter class of liens is one in contemplation of law only. The relation of the factor to the property in his possession is more analogous to the relation of a creditor by security deed than that of a creditor by mortgage, and it is the well-settled law of this state that a power of sale in a security deed is not revoked by the death of the grantor. *Roland v. Coleman*, 76 Ga. 652, and cases cited. Applying the principle laid down by Mr. Chief Justice Marshall in *Hunt v. Rousmanier*, cited above, to the case of a factor making advances upon the property in his possession, his interest is "coupled" with a power to be exercised for his indemnity. It is therefore essentially different from a case where the interest does not arise until after the execution of a pre-existing power. This seems to us to be the true distinction between the case of a factor who has the power to sell to reimburse himself and the case of a mortgagee who has never been in possession of the property, but whose power is to seize the property and sell it in order that he may acquire an interest in the proceeds of such sale. Another distinction between the case of a factor and the case of

a mortgagee is that the factor is given no right to foreclose his lien, his only remedy being to retain possession and sell according to the usage of trade. The mortgagee has a remedy by foreclosure, both at law and in equity.

But, even if the power of the factor to sell is terminated by the death of the principal, it does not follow that a sale by him for the purpose of reimbursing himself for advances made and expenses incurred would necessarily render him liable as an executor in his own wrong. Such an executor is one who intermeddles with the goods of the deceased, and performs acts which are characteristic of the office of executor. As a general rule, at common law, in order to charge one as executor in his own wrong, it was necessary to show that no will had been proven or administration granted upon the estate. This, however, was not an invariable rule, as one expressly claiming to act as executor, doing an act which an executor only was authorized to perform, became chargeable as executor in his own wrong, notwithstanding that there was a lawfully appointed representative of the estate. 1 *Williams, Ex'rs* (7th Am. Ed.) p. 298 et seq.; 2 *Bl. Comm.* p. 507; 1 *Lomax, Ex'rs* (2d Ed.) top pages 177, 178. The Code of this state declares that "if any person, without authority of law, wrongfully intermeddles with, or converts to his own use, the personalty of a deceased individual, whose estate has no legal representative, he shall be held and deemed an executor in his wrong, and as such shall be liable to the creditors and heirs or legatees of such estate, for double the value of the property so possessed or converted by him; nor shall such executor be allowed to set off any debt due to him by the deceased, or voluntarily paid by him out of the assets." *Civ. Code*, § 3310. Under the terms of this section, it appears that no person can be charged in this state as executor in his own wrong where there is a lawfully appointed legal representative upon the estate. If there is no legal representative upon the estate, the same acts, and no others, which would charge him at common law as an executor in his own wrong, would charge him in this state in like capacity. While it takes, as a general rule, very little to charge a person as an executor *de son tort*, still that which will charge him as such must be such an act as shows an intention on the part of the alleged wrongdoer to take upon himself the exercise of those duties which appertain to the office of the legal representative only. The intermeddling with the goods of the deceased must be of such a character as to indicate that the wrongdoer is endeavoring to perform an act which should be performed only by the legal representative. If the act done, although it be an act of intermeddling with the goods of the deceased, be inconsistent with an intention on the part of

the person sought to be charged as executor in his own wrong to exercise the office and discharge the duties of a legal representative, then such person, although he may thus render himself liable to the legal representative of the estate when appointed, will not be chargeable as an executor in his own wrong. If the act or conduct which is alleged to charge the person as executor *de son tort* be of such a character that it clearly appears that he was acting in good faith in attempting to protect his own rights, under color of authority, and not solely to prejudice the rights of those interested in the estate of the deceased, then, as a general rule, such act or conduct will not charge a person as executor *de son tort*. In *Godol. Leg. p. 93*, a work published in 1685, the doctrine is clearly stated that if one takes the goods of the deceased by mistake, supposing them to be his own, or under color of title, this will not make him an executor in his wrong. This doctrine was followed in a case decided by Lord Kenyon in 1795, who said that, "if the defendant came to the possession by color of a legal title, though he had not made out such title completely in every respect, he should not be deemed an executor *de son tort*." *Femings v. Jarrat*, 1 Esp. 335. In the case of *Densler v. Edwards*, 5 Ala. 31, Chief Justice Collier says in the opinion: "So it is said, if a person sets up in himself a colorable title to the goods of the deceased, as where he claims a lien upon them, though he may not be able to make out his title completely, he will not be deemed an executor *de son tort*." In the case of *Ward v. Beville*, 10 Ala. 197, it was held that, "where one takes or retains possession of property under color of title, and in good faith, believing his right to be superior to that of the lawful administrator, he will not be chargeable as an executor *de son tort*, though his title prove to be indefensible. In such case the bona fides of the possession is a question of fact, referable to the jury, and it is error for the court to decide it." In the case of *O'Reilly v. Hendricks*, 2 Smedes & M. 388, where certain property was delivered to a surety to indemnify him on his contract of suretyship, with verbal authority to sell in case of liability on the contract, and after the death of the principal, the surety having become liable on the contract and discharged the same, he sold the property to indemnify himself, it was held that a creditor of the principal could not maintain an action against the surety as an executor in his own wrong. The same doctrine is also recognized in *Smith v. Porter*, 35 Me. 287; *Claussen v. Larenz*, 4 G. Greene, 224; *Johnston v. Duman*, 3 Litt. (Ky.) 163, 164. See, also, *Lomax*, *infra*, cited *supra*, and 7 Am. & Eng. Enc. law, p. 182 et seq. It might be said, however, that if the factor had no right to sell, the law would charge him with notice of

this want of authority, and that no amount of good faith would relieve him from the consequences of his conduct, as the law of this state expressly declares that when a person, "without authority of law," intermeddles with the goods of the deceased, he is chargeable as an executor in his own wrong. Such, however, has not been the interpretation placed by this court upon the section. In the case of *Stove Co. v. Adams*, 81 Ga. 319, 6 S. E. 695, a person named as assignee, in what purported to be a deed of assignment, accepted the trust, went into possession of the goods conveyed, sold them, some before and some after the assignor's death, and applied the proceeds to the debts mentioned in the assignment, acting in perfect good faith and without fraud, believing that he had authority to do what he was doing. It was held that, notwithstanding the assignment may have been absolutely void, the defendant, having acted in good faith in taking possession, in selling the property, and in disbursing the fund, did not render himself liable as an executor *de son tort* for any of the acts of this character which took place after the death of the assignor. Applying the principles of the cases cited to the present one, even if Willingham had no authority to sell under the law, still, if he acted in good faith, without any fraud, under what he believed to be a right resting in him, for the purpose of protecting his own interests, as well as the interests of the estate of his deceased customer, then, although he might be liable as a factor for having exceeded his authority and for having disobeyed instructions, such acts cannot charge him as executor in his own wrong, and place upon him the penalty of double the value of the goods dealt with.

It was contended that this case was controlled by the case of *Wiley v. Truett*, 12 Ga. 588, where it was held that "if one has some color to intermeddle with the goods of an intestate, but exceeds his authority, that will make him an executor in his own wrong." In that case the person sought to be charged as an executor *de son tort* came into possession of certain money belonging to the deceased after his death by consent of a portion of the heirs at law. This possession was held colorable, and alone would not render the person liable as an executor in his wrong; but after this possession was acquired the money was divided among some of the heirs at law without the consent of others, and this wrongful act was what was held would subject the party to a liability as an executor *de son tort*. In that case the possession of the property was only colorable, and the subsequent division was entirely without color of authority. In the present case the possession of Willingham was lawful. He came into possession during the lifetime of his customer, and was lawfully in possession at the time of his

death. The sale, even if not authorized by law, was under color of authority, and if had in good faith and without fraud, for the purpose of protecting himself, would not be sufficient to charge him in the capacity in which he is sued. We think the judge of the court below erred in not submitting the case to the jury, for them to determine, from all the facts and circumstances, whether Willingham acted in good faith and without fraud. If the jury should so find, there would be no liability for the penalty imposed upon persons who unlawfully intermeddle with the goods of a deceased person. If in making the sale he came fully up to the duties which the law imposes upon him, he would be protected, because he had the legal right to make the sale under such conditions. If he deviated from the line of such duties, but still acted in good faith, without fraud, he would be protected against being charged as executor in his own wrong, because he was acting under color of authority. Judgment reversed. All the justices concurring.

(105 Ga. 70)

CENTRAL OF GEORGIA RY. CO. v. WILLIAMS.

(Supreme Court of Georgia. July 22, 1898.)
INJURY TO EMPLOYE—AMENDMENT—NEW CAUSE OF ACTION.

1. Where one brings an action against a railway company for injuries he sustained growing out of the defective construction of a platform upon which he was engaged at work as an employé and servant of the company, such a suit cannot be converted into an action against the railway company, as owner of the premises where plaintiff was hurt, and as landlord of the plaintiff's employer.

2. The amendment not being allowable, and the verdict being predicated upon the amendment, the court erred in refusing to grant a new trial.

(Syllabus by the Court.)

Error from city court of Macon; J. P. Ross, Judge.

Action by John Williams against the Central of Georgia Railway Company. Judgment for plaintiff. Defendant brings error. Reversed.

Steed & Wimberly and John R. Cooper, for plaintiff in error. Marion W. Harris, for defendant in error.

SIMMONS, C. J. 1. Williams brought suit against the railway company for damages. He alleged that he was a servant of the company, employed to "truck cotton" on the platform of a compress, and that, by reason of the defective construction of the platform and a want of repairs, it fell, and he was thereby injured. The company pleaded that Williams was not its servant, and that it was not in possession or control of the compress or platform at the time of the injury; that the compress and platform had been leased by the Old Central Railroad & Banking Com-

pany to one Whitesides, and that, when this company had its property sold by the court, it was purchased by the defendant company; that, when defendant purchased the property and franchises of the old company, the lease had not expired, and Whitesides retained control and possession until the lease did expire; and that Whitesides was in control and possession, under the lease, at the time of the injury. The trial proceeded under the petition and plea, and, at the close of the testimony, after the defendant had fully established its plea as to the lease of the compress to Whitesides, the plaintiff amended his petition by striking out that portion in which he alleged that he was a servant of the company, and inserting in lieu thereof that he was lawfully on the platform in the discharge of his duties, which consisted in trucking cotton, and that defendant then owned said platform and compress; that he was injured by reason of the carelessness and negligence of defendant, and its failure of duty to him, in not having properly constructed the platform and kept it in repair. Thus, the amended petition made the action one by a stranger to the company against it for defective construction and nonrepair of the platform, whereby he, as the servant of Whitesides, was injured. The defendant objected to the allowance of this amendment; the objection was overruled; and defendant excepted. The trial proceeded, and, under instructions of the court, the jury returned a verdict against the company, as owner of the platform. A motion for a new trial was made by the defendant, and overruled by the court. Defendant excepted.

It will be observed that the plaintiff's original suit was predicated upon the relation of master and servant, and upon the duties of the master growing out of that relationship. The gist of the action as first instituted was that the master had negligently failed to provide plaintiff a safe place on which to do the work for which he was employed. These duties grew out of the contract relationship between the master and the servant. When the amendment was made and allowed, it changed the whole character of the action. Plaintiff then depended for recovery upon the obligation of the landlord to his tenant and the tenant's servants to keep the premises in repair. The two causes of action are quite different, and the rules governing the obligations of the master and of the landlord under such circumstances are also different. In the one, a legal obligation is upon the master to provide a safe place for his servant to work; in the other, the obligation is that of a landlord to keep his premises in repair, so as not to injure his tenant or his tenant's servants. These obligations are quite distinct, and a breach of one gives rise to a cause of action quite distinct from that arising from a breach of the other. While our Code is very liberal in allowing amendments, and while this court has been liberal in construing the

Code upon this question, neither the Code nor the decisions of this court will sanction the allowance of an amendment which adds a new and distinct cause of action to the original suit. We think, therefore, that the court erred in allowing this amendment over the objection of the defendant.

2. Inasmuch as the verdict of the jury was clearly predicated upon the amendment, which had been improperly allowed, the trial was a nullity and the judgment must be reversed. All the justices concurring.

(105 Ga. 508)

HURST et al. v. LANE.

(Supreme Court of Georgia. July 22, 1898.)

ACTION FOR WAGES—SERVICES OF NIECE.

There being evidence to warrant a finding that the plaintiff below, in the capacity of a servant, rendered to her deceased uncle and to his wife services for which payment was contemplated, and that these services were not exclusively such as would be prompted by affection and a sense of duty, she was entitled to a recovery against his executors; and having, under the court's direction, written off a portion of the verdict returned in her favor, the same, as thus amended, was not excessive in amount. See *Murrell v. Studstill* (decided at the present term) 30 S. E. 750.

(Syllabus by the Court.)

Error from superior court, Walton county; N. L. Hutchins, Judge.

Action by Susie Lane against M. F. Hurst and others, executors. Judgment for plaintiff. Defendants bring error. Affirmed.

W. S. Upshaw, for plaintiffs in error. Foster & Butler, for defendant in error.

PER CURIAM. Judgment affirmed.

(105 Ga. 106)

SMITH v. SMITH et al.

(Supreme Court of Georgia. July 22, 1898.)

INJUNCTION—PETITION—BOND—CUTTING TIMBER—HOMESTEAD—RIGHTS OF WIDOW AND REVERSIONERS.

1. The provisions of section 4927 of the Civil Code, which require the plaintiff in an application for an injunction to prevent the cutting of timber to attach to his petition an abstract of his title, and give a bond for damages when the restraining order is granted, are not applicable in a case where the plaintiff alleges and proves the insolvency of the defendant.

2. While a widow who has taken a homestead in the land of her deceased husband is entitled to a reasonable and proper use thereof, and of the timber thereon, for the benefit of herself and the other beneficiaries of the homestead, she cannot, as against the rights of those who will be entitled to the property in reversion after the homestead estate shall have expired, make a sale of the standing timber on the land, when it appears that the same will injure the value of the freehold, and is not essential to a legitimate use of the property for homestead purposes. In such a case the reversioners may maintain against the widow's grantee an equitable petition to restrain waste of this character.

3. There was no error in overruling the demurrer to the petition, nor in granting the injunction.

(Syllabus by the Court.)

Error from superior court, Heard county; S. W. Harris, Judge.

Action by E. M. and S. C. Smith against J. B. Smith. Judgment for plaintiffs. Defendant brings error. Affirmed.

Talbot Smith and Reese & Gordon, for plaintiff in error. L. B. Davis, Whitaker & Bingham, and Felix N. Cobb, for defendants in error.

LITTLE, J. 1. Prior to the enactment of the provisions of law now codified in section 4927 of the Civil Code, the established rule in this state was that equity would not interfere to restrain a trespass, unless the injury was irreparable in damages, or the trespasser was insolvent, or there existed other circumstances which, in the discretion of the court, rendered the interposition of the writ necessary and proper, among which circumstances was to be considered the avoidance of circuity and multiplicity of actions. Civ. Code, § 4916. In the case of *Powell v. Cheshire*, 70 Ga. 357, where a bill was filed to enjoin a trespass upon realty by felling timber, it was held that, "to give equity jurisdiction, the injury must be irreparable in damages, or the trespasser be insolvent, or other circumstances (such as the avoidance of circuity and multiplicity of actions) must exist rendering the interposition of a court of equity necessary," etc. To the same effect, see *Strickland v. Griffin*, 70 Ga. 541; *Cottle v. Harrold*, 72 Ga. 830; *Lingo v. Harris*, 74 Ga. 368. Where such facts or circumstances, however, exist, the plaintiff is not required to show a perfect title, but a prima facie title is all that is necessary, at least until a better outstanding title is shown. *McArthur v. Matthewson*, 67 Ga. 143. The rule embraced in the Code section above referred to, and applied in the aforementioned authorities, while modified with respect to a given class of trespassers by section 4927 of the Civil Code, is not repealed by the latter, but the two embrace concurrent and subsisting rules of law. By said section 4927 it is provided that "in all applications to enjoin the cutting of timber for sawmill purposes and railroad ties and bridge timbers for railroad purposes, or to enjoin the cutting of timber or boxing or otherwise working the same for turpentine purposes, it shall not be necessary to aver or prove insolvency, or that the damages will be irreparable; provided, the petitioner has perfect title to the land upon which the timber is situated, and shall attach an abstract of his title, stating name of grantor and grantee, date, consideration and description of property, names of witnesses, when and where recorded, to his petition and produce the original titles before the judge: and provided, that the judge granting said temporary restraining order shall require the petitioner to give such bond as in his discretion he may deem proper, to be approved by the clerk of the superior court, to answer the

damages, if any, which may be sustained by the defendant by reason of the granting of said injunction, and if, on the final hearing of the cause, damages against the petitioner are proven, judgment shall be entered against the sureties on said bond as in appeal cases." It will be seen from the provisions of these two sections of the Code that under section 4916 an injunction may be granted to restrain a trespass of any character where the injury is irreparable in damages, or the trespasser is insolvent, and that under such circumstances the complainant is not required to give a bond as a condition precedent to the issuance of the writ; whereas under section 4927 the complainant need not allege insolvency, or that the damages will be irreparable, but the writ may be issued to restrain trespasses of the particular character prescribed in that section, provided the petitioner has perfect title to the land, and gives the bond as required by the section, and otherwise complies with the conditions of such section. Even with respect to the particular trespasses therein enumerated, if the complainant shall allege and prove insolvency, or that the damages are irreparable, then the provisions of section 4927 would not be applicable, but the complainant's rights would be governed by the provisions of section 4916, under which he is neither required to give bond, nor, in the first instance, show perfect title, nor attach an abstract of such title to his petition.

2. The ruling made in the second headnote requires but little elaboration. It is provided by section 3090 of the Civil Code, which must, as far as applicable, govern the rights of the beneficiaries of a homestead, that "the tenant for life is entitled to the full use and enjoyment of the property, so that in such use he exercises the ordinary care of a prudent man for its preservation and protection, and commits no acts tending to the permanent injury of the person entitled in remainder or reversion," etc. Section 2846 of the Civil Code, with reference to the vesting of property set apart as a homestead, provides: "Property set apart for a wife or for a wife and minor children, or for minor children alone, upon the death of the wife or her marriage, when set apart to her alone, and upon majority of the minor children or their marriage during minority, when set apart for minor children, and upon the death or marriage of the wife and majority or marriage of the minor children, when set apart to wife and minor children, reverts to the estate from which it was set apart," etc. The beneficiaries of the homestead estate, therefore, not being entitled to commit waste as against those who are entitled to the property in reversion, it remains only to inquire whether a widow who has taken a homestead in the land of her deceased husband is entitled, as against such reversioners, to make a sale of the standing timber on the land, which will

injure the value of the freehold, when it appears that the sale of such timber is not essential to a legitimate use of the property for homestead purposes. Timber growing on land is a part and parcel of the realty. *Pritchett v. Davis* (Ga.) 28 S. E. 666. It is a part of the inheritance. 28 Am. & Eng. Enc. Law, p. 870. And while a tenant for life or years is entitled, of common right, to take prudently sufficient estovers, unless restrained by contract, or to take timber for reasonable repairs (*Gower v. Eyre*, Coop. 160; *Alexander v. Fisher*, 7 Ala. 514; *Calvert v. Rice*, 91 Ky. 533, 16 S. W. 351), yet such tenant has no right to sell the timber, where such sale is not an incident to the reasonable enjoyment of his estate. In *Davis v. Gilliam*, 40 N. C. 308, the court said: "We should hold, as the state of the country now is, that a tenant for life of land entirely wild might clear as much of it for cultivation as a prudent owner of the fee would, and might sell the timber that grew on that part of the land. Clearing for cultivation has, according to the decisions, peculiar claims for protection; and a sale of the timber from the field cleared may be justly made in compensation for clearing and bringing it into cultivation. But it seems altogether unjust that a particular tenant should take off the timber without any adequate compensation to the estate for the loss of it; for he takes in that case, not the product of the estate arising in his own time, but he takes that which nature has been elaborating through ages, being a part of the inheritance itself, and that, too, which imparts to it its chief value." In the case of *Davis v. Clark*, 40 Mo. App. 515, the principle is applied that cutting timber for the purpose of cultivation (if it does not lessen the value of the inheritance) is a privilege following a tenancy for life, when it is necessary for the proper and reasonable enjoyment of the estate, and as long as the tenant only acts in so doing in conformity to good husbandry, regard being had to the situation of the country and the comparative value of the timber. But this is a privilege which can only be exercised for the purpose mentioned; that is, the proper and reasonable enjoyment of the estate. Therefore, cutting and destroying timber, not for firewood, repairs to the premises, or for cultivation, but for the purpose of converting it into railroad ties for the market, will constitute waste, for which the defendant will be liable. See, also, *Webster v. Peet*, 97 Mich. 327, 56 N. W. 558; *Weatherby v. Wood*, 29 How. Prac. 404; *Brashear v. Macey*, 3 J. J. Marsh. 93. It is committing waste for a tenant for life to sell and authorize the cutting and removal of valuable timber trees growing on the land. *Modlin v. Kennedy*, 53 Ind. 267. See, generally, 28 Am. & Eng. Enc. Law, p. 870 et seq., and authorities cited.

3. It follows from what has been before said that the action of the judge below in

overruling the demurrer to the petition was in accordance with the law applicable to the case, and the judgment is affirmed. All the justices concurring.

(105 Ga. 122)

HOYLE et al. v. SOUTHERN SAW WORKS.

(Supreme Court of Georgia. July 23, 1898.)

EVIDENCE—CONCLUSIONS—SALES—RESCISSION BY BUYER—FRAUD—CONSIDERATION.

1. The court committed no error in ruling out the following testimony of one of the plaintiffs: "The material was bought under a misunderstanding of its real value, caused by the misrepresentation of one of the officers of the Southern Saw Works;" it not appearing from the testimony of the witness what the misrepresentation was, or how it induced him to buy the property for more than its value.

2. Where one offers to buy of another a particular article of certain quality, and the seller fraudulently ships to him a different article or one of inferior quality, and where the buyer has no opportunity of examining the property purchased until after its delivery, he has a right to rescind the contract, if the offer to do so is made within a reasonable time after the discovery of the fraud practiced upon him.

3. The mere fact that the buyer attempted, after a delivery of the goods, to sell the same, will not necessarily deprive him of the right to rescind.

4. As a general rule, inadequacy of price alone will not be sufficient to set aside a contract; yet that circumstance, taken in connection with others of a suspicious nature, may afford such a vehement presumption of fraud as would authorize the court to set it aside.

5. There was sufficient evidence in this case of the facts alleged in the original petition to require a submission of the same to a jury, and the court erred in granting a nonsuit.

(Syllabus by the Court.)

Error from superior court, Fulton county; J. H. Lumpkin, Judge.

Action by Hoyle & Abbott against the Southern Saw Works. There was a judgment for defendant, and plaintiffs bring error. Reversed.

Abbott, Cox & Abbott, for plaintiffs in error. Alexander & Lambdin, for defendant in error.

COBB, J. Hoyle & Abbott brought suit against the Southern Saw Works, alleging that on or about January 29, 1896, the defendant sold to the plaintiffs 21 barrels of saw scrap steel, weighing 19,350 pounds, for \$581.77, being 3 cents per pound, and the plaintiffs have paid defendant for the same. They were induced to pay this price, which was grossly excessive, by the false representations made by an officer and agent of the defendant that the market price of such steel was 4 cents per pound, and that such steel had been sold by the defendant at that price. These misrepresentations were made to mislead the plaintiffs, who were inexperienced in the business, which fact was known to the defendant; and by means of such misrepresentations they were misled, and induced to buy the steel and pay this exorbit-

ant price for it, its true value not being more than \$50 or \$60. It was put up in barrels, and could not be thoroughly examined without great and unusual labor; but there was enough of the steel put at the top of some of the barrels to cause the whole to have the appearance of being of the quality that was bought, but the entire lot was not such as was contracted for. The contract was for the purchase of pure and unmixed saw scrap steel. The lot delivered was mixed scrap, and had other material, such as cast iron and the like, mixed with it, thereby making it objectionable and undesirable. They have been unable to find any person who would make an offer on the steel as it was delivered to them. Upon discovering the fraud which had been perpetrated upon them, the property was promptly tendered back, and a demand made upon the defendant for the return of the money, which was refused. Plaintiffs "make a continuing tender" of the steel, and, waiving discovery, pray that the defendant be decreed to take the steel, and pay plaintiffs the amount paid by them, with interest, and that the contract be rescinded. Upon the trial it appeared that Hoyle, one of the plaintiffs, had a conversation with Boyd, who represented the defendant, in which conversation a car of saw scrap steel was offered for sale. Subsequent negotiations were carried on by correspondence. On January 18, 1896, plaintiffs wrote to defendant, asking for lowest cash price on the car of scrap steel which was referred to in the conversation between Boyd and Hoyle. On January 22d the defendant replied, stating that sales heretofore of scrap steel had been made by bids from parties wanting it, but that they would price the plaintiffs' "rates f. o. b. East Point, three cents per lb.," stating further that this was in barrels, which was considered quite an advantage over loose scrap steel, and that they thought this price very reasonable. On January 24th the plaintiffs wrote to the defendant, quoting the offer made in the letter of January 22d, and accepting the same, and asking that the defendant have the cars billed to Atlanta, and stating that, upon receipt of the bill for the material, they would remit check. On January 25th the defendant wrote to the plaintiffs that, as early as possible the next week, they would have the car of steel loaded and forwarded to Atlanta, as directed. It appeared from the evidence that Boyd had told Hoyle, one of the plaintiffs, that the saw scrap steel that he had to sell was superior material, and that similar information was given him over the telephone by two other persons representing the defendant, who informed him that the saw scrap steel offered was saw scrap steel and gummings. The cash market price of the saw scrap steel delivered in Atlanta on the date of the purchase was \$10 to \$12 per ton of 2,000 pounds, and of scrap gummlags \$19. The price paid by the plaintiffs was \$40 per

ton in excess of the market value. At the time of payment, the attention of the agent of the defendant was called to the fact that the price was in excess of what the plaintiffs intended to pay; and the agent stated that the saw scrap steel was worth it, and that he had sold such at $3\frac{1}{4}$ cents per pound. The officers and agents of the defendant with whom the plaintiffs dealt had a thorough knowledge of the value of the article which was the subject-matter of the contract, and the plaintiffs had had no experience in the purchase and sale of the same. The material bought was worth only five to six dollars per ton. Plaintiffs made strenuous efforts to sell it, and to get the market quotations on it, writing letters and telegrams to various parties, all of which appear in the record. The material was packed in 21 barrels, and accepted by plaintiffs as saw scrap steel at the time of the purchase without examination, which would have caused great labor and expense to have examined it piece by piece. Many of the barrels were packed at the top with saw scrap gummings, and after the purchase an examination was made, when it was found that it was not what it was represented to be. Offers to rescind the purchase were made, one of the plaintiffs stating to Boyd the causes that led them to buy the material. These offers were made to Boyd on two separate occasions. On March 3d plaintiffs wrote to defendant a letter, referring to the several conversations which had been had relative to the steel, and stating that they were unable to dispose of the same except at a heavy pecuniary loss, and therefore asked that, as a compromise, the defendants accept the steel and \$100, and refund to the plaintiffs \$481.77. All the propositions to rescind were declined. A thorough examination of the material showed it to be ordinary scrap iron and steel very much mixed, consisting of saw scrap gummings, saw scrap steel of various kinds, scrap iron, such as pots, hoop iron, hammers, castings, and the like, the market price of which would be four or five dollars per long ton. The efforts to obtain quotations on the steel and sell the same continued until March 16th. The suit was filed on August 18, 1896. At the conclusion of the plaintiffs' evidence, the court, upon motion of the defendant, granted a nonsuit, and to this ruling the plaintiffs excepted.

1. Hoyle, one of the plaintiffs, was examined by interrogatories. Among other questions propounded to him was the following: "If the price paid said defendant was in excess of the market price on said date, state how much in excess, and state how it occurred that the plaintiffs paid three cents per pound for the same." The answer was: "About forty dollars per ton. The material was bought under misunderstanding of its real value, caused by misrepresentations of the officers of the Southern Saw Works." The last sentence of the answer

was objected to, on the ground that it did not state facts, but stated mere conclusions of the witness. The court sustained the objection, and excluded the testimony, and to this ruling the plaintiffs excepted. It not appearing from the testimony of the witness what the misrepresentations were, or how they induced him to buy the property at a price in excess of its actual value, there was no error in excluding the evidence.

2. The contract between the parties was closed by the letter from the plaintiffs to the defendant, dated January 14, 1896, above referred to. It does not distinctly appear in the record when the material was received by the plaintiffs, but it must have been some time subsequent to the 25th of January, 1896, as on that day the defendant wrote to the plaintiffs, advising them that shipment would be made as early as possible in the following week. After the material was received by the plaintiffs, relying upon the representations of the defendant in regard to its quality, and upon the presumption that it would ship them exactly what had been ordered, they did not examine the material, but delayed such examination for a few days, as they had a right to do. Upon an examination being subsequently made, when it clearly appeared that the articles shipped were essentially different from the articles which had been ordered; the plaintiffs, according to the testimony of one of them, made two distinct propositions offering to return the property shipped to them, and rescind the contract, which were declined; and on March 3, 1896, subsequent to the verbal propositions of rescission, wrote to the defendant, offering as a compromise that the defendant take back the steel, and refund to the plaintiffs the amount of the purchase money, less \$100. If the delay of the plaintiffs in examining the articles sold was not unreasonable, and if the offer to rescind was promptly made upon the discovery of the fraud which had been perpetrated upon them, the fact that there had been delay in making the examination would not destroy the plaintiffs' right to rescind. It appearing that the material must have been received by the plaintiffs some time about the 1st of February, and the letter offering the compromise being dated March 3d, it would have been proper to have submitted to the jury the question as to whether, under these facts, the delay in making the examination was for an unreasonable length of time, and whether the offer to rescind was promptly made upon the discovery of the fraud which the plaintiffs claimed had been perpetrated upon them.

3. But it is contended by the defendant that the plaintiffs had waived their right to rescission, because they attempted, after the delivery of the goods to them, to sell the same. It appears from the evidence that the attempt to sell the articles began shortly after the delivery of the goods, and was con-

tinued pending the propositions for rescission, and continued after all the propositions for rescission had been declined. That the buyer of personal property is dealing with the same as his own, and in such a way only as an owner would deal with it, might be sufficient for the jury to find that there had been a waiver of the right of rescission, growing out of a fraud perpetrated by the seller at the time of the purchase. The mere fact, however, that the buyer attempts to sell the article, and does not effect a sale, will not alone constitute a waiver of the right to rescind the contract upon the ground of fraud. An offer of the article for sale under the circumstances is subject to explanation by the buyer; and where, as in the present case, the buyer, as soon as informed of the fraud which had been perpetrated upon him, notified the seller that the articles delivered were not of the character ordered, and subsequently offered to rescind, and pending such offer made attempts to obtain market quotations as to the price of the article looking to a sale of the same, these attempts continuing after the offer to rescind had been finally declined, but the articles or no part of the same being actually sold, a jury should have been called upon to determine whether, under the facts and circumstances related, there had been a waiver by the plaintiffs of their right to take advantage of the fraud which had been perpetrated upon them, and rescind the contract.

4. According to the undisputed evidence in this case, an article which was worth \$6 per ton was sold to the plaintiffs at the rate of \$80 per ton. Inadequacy of consideration ordinarily will not be sufficient to set aside a contract, but gross inadequacy of consideration is a circumstance indicative of fraud, and that, together with other circumstances, may be sufficient as a ground for rescission. *Bishp. Eq. (5th Ed.) § 219.* Our Code declares that "inadequacy of price is no ground for rescission of a contract of sale, unless it is so gross as combined with other circumstances to amount to a fraud." *Civ. Code, § 3549.* In the case of *Wormack v. Rogers*, 9 Ga. 60, it was held that "inadequacy of price, as a general proposition, will not per se be a sufficient ground to set aside a conveyance in a court of equity; yet that circumstance, taken in connection with others of a suspicious nature, may afford such a vehement presumption of fraud as will authorize the court to set it aside." And in the opinion Judge Warner uses this language: "Inadequacy of consideration, as a general proposition, is not, per se, a sufficient ground to set aside this conveyance, although, as remarked by Lord Thurlow, in *Gwynne v. Heaton*, 1 Brown Ch. 9, the inadequacy of price paid, compared to the value of the property purchased, 'is so gross and manifest that it must be impossible to state it to a man of common sense, without producing an exclamation at the inequality of it.'"

While we do not place our judgment exclusively upon the ground of the inadequacy of the consideration, yet that circumstance, taken in connection with the other facts charged in the bill, furnishes the most vehement presumption of fraud."

5. Viewing the record as a whole, we have reached the conclusion that the case should have been submitted to the jury, and that the nonsuit was improper. There was evidence from which the jury could have found that the price agreed to be paid was grossly excessive; that the defendant was thoroughly conversant with all matters relating to the subject-matter of the contract; that the plaintiffs, if not entirely ignorant of the same, were not as thoroughly versed as to the matter which was the subject of the contract as was the defendant; that the article shipped was essentially different from the article ordered; that, within 30 days after the articles were received, they were examined, and found not to correspond with the articles called for by the terms of the contract of sale; that two distinct offers of rescission were made; that attempts had been made before and after and pending the offers of rescission to sell the article, but that no sale had been made. Under this state of facts, it seems to us that the jury should have been allowed to pass upon the questions as to whether a fraud had been perpetrated; whether the plaintiffs had exercised diligence in discovering it; whether they had promptly offered to rescind the contract, and return the article upon this discovery; and whether, by their offers to obtain quotations on the article, and attempts to make a sale of the same, they had waived their right to rescind. Judgment reversed. All the justices concurring.

(105 Ga. 180)

CUTCHER et al. v. CRAWFORD et al.,
County Com'rs.

(Supreme Court of Georgia. July 23, 1898.)

STATUTES—ENACTMENT—EVIDENCE.

1. A minority report, signed by a senator and appearing in the senate journal, which, in effect, states that notice of the introduction of a given bill had not been published, and that the advocates of the bill admitted that no notice had been given that this bill was to be introduced, is not, after its passage, competent evidence to prove that no notice of the introduction of such bill had been published. An act of the general assembly cannot be invalidated in this manner.

2. Nor is a certified copy from the office of the secretary of state of the consolidated return of an election held in a given county upon the question of removing the county site thereof admissible in evidence for the purpose of showing that the general assembly, in acting upon a bill providing for such removal, did not have before it legal evidence showing that such an election had been held, and that two-thirds of the qualified voters thereat voted in favor of a removal of the county site to a particular place.

(Syllabus by the Court.)

Error from superior court, Fannin county; Geo. F. Gober, Judge.

Suit by L. G. Cutcher and others against H. B. Crawford and others, county commissioners. Decree for defendants, and plaintiffs bring error. Affirmed.

Dorsey, Brewster & Howell, Phillips & Brown, Sanders McDaniel, and Hugh M. Dorsey, for plaintiffs in error. Draper & Hull and Clay & Blair, for defendants in error.

LUMPKIN, P. J. On December 13, 1895, the general assembly passed an act to change the county site of Fannin county from Morganton to Blue Ridge. Acts 1895, p. 420. The preamble of this act recites that on the 13th day of August, 1895, an election was held in that county for the purpose of changing the county site, and that "at said election so held two-thirds of the legal votes cast at said election were in favor of the removal of said county site from the town of Morganton to the town of Blue Ridge, in said county." Certain citizens and taxpayers of the county brought an equitable petition against the county commissioners to enjoin them from building a jail for the county in Blue Ridge. This petition was predicated upon two grounds: First, because the above-mentioned act was unconstitutional, for the reason that it was "a local bill, and notice of the intention to introduce said bill, as required by the constitution of the state, was not given nor published in the locality affected by such bill"; and, second, because "less than two-thirds of the votes cast at said election were in favor of removal of said county site, as the consolidated returns of said election showed." The injunction was denied, and the plaintiffs excepted.

1. At the hearing they offered in evidence an official copy of the senate journal of 1895, containing the following: "Mr. Cumming, of the Eighteenth district, member of the special judiciary, submitted the following minority report: Mr. President: The undersigned dissents from the report of the special judiciary committee on house bill No. 730, by Mr. McDaniel, of Fannin, in reference to changing the county site of Fannin county, which was favorable to the passage of the bill, and recommends instead that the bill do not pass, for the reason that in the opinion of the undersigned this is a local bill, and there is no evidence that notice thereof was given as prescribed by the constitution and statutes, but, on the contrary, it was admitted by the advocates of the bill that no notice was given that this bill was to be introduced. Respectfully submitted, [Signed] Bryan Cumming."

This evidence was properly rejected. Its purpose was to show that no notice of the bill to change the county site of Fannin county had been published. We do not

think an act of the general assembly can be invalidated in this manner. At most, the report was nothing more than a statement by Senator Cumming that, in his opinion, this was a local bill, notice of the introduction of which had not been duly given. Surely, it would never do to declare void an act of the legislature upon the strength of anything contained in a minority report which was overridden by that branch of the general assembly to which it was presented. Presumably, the senate, by a majority of two-thirds, differed with the distinguished senator from the Eighteenth as to the conclusions expressed in his minority report, and, if this be so, it makes no difference, so far as relates to the present controversy, whether, in point of fact, he was right or wrong. The action of the senate must be accepted as conclusive. The statement, that "it was admitted by the advocates of the bill that no notice was given that this bill was to be introduced," cannot be made a ground for invalidating the act. Courts cannot act upon admissions, no matter by whom made, in passing upon the constitutionality of statutes. See *Fullington v. Williams*, 98 Ga. 809, 27 S. E. 183, and authorities there cited. Disregarding the recitals of this report, as we are constrained to do, we have nothing from the senate journal showing whether notice was or was not given. This being so, the presumption is that the general assembly did not disregard the constitutional requirements as to publication, if, indeed, these requirements are applicable to a bill of this kind. See 23 Am. & Eng. Enc. Law, 199 et seq.

2. In support of the other ground upon which the petition was founded, the plaintiffs offered in evidence a transcript from the office of the secretary of state of the consolidated return of the election held in Fannin county upon the question of removing the county site. That return purported to show that the vote stood as follows: "For removal to Blue Ridge, received 947; for removal to Mineral Bluff, received 155; against removal, 396." If these figures are correct, it is, of course, obvious that two-thirds of the qualified voters of the county voting at the above-mentioned election did not cast their ballots in favor of the removal of the county site to Blue Ridge; and, if this be true, the provisions of paragraph 4, § 1, art. 11, of the constitution (Civ. Code, § 5927), were not complied with. But the transcript from the office of the secretary of state, even if its introduction in evidence had been permitted by the court, would not have shown upon what evidence the general assembly acted in passing upon the question whether or not the removal provided for by the act had been duly authorized by the people at the polls. It is not to be presumed that the general assembly would have passed this act unless satisfied in some way that the proposal to remove the county site to Blue Ridge was in the popular election carried by the requisite

constitutional majority. We are not officially informed from what source the general assembly sought or obtained the evidence relating to this matter upon which it acted. We are not even informed that any certificate at all from the secretary of state, or any transcript of the return on file in his office, was laid before or considered by the general assembly. If such evidence was before it, we are bound to conclude that the same was not satisfactory, and that in some other way, or by some other means, it became convinced that two-thirds of the legal voters voting at the election cast their ballots in favor of the removal of the county site to Blue Ridge. It is not our province to inquire whether or not the general assembly had authority to make an investigation for itself upon this question. It is enough for us to know that the present record does not disclose that the general assembly acted upon illegal or insufficient evidence in reaching the conclusion that the result of the election warranted the enactment of a law changing the county site. Nor would the rejected transcript, even if it had been received in evidence, have shown that the action of the general assembly in passing this law was unconstitutional. Section 394 of the Political Code, which relates to elections of this kind, declares that "the certificate of the secretary of state showing that said election was held and that two-thirds of the qualified voters of said county (as indicated by the tax digest) voted at said election in favor of 'removal,' shall be sufficient evidence of the holding of said election and the number of votes cast." In *Wells v. Ragdale* (Ga.) 29 S. E. 165, it was held that, in so far as this section undertook to require the assent of two-thirds of the qualified voters of the county, it was violative of the constitution, which only required the assent of two-thirds of those voting at the particular election. Dealing with this section as construed in the case just cited, a certificate from the secretary of state showing that two-thirds of those voting at an election upon the question of removing a county site voted in favor of removal would be sufficient evidence as to the facts therein cited. It will be observed that the secretary of state is not required to furnish the general assembly with a transcript of the return of the election made to him, but it would seem lawful for him to state in a certificate the result of the election; and again, it will be noticed that, while such a certificate is sufficient evidence as to the facts, the law does not say that it shall be the exclusive evidence to be acted upon by the general assembly. We do not know, as already remarked, whether the secretary of state furnished a certificate of any sort to the general assembly in the present instance, or, if he did, what that certificate contained, and we repeat that the transcript offered in evidence and rejected was not relevant or admissible for the purpose of contesting the constitutionality of the law under review. The trial judge committed no error at

the hearing, and properly denied the injunction. Judgment affirmed. All the justices concurring.

(106 Ga. 116)

HAGER v. NATIONAL GERMAN-AMERICAN BANK.

(Supreme Court of Georgia. July 23, 1898.)

HUSBAND AND WIFE—CONTRACTS OF MARRIED WOMEN—CONFLICT OF LAWS—BILLS AND NOTES—TRANSFER—NOTICE—BANKS AND BANKING—EVIDENCE—CONJECTURE.

1. A married woman incapacitated by the law of the place of her domicile to bind herself by a promissory note cannot be made liable on such a note because of the fact that, though executed at the place of residence, it was made payable in another jurisdiction, where she would be authorized by the law to make such a contract.

2. Knowledge by one of the officers of a bank, who participated in the acceptance for the bank of a negotiable note before due, of a fact which would put a prudent person upon inquiry as to the power of the maker to execute the paper, is sufficient to charge the bank with notice of a disability, if such existed.

3. Testimony of a witness to the effect that the plaintiff's authorized agent knew the fact of the defendant's marriage "in a general way, no doubt," and that "I expect he got his information through me possibly," was inadmissible, and the court did not err in excluding such testimony as a mere conjecture of the witness.

4. This case was tried upon the theory that, if the plaintiff was an innocent purchaser of the note sued on, the defendant, though a married woman, who labored under a disability to make the contract, would not be allowed to set up such defense. If notice of the defendant's disability was at all necessary to her defense, there was sufficient evidence in the record on the subject to require a submission of the issue to the jury. The court therefore erred in directing a verdict.

(Syllabus by the Court.)

Error from city court of Atlanta; H. M. Reid, Judge.

Action by the National German-American Bank against Robert Hager and Belle Hager. There was a judgment for plaintiff, and defendant Belle Hager brings error. Reversed.

N. J. & T. A. Hammond, for plaintiff in error. B. F. Abbott, for defendant in error.

COBB, J. The National German-American Bank of St. Paul, Minn., brought suit against Robert Hager and Belle Hager on a promissory note, of which the following is a copy: "\$3,731.82. St. Paul, June 4, 1888. On or before one year after date, we promise to pay to the order of F. D. Hager thirty-seven hundred and thirty-one and ⁸³/₁₀₀ dollars, at National German-American Bank, St. Paul, Minnesota, value received, with interest before and after maturity at the rate of eight per cent. per annum until paid. [Signed] Robert Hager. Belle Hager. [Indorsed] F. D. Hager." Robert Hager made no defense. Belle Hager pleaded that she was not indebted, because at the time the note was executed she was a married woman, residing with her husband, the defend-

ant Robert Hager, in the state of Tennessee, and the note was made in that state, and was not made for her benefit in any way, nor connected with any dealings as to her separate property. She then had no separate estate, has had none since, and is now a resident of the state of Georgia. Under the laws of Tennessee, she had no capacity to make and bind herself by such a note, because of her then married condition and the facts above set forth, of all of which the plaintiff had notice before acquiring the note. At the trial the plaintiff offered in evidence the note sued on, and closed. The defendant Belle Hager then introduced evidence which she claimed tended to establish the truth of her pleas. The court directed the jury to return a verdict in favor of the plaintiff for the amount sued for. To this ruling the defendant Belle Hager excepted.

1. It was contended by the plaintiff that the note purported to have been executed in the state of Minnesota, and that, as it was payable in that state, the validity, force, and effect of the contract was to be determined according to the laws of that state. On the other hand, it was contended by the defendant that the proof showed that the paper was actually executed in the state of Tennessee, of which state the defendant Belle Hager was at the time a resident, and that, therefore, the validity of the contract was to be determined according to the laws of that state. There was no evidence offered to show what was the law of the state of Minnesota in reference to the power of a married woman to bind herself by promissory note. We are therefore to presume that the rules of the common law prevail there. *Woodruff v. Saul*, 70 Ga. 271; *Jones v. Rice*, 92 Ga. 236, 18 S. E. 348. At common law a promissory note executed by a married woman was absolutely void. 1 *Rand. Com. Paper*, 282, and cases cited. A married woman in the state of Tennessee is under the same disability to contract that she was at common law, except so far as that disability has been removed by statute. The only evidence before the court as to what was the law of Tennessee on the subject of the right of a married woman to bind herself by promissory note was a section of the Code of that state, which reads as follows (Mill. & V. Code, § 3345): "Whenever a husband has been ascertained to be insane by the verdict of a jury in the manner prescribed by law, his wife may act as a single woman to purchase, receive and hold property, real and personal; to contract and be contracted with; to sue and be sued; to plead and be impleaded; and such property as she may acquire, by purchase or otherwise, while so acting, shall not be taken or made subject to the satisfaction of the debts or contracts of the husband." There was evidence that Belle Hager was a married woman; that she was a mere surety on the note; that she had no separate estate, did not participate in

the consideration of the note, and was not interested in its proceeds. Nothing appearing in the evidence to bring the case within the exception which the statute of Tennessee makes to the common-law rule, the note would be void if the contract is to be controlled by the laws of that state. We have determined the question as to what the law of Tennessee is solely from the statute which was offered in evidence, and the presumption that, except so far as altered by that statute, the common law prevailed there. While no decisions of the supreme court of Tennessee were in evidence, we have examined some of them as we would other authorities, and find that the conclusions reached by that court in reference to the question under consideration are identical with ours. See *Sheppard v. Kindle*, 3 *Humph.* 80, 81; *Jackson v. Rutledge*, 3 *Lea*, 626, 629; *Lowry v. Naff*, 4 *Cold.* 370; *McClure v. Harris*, 7 *Heisk.* 379. It would seem, therefore, that, whichever law controls on the question as to the validity of the promissory note, it would be void. The common law being presumed to prevail in Minnesota, nothing to the contrary appearing in the record, the note, as above shown, is absolutely void under the law of that state. The common law being presumed to prevail in Tennessee, except so far as changed by the statute which was in evidence, and the exception in the statute not being broad enough to embrace a case like the one now under consideration, there was no liability on the note.

However, we are of the opinion that the capacity of the defendant to bind herself by a contract of the character under consideration is to be controlled by the laws of the state of Tennessee. She was domiciled in that state, and the note sued on was executed there. If a person having capacity to contract under the laws of the state of his domicile there execute a contract to be performed elsewhere, its validity and effect would generally be governed by the laws of the place where the contract was to be performed. We do not think, however, that the laws of the place of performance of a contract can be called to the aid of a person who is seeking to enforce as a contract something which is absolutely void at the place where it was executed. If the instrument was void as a contract in Tennessee, it is void everywhere. In the case of *Martin v. Johnson*, 84 Ga. 481, 10 S. E. 1092, it was held that while the general rule is that the rate of interest which a contract is to bear is to be determined by the law of the place where the contract is to be performed, still this rule had no application in cases where the entire contract was illegal at the place of its execution. In the opinion, Justice Blanford cites the case of *Andrews v. Pond*, 18 *Pet.* 65, where a similar ruling was made. In that case a draft which was infected with usury was made in the state of New York, and payable in the state of

Alabama. Under the laws of New York the entire instrument was void, while under the laws of Alabama the instrument would be void only to the extent of the usury exacted. It was held that the contract was incapable of enforcement, as its validity was to be determined according to the laws of the state of New York. It was also held that the general principle in relation to contracts made at one place to be performed at another was well settled, being that the laws of the place of performance controlled, but that this principle had no application to a contract void at the place of its execution, although intended to be performed elsewhere. See, also, *Story, Conf. Laws* (8th Ed.) 242, 243; 2 Kent, Comm. p. 458; *Watson v. Orr*, 14 N. C. 161; *Holmes v. Manning* (Mass.) 19 N. E. 25. The defendant, according to the laws of the state of Tennessee, being incapacitated from making a contract of the nature sought to be enforced against her, the same is void, and, being void according to the laws of the place of its execution, is, according to the authorities above referred to, void everywhere.

2-4 It was contended by the defendant that there was evidence sufficient to require the judge to submit to the jury the question as to whether the bank had notice that Belle Hager was a married woman at the time she signed the note and the bank received it, and was therefore incapacitated to make the contract contained in the note. It was shown that F. D. Hager, a brother of Robert Hager, was a customer of the bank, and that notes amounting in the aggregate to a large sum had been discounted for him prior to the transaction now in question. Some of these notes matured on the 23d of June, 1888, and the bank had insisted that he pay the same at maturity, and he had requested that he be permitted to renew the same. He had offered to transfer and indorse to the bank, as collateral security for his indebtedness then existing, the note which is sued on in this case, as well as certain other paper. The "officers of the bank" accepted his proposition, permitted him to renew the notes, and extended the time of payment; and he indorsed and delivered the note now sued on to the bank. F. D. Hager, who was examined by interrogatories, was asked this question: "What notice had Lockey [the cashier of the bank] of Mrs. Belle Hager's being a married woman?" The answer was: "I expect he got his information through me possibly. He knew in a general way, no doubt." This answer was ruled out. We do not see any error in this ruling. The statement made by the witness is nothing more than a conjecture on his part as to the possible knowledge of the cashier in regard to the matter which was under investigation. There was no other evidence offered to charge the cashier with notice that the defendant was a married woman, but there was evidence

that the president of the bank knew the fact. While it may be, as a general rule, that the discounting of bills and notes is not within the scope and duty of the president of a bank, and therefore notice to him would not generally be notice to the bank in relation to such transactions, still where it appears, as it did in this case, that the "officers of the bank" consulted and acted upon the question as to whether a note should be accepted by the bank as collateral for an existing debt, notice to any of the officers who participated in the conference would be notice to the bank; and, in the absence of proof as to what officers were in such consultation, it might be inferred that the president and directors were those referred to. There being evidence that the president of the bank knew that Belle Hager was a married woman, and evidence that the "officers of the bank" consulted and acted on the question of the acceptance of the note by the bank, the jury should have been allowed to say whether this evidence was sufficient to show that the president took part in the consultation. If the jury were to find that the president was among the "officers of the bank" who consulted about the acceptance of the note, and that he knew that Belle Hager was a married woman, this would charge the bank with notice of her disability to make the contract, and she would be let in to set up such disability as a defense to the note.

Whether such a note could be enforced in the hands of a bona fide purchaser for value before due, who had no notice that the maker was a married woman, and consequently disabled from making the contract, will not now be decided. The case was argued here by counsel for both parties upon the assumption that if the bank acquired the note for value before due, without notice that Belle Hager was a married woman, she would be precluded from setting up the defense contained in her plea. As the question of the rights of an innocent purchaser in such a case was not referred to by counsel in any way, and as a new trial is necessary in any view of the case, we have seen proper to deal with the case in the manner in which it was presented to us, and to decide it upon the theory upon which it was evidently tried in the court below, and leave it as an open question to be decided hereafter whether the bank had a right to maintain an action, even if it be an innocent purchaser of the note. If the case had arisen under the law of this state, the right of a married woman to have set up such a defense against an innocent purchaser of the paper would not have existed. But the law of this state is entirely different from the law of Tennessee. In this state the right of a married woman to make a contract is the general rule; her disability is the exception; and therefore, where the paper purports to contain a contract which a married

woman would have a right to make, an innocent purchaser would be protected against a plea setting up disability of the maker on account of the contract being within some of the exceptions provided for by law. And this would be true even though the holder knew at the time that he acquired the note that the maker was a married woman. If she purports to contract in a way that the law would authorize, and puts the note in circulation, a person purchasing such note would have a right to presume that she was contracting in a lawful instead of an unlawful way. In Tennessee, however, the rule is different. There the general rule is that a married woman labors under a disability to contract, and contracts made by her are void, the common-law rule being of force in regard to such undertaking. There is a single exception to the rule which is referred to above, where the husband has been adjudged to be a lunatic. There is force, therefore, in the position that a person who was about to purchase a note signed by a female resident in the state of Tennessee would be bound to inquire—First, is the maker a married woman? and, second, is the contract within the exception to the general rule of disability provided by law? However, we do not now decide this question. Judgment reversed. All the justices concurring.

(105 Ga. 112)

MCINTYRE v. MOORE.

(Supreme Court of Georgia. July 23, 1898.)

NOTE—JOINT PRINCIPAL—ACTION ON FOREIGN JUDGMENT—PARTIES.

1. Where a promissory note is signed by one person, and another signs upon the same the following entry: "I do hereby subject and make liable my individual and personal real and separate estate to the payment of the within note,"—the undertaking of the latter is that of surety only and not of joint principal.

2. In a suit upon a foreign judgment, it is proper to consider the entire record, and the judgment rendered should be construed in the light of the pleadings. Though the judgment be in its terms apparently a joint one, yet, if the pleadings and the exhibits show that the liability is several only, the judgment will be construed so as to fix the liability according to the pleadings and exhibits.

3. It follows from the foregoing that where two judgments were rendered in another state, one against one defendant only and the other against the defendant and his wife, the undertaking of the latter being of the character above described, a single suit against the husband upon both judgments could be maintained in this state without joining the wife; and this is true notwithstanding the fact that the judgment in the latter case, standing alone, unaided by other parts of the record, would be construed to be a joint judgment against the husband and wife.

(Syllabus by the Court.)

Error from city court of Atlanta; H. M. Reid, Judge.

Action by A. C. Moore against P. G. McIntyre. Judgment for plaintiff. Defendant brings error. Affirmed.

Maddox & Terrell, for plaintiff in error. Edward R. Austin, for defendant in error.

COBB, J. A. C. Moore sued P. C. McIntyre in the city court of Atlanta upon two judgments rendered against the defendant in the superior court of Buncombe county, N. C. Attached to the petition as exhibits were certified copies of the entire record in each case upon which judgments had been rendered. It appeared that one judgment had been rendered against McIntyre upon a promissory note signed by him alone. The other judgment was rendered upon a promissory note, of which the following is a copy: "\$622.75. Ashville, N. C., Nov. 25, 1891. Forty days after date I owe and promise to pay to A. C. Moore or order six hundred and twenty-two dollars and seventy-five cents, for value received. [Signed] P. C. McIntyre." Immediately following the copy of the note in the record is the following: "I do hereby subject and make liable my individual and personal real and separate estate to the payment of the within note. [Signed] Mary E. McIntyre." The judgment was entered in the following form: "It is, on motion of Thos. B. Ransom and H. B. Carter, attorneys for plaintiff, considered and adjudged that the plaintiff, A. C. Moore, have and recover of the defendants, P. C. McIntyre and Mary E. McIntyre, the sum of six hundred and twenty-two and $\frac{75}{100}$ dollars, with six per cent. interest thereon from the 5th day of January, 1892, until paid, together with the costs of this action, to be taxed by the clerk." The defendant demurred to the petition upon various grounds, those relied on here being, in substance, as follows: First, that the petition shows that the court has no jurisdiction; second, because Mary E. McIntyre is not a party, and no reason is alleged why she could not be sued; third, the petition sets forth no cause of action.

1. The first matter which requires our consideration is to determine what relation Mary E. McIntyre bears to the note which was the foundation of the judgment rendered against her in North Carolina. Was her undertaking that of a principal or joint maker with her husband, or was it that of surety merely? In the present case this question must be determined entirely from the paper itself. The Code of this state declares that "the contract of suretyship is that whereby one obligates himself to pay the debt of another in consideration of credit or indulgence, or other benefit given to his principal, the principal remaining bound therefor." Civ. Code, § 2968. This is but a codification of the common law, which, in the absence of any allegation to the contrary in the petition, must be presumed to be the law of North Carolina. In the light of this definition of suretyship, we must determine from the paper contained in the record what was the intention of Mrs. McIntyre when she signed the instrument subjecting her separate es-

tate to the payment of her husband's note. We have reached the conclusion that her undertaking was not that of principal, but was that of surety only. The original paper not being before us, we cannot see exactly where the statement signed by her was placed on the note. As it refers to the within note, it is to be presumed that it was indorsed upon the note. The fact that it was upon the back of the note would not, however, be conclusive as to her relation to the paper, but only a circumstance to be considered, along with others, to determine what was her true relation to the instrument to which she thus made herself a party. The undertaking of P. C. McIntyre seems to be individual and sole. The language of the note is, "I owe and promise to pay." The note as drawn does not contemplate any one other than McIntyre being primarily liable upon it. The undertaking of Mrs. McIntyre is not to pay the note,—not to make herself personally liable for the amount of the note,—but only to make whatever separate estate she may have subject to its payment. If her separate estate be equal to or exceed the amount of the note, her undertaking would be, in effect, to discharge the obligation. If her separate estate be less than the sum due on the note, her undertaking would be limited by the amount of her separate estate. She has not undertaken or promised to pay any part of the debt as a personal obligation upon herself. She has simply pledged whatever property she has to its payment, and when that property is exhausted her obligation is at an end, whether the debt be discharged or not. The nature of her obligation, "to subject her separate estate to the payment of the within note," is not to pay the debt owing by McIntyre, but it is to secure the payment of the note which is the evidence of McIntyre's indebtedness. For these reasons we have, as stated, reached the conclusion that her liability was not that of a joint principal with her husband. If it had been the intention of the payee of the note to obtain an obligation from Mrs. McIntyre which would make her a joint principal with her husband, or if it had been her intention to have undertaken such an obligation, how easy it would have been for her to have signed the note in such a way as that there could be no question about it. Having signed it in such a manner that it does not expressly appear that her undertaking was an original one, and everything in the note and in the paper signed by her being more consistent with the idea of suretyship than that of principal debtor, it is proper that the papers should be construed to fix the relation of the parties as that of principal and surety.

2, 3. It was contended by the plaintiff in error that a court in this state should not go behind the judgment rendered in North Carolina, which, in effect, made Mrs. McIntyre and her husband jointly liable on the judg-

ment. If we look at the judgment alone, and close our eyes to the other parts of the record in the case, we would have to reach the conclusion that the two defendants named were joint debtors. The judgment does not, in terms, declare this to be true, but being rendered against the two together, in the absence of anything in the record to the contrary, it would be held to be a joint judgment; but in determining what this judgment means we must look to the record, and unless it appear from the record that the question of the relationship to the paper sued on, which is embodied in the record, has been expressly adjudicated by the foreign court, it is proper for the court here to construe the judgment in the light of the pleadings and exhibits which form a part of the record. Having reached the conclusion that the undertaking of McIntyre and his wife was that of principal and surety only, and there being nothing in the judgment declaring that this question has been passed on or adjudicated, in terms, by the court of North Carolina, construing the record as a whole, it is the duty of the courts here to fix the relation of the parties to the paper according to what appears in the pleadings and exhibits, and not according to the formal part of the judgment which concludes the record. *Freem. Judgm. § 50 (a); Black, Judgm. § 116.* There is nothing in this case which conflicts with the ruling made in the case of *Powell v. Davis*, 60 Ga. 70. In that case it was held that "a judgment obtained in the state of Tennessee against two, as joint defendants, makes against them a joint debt, and is conclusive as to the joint liability to the plaintiff. In a suit, therefore, in this state, on such a judgment, between plaintiff and defendants, parol testimony cannot be introduced to contradict the verity of the record. It must stand, as between them, until reversed or set aside." In that case it appears that the judgment was obtained against two persons on an undertaking joint in its nature, and it was held that parol evidence was not admissible to show that the relation of the parties to the judgment and the paper which was the foundation of the judgment was different from that indicated in the record. In the case now before us, we are determining the whole question by an inspection of the record itself, and the ruling in the present case is simply that the mere formal judgment, apparently fixing the relation of the parties to each other, will not be allowed to control, when an inspection of the entire record, without the aid of any other evidence whatever, parol or otherwise, shows that the relation is in reality entirely different; it not appearing, as has been stated above, that this question had been directly passed upon by the court rendering the judgment. The undertaking of Mrs. McIntyre being that of surety only. It was competent for the plaintiff to bring suit upon a foreign

judgment against McIntyre without joining his wife, and therefore it was allowable to join in the same suit a cause of action upon another judgment which was rendered against McIntyre alone. The court did not err in overruling the demurrer. Judgment affirmed. All the justices concurring.

(106 Ga. 507)

BREWER v. STATE.

(Supreme Court of Georgia. July 23, 1898.)
CRIMINAL LAW—ASSIGNMENTS OF ERROR—RECORD—REVIEW.

Assignments of error in a bill of exceptions, upon the refusal of the superior court to sanction a petition for certiorari, cannot be considered and passed upon by this court when a copy of such petition is neither embodied in the bill of exceptions, nor attached thereto and verified by the judge. *Watson v. McCarty*, 72 Ga. 216; *Fleming v. City of Bainbridge*, 10 S. E. 1098, 84 Ga. 622.

(Syllabus by the Court.)

Error from superior court, Carroll county; S. W. Harris, Judge.

J. W. Brewer was convicted of a crime, and brings error. Dismissed.

Irwin & Bunn, S. E. Grow, and S. Holderness, for plaintiff in error. T. A. Atkinson, Sol. Gen., and R. D. Jackson, Sol. City Court, for the State.

PER CURIAM. Writ of error dismissed.

(106 Ga. 509)

SOUTHERN RY. CO. v. BUTLER.

(Supreme Court of Georgia. July 23, 1898.)

APPEAL—REVIEW—CONFLICTING EVIDENCE.

Although, upon a careful examination of the record, the verdict rendered in this case is not satisfactory to this court, and, in its opinion, the trial court would have been well warranted in granting a new trial, yet as the evidence was conflicting, and that portion of it most favorable to the plaintiff, if it represented the real truth of the case, was sufficient to sustain the jury's finding, the responsibility of allowing the same to stand will be left where the law placed it, and the judgment below will not be disturbed.

(Syllabus by the Court.)

Error from superior court, Paulding county; C. G. Janes, Judge.

Action by G. T. Butler against the Southern Railway Company. Judgment for plaintiff. Defendant brings error. Affirmed.

Sanders McDaniel and A. J. Camp, for plaintiff in error. L. M. Washington and A. L. Bartlett, for defendant in error.

PER CURIAM. Judgment affirmed.

(106 Ga. 507)

COLEMAN v. FLANNERY et al.

(Supreme Court of Georgia. July 23, 1898.)

APPEAL—REVIEW—GRANT OF NEW TRIAL.

The assignments of error in this case being based on the first grant of a new trial on general grounds, and it not appearing that the court below abused its discretion in granting

the same, this court will not interfere. Civ. Code, § 5585.

(Syllabus by the Court.)

Error from superior court, Dodge county; Z. A. Littlejohn, Judge.

Action between Georgia Coleman and John Flannery & Co. From the judgment, Coleman brings error. Affirmed.

E. Herrman and Smith & Clements, for plaintiff in error. De Lacy & Bishop, for defendant in error.

PER CURIAM. Judgment affirmed.

(106 Ga. 178)

MARLOW v. MARLOW et al.

(Supreme Court of Georgia. July 23, 1898.)

HABEAS CORPUS—CUSTODY OF CHILD—APPEAL—REVIEW.

A judgment of an ordinary upon a habeas corpus proceeding instituted by a father against his own parents to obtain the custody of his minor child will not, after its affirmance by the superior court, be disturbed, the evidence being conflicting as to whether or not the father relinquished his parental right in favor of the grandparents, and it not appearing that he was in any respect an unfit or improper person to have the custody and control of the child.

(Syllabus by the Court.)

Error from superior court, Lumpkin county; J. J. Kimsey, Judge.

Petition in habeas corpus by L. M. Marlow against J. J. Marlow and another. From a judgment for petitioner, defendants bring error. Affirmed.

Boyd & Lilly, for plaintiffs in error. R. H. Baker, for defendant in error.

LUMPKIN, P. J. This was a controversy between a father and his parents over the custody of a minor child of the former. He sued out a writ of habeas corpus to obtain from his father and mother the possession of the child. The case was heard by the ordinary, by whom the writ was issued, and he awarded the child to the petitioner. On certiorari, the ordinary's judgment was affirmed, and the grandparents excepted. No question of law is presented. The evidence was conflicting as to whether or not the father had relinquished to his parents his parental right to and control over the child's person. There was no evidence showing that he was in any respect an unfit or improper person to have the custody and control of his child. There is nothing, therefore, for us to do but to affirm the judgment. The case of *Franklin v. Carswell* (decided at the present term) 29 S. E. 476, is controlling. Judgment affirmed. All the justices concurring.

(106 Ga. 507)

FAIN v. MECHANICS' BUILDING & LOAN ASS'N.

(Supreme Court of Georgia. July 23, 1898.)

APPEAL—REVIEW—REFUSAL OF INJUNCTION.

This court will not reverse a judgment denying an injunction, when there was at the

hearing ample evidence to support the conclusion reached by the judge, that the plaintiff was not entitled to the relief sought.

(Syllabus by the Court.)

Error from superior court, Fulton county; J. H. Lumpkin, Judge.

Suit by Mildred A. Fain against the Mechanics' Loan & Building Association. Judgment for defendant. Plaintiff brings error. Affirmed.

Jas. W. Austin and C. L. Pettigrew, for plaintiff in error. Simmons & Corrigan, for defendant in error.

PER CURIAM. Judgment affirmed.

(105 Ga. 459)

BOWEN et al. v. CLIFTON, Secretary of State, et al.

(Supreme Court of Georgia. July 23, 1898.)

CONSTITUTIONAL LAW—JUDICIAL AND EXECUTIVE POWERS—COUNTY SEAT ELECTION CONTESTS.

1. The act of the general assembly, approved November 9, 1897 (Acts 1897, p. 87), which provides for the filing, hearing, and determining of contests in elections held for the removal of county sites in this state, and which confers upon the secretary of state the power and makes it his duty to hear and determine such contests on evidence previously taken under the terms of the act, is not in conflict with paragraph 23, § 1, art. 1, of the constitution, which declares: "The legislative, judicial and executive powers shall forever remain separate and distinct, and no person discharging the duties of one shall at the same time exercise the functions of either of the others, except as herein provided."

2. The terms of the act do not confer on the secretary of state the power to perform "duties" or to exercise "functions" belonging to the judicial department of the state government, in the sense in which the words just quoted are used in the constitutional provision above mentioned; but the effect of the act is to vest in the secretary of state the duty of hearing and passing upon the questions raised in such a contest; and this, being a duty which pertains largely to matters of a political nature, is one properly exercisable by an executive officer of the government. See *Carter v. Janes*, 23 S. E. 201, 96 Ga. 280; *Johnson v. Jackson*, 27 S. E. 734, 99 Ga. 389.

(Syllabus by the Court.)

Error from superior court, Fulton county; J. H. Lumpkin, Judge.

Action between J. E. Bowen and others and William Clifton, secretary of state, and others. There was a judgment for the latter, and the former bring error. Affirmed.

Cutts & Lawson and Bankston & Wells, for plaintiffs in error. E. D. Graham, D. B. Nicholson, and J. M. Terrell, for defendants in error.

PER CURIAM. Judgment affirmed.

(105 Ga. 178)

WHITE et al. v. BLECKLEY et al.

(Supreme Court of Georgia. July 23, 1898.)

APPEAL—PARTIES—ACKNOWLEDGMENT OF SERVICE—DISMISSAL.

1. A person who was a party to a judgment to set aside which an equitable petition was

brought, and who was interested in sustaining that judgment, was properly made a party defendant to such petition; and, where the same was dismissed on demurrer, this person was an essential party to a bill of exceptions sued out to review in the supreme court the judgment of dismissal.

2. One who is not named in a bill of exceptions as a party thereto, but who signs thereon an acknowledgment of service as "attorney for defendants in error," does not, by so doing, acknowledge service upon himself as an individual.

3. If a person who is an essential party to a bill of exceptions is not made a party thereto, and duly served, the writ of error will be dismissed.

(Syllabus by the Court.)

Error from superior court, Rabun county; J. J. Kimsey, Judge.

Petition by S. E. White and another against F. A. Bleckley and others in the nature of a bill of review. From a judgment of dismissal, petitioners bring error. Dismissed.

J. B. Jones, John J. Strickland, and J. O. Edwards, for plaintiffs in error. W. S. Paris and H. H. Dean, for defendants in error.

LUMPKIN, P. J. In 1884, H. W. Cannon and F. A. Bleckley brought an action of ejectment against W. D. Young and Caleb Woodall for the recovery of certain land in Rabun county. In defense to this suit, Young pleaded that he and S. E. White were joint owners of the land. After three trials in the lower court, each of which resulted in a verdict in favor of the plaintiffs, the case came to this court for review; and, it appearing that the only title relied on by them consisted of two grants which had been issued by virtue of an unconstitutional statute, the judgment of the court below granting a third new trial was affirmed. See *Cannon v. Young*, 92 Ga. 164, 17 S. E. 863. Prior to the rendition of this decision, H. W. Cannon had died, and his administrator, J. O. Cannon, had been made a party plaintiff. Before the case again came on for a hearing in the trial court, it was dismissed at the instance of the plaintiffs. Shortly thereafter J. O. Cannon and others entered upon the land, and took possession thereof. Thereupon Young and White brought an equitable petition against Cannon, as administrator, James Bleckley and W. S. Paris, an attorney of record in the ejectment suit. It was alleged in this petition that the defendants therein named had "combined and confederated together to defy, set at naught, and evade the judgment of the supreme court and of the superior court in said ejectment case," and "to this end [had] taken forcible possession of" the land in controversy, and were proceeding, through their agents, to cut down the timber thereon; and, accordingly, it was prayed that an injunction against each and all of the defendants be granted, "commanding them to desist from any interference with the said lots of land, and enjoining them from cut-

ting thereon, or from doing any other acts to damage said premises, or from exercising any acts of ownership." Upon the hearing of this petition, the trial judge granted an injunction as prayed; but this judgment, on review before this court, was reversed, it being held that, "the plaintiffs having utterly failed either to prove a joint ownership of the premises in controversy, or to show that either of them had any interest, legal or equitable, therein, the court erred in granting an injunction restraining the defendants from interfering with or exercising control over the premises." See *Bleckley v. White*, 98 Ga. 594, 25 S. E. 592. Subsequently, when the case was called in its order in the lower court at the trial term of the plaintiffs' petition, the defendants offered an amendment to their answer, alleging that they were "the owners in fee simple of the property described in plaintiffs' petition," and had "the right to the possession of the same, and that plaintiffs [had] no right to interfere with said possession," though, notwithstanding this fact, they had been "for a number of years illegally interfering with defendants' possession, cutting defendants' timber and wood, and drawing wagons and teams across said property, to the injury and damage of defendants, and against the protest of defendants, and to their great annoyance and damage." Affirmative relief was asked, the defendants praying "that plaintiffs be forever restrained and enjoined from in any way or manner annoying defendants, and from interfering with defendants' possession of said property, and from trespassing upon the same and cutting timber or wood, and from driving across said property, and from in any way disturbing the legally acquired and lawful possession of said property above mentioned." This amendment was duly allowed, and the case proceeded to trial, resulting in a verdict and judgment in favor of the defendants, granting to them the affirmative relief for which they prayed.

It appears that, at the trial last referred to, neither of the plaintiffs to the action was present in court, nor were they represented by counsel. No motion for a new trial was filed; but at a subsequent term of the court the plaintiffs brought an equitable petition, in the nature of a bill of review, praying that the judgment in favor of the defendants "be reviewed, set aside, and declared null and void." Among other things, the plaintiffs alleged: "It was understood by them, through their counsel, that the supreme court had held that the" above-mentioned suit in ejectment brought against them "had been properly dismissed, and that there was nothing further in the injunction case to try, and that the same would be dismissed." They therefore filed suits in ejectment against Bleckley and Cannon for the recovery of the premises in dispute, returnable to the term of court at which the judg-

ment sought to be set aside was rendered. Neither of the plaintiffs was present in court, in person or by attorney, when defendants amended the answer originally filed by them to plaintiffs' petition for injunction; nor had either of them, or their counsel, been served with "any sort of notice that any amendment was going to be made," and "knew nothing about what had been done until more than two months after the adjournment of said court." Their sole counsel was at the time "confined at his home with sickness." This "amendment was not sworn to or verified in any way," and "stated and set up facts that were untrue." In point of fact, "defendants had no title to said lands, and well knew it, and had never been in the legally acquired possession of the property, but had entered on the property with force and arms, and had ejected petitioners' tenants therefrom in the manner and form as described by petitioners in their said ejectment suits which were returnable to that very term of said court"; it being the design "of said defendants to obtain the decree, predicated upon a pretended amended statement of facts that they dared not swear to, for the purpose of preventing a recovery by petitioners in their said ejectment suits." On the hearing, so "petitioners have recently been informed, the defendants, Cannon et al., introduced no paper title before the court and jury, and oral evidence only was presented to the jury, and a verdict was directed by the court for the defendants." As originally filed, the petition last above referred to named as defendant J. C. Cannon, as administrator, F. A. Bleckley, and James Bleckley. At the trial term thereof, W. S. Paris was, on motion of the plaintiffs, also made a party defendant. He thereupon joined the other defendants in a demurrer to the petition based on various grounds, which the court sustained, and the action was dismissed. To this judgment of dismissal the plaintiffs excepted. In their bill of exceptions brought to this court the facts above recited, concerning the history of this litigation throughout its various stages, are made to appear by setting forth at length copies of the pleadings filed by the parties in connection therewith. The persons named in the bill of exceptions as defendants in error are "J. C. Cannon, as administrator of H. W. Cannon, F. A. Bleckley and James Bleckley." There appears thereon an acknowledgment of service signed, "W. S. Paris, Attorney for Defendants in Error."

When the case was called for argument here, a motion to dismiss the writ of error was made, "because one of the defendants in the court below, to wit, W. S. Paris, a material party to the cause, [had] not been made a party to the bill of exceptions, [had] not been named in the bill of exceptions, as required by law, [and] had not been served with the said bill of exceptions." We are fully satisfied that this motion was well taken, and accordingly adjudge that the writ of er-

ror be dismissed. It is apparent from the foregoing recital of facts that W. S. Paris was a party to the judgment to reverse which the pending bill of exceptions was sued out. It is also true beyond doubt that he was an essential party to the case, and is interested in having that judgment sustained. For these reasons, it is clear that he was an indispensable party to the bill of exceptions now under consideration, and ought to have been served with a copy of the same. He was neither made a party nor served. Although it appears from the pleadings which are set forth in the bill of exceptions that Paris was made a party defendant in the court below after the plaintiffs' petition had been filed, it by no means follows, and is not true, that he was made a party to the bill of exceptions, or named as such therein. This being so, his acknowledgment of service upon the bill of exceptions as "attorney for defendants in error" must be construed, not as an acknowledgment of service upon himself in his individual capacity, but simply as an acknowledgment in behalf of those who were in fact made defendants in error, which he signed as their authorized attorney. See *Inman v. Estes* (Ga.) 30 S. E. 800, and the cases there cited. Writ of error dismissed. All the justices concurring.

(105 Ga. 508)

MAYOR, ETC., OF SAVANNAH v. GRAYSON et al.

(Supreme Court of Georgia. July 23, 1898.)

APPEAL—LAW OF THE CASE—COSTS.

The law of this case having been settled adversely to the defendants in error when it was here before on a fast writ of error between the same parties, the judgment is reversed; and the present writ of error being, for the reason stated, unnecessary, direction is given that judgment be entered against the plaintiff in error for the costs.

(Syllabus by the Court.)

Error from superior court, Chatham county; R. Falligant, Judge.

Application for writ of prohibition by W. L. Grayson and others, members of the board of fire commissioners, against the mayor and aldermen of the city of Savannah. Motion to dissolve restraining order was denied, and respondents bring error. Dismissed.

For judgment on appeal reversing the judgment below, see 80 S. E. 693.

S. B. Adams, for plaintiffs in error. F. G. du Bignon and A. A. Lawrence, for defendants in error.

PER CURIAM. Judgment reversed, with direction.

(105 Ga. 129)

JARRELL v. GUANN.

(Supreme Court of Georgia. July 23, 1898.)

GARNISHMENT—PROCEDURE BEFORE JUSTICE—JUDGMENT—DISQUALIFICATION OF JUSTICE.

1. A person summoned as garnishee in a justice's court must answer at the term to which

the summons is returnable, provided the term is more than 10 days from the day of service; and, upon failure so to answer, judgment may be rendered against him at the first term for such an amount as judgment may have been obtained against the principal debtor.

2. That the justice who rendered the judgment was related within the fourth degree of consanguinity or affinity to one of the parties to the case was no ground of illegality.

(Syllabus by the Court.)

Error from superior court, Effingham county; R. Falligant, Judge.

On levy of execution by A. A. Guann, J. B. Jarrell interposed affidavit of illegality. On affirmance of certiorari of superior court, claimant brings error. Affirmed.

Gordon Saussy, for plaintiff in error. J. G. & D. H. Clark, for defendant in error.

COBB, J. On February 18, 1896, suit was brought in the justice's court, and process of garnishment issued, returnable to the March term of the court to be held March 7, 1896. At that time judgment by default was rendered against the defendant and the garnishee. At the April term the garnishee filed an answer under oath, denying indebtedness and the possession of any property or effects of the defendant. This answer was stricken. Execution being issued against the garnishee and levied, he interposed an affidavit of illegality, alleging that the execution was proceeding illegally, on the grounds that the summons of garnishment did not bear date 20 days before the term to which it was returnable; that the judgment was rendered against the garnishee at the same time that judgment was rendered against the defendant; that the judgment was rendered against the garnishee at the term to which the summons was returnable; that the court declined to receive the answer of the garnishee, which was filed at the next term; that the justice of the peace who rendered the judgment was disqualified to preside in the case, being related to the plaintiff within the fourth degree of consanguinity and affinity; that the garnishee owes the defendant nothing. The issues arising upon the affidavit of illegality were tried in the justice's court before a magistrate other than the one who rendered the judgment, who had been summoned from another district to preside in the place of the magistrate who was disqualified. The affidavit of illegality was dismissed. On certiorari, this judgment was affirmed by the superior court, and to this judgment the plaintiff in error excepted.

1. It is contended by the plaintiff in error that the judgment rendered by the justice of the peace against the garnishee was void, because the same was rendered at the first term after service. In support of this contention the act of March 4, 1856 (Acts 1855-56, p. 29), is cited. Section 15 of that act declares that, "when any person summoned as garnishee fails to appear in obedience to

the summons, and answer at the term of the court at which he is required to appear, the case shall stand continued until the next term of the court, and if he shall fail to appear and answer by the next term of the court, the plaintiff in attachment may, on motion, have judgment against him for the amount of the judgment he may have obtained against the defendant in attachment, or for so much thereof as shall remain unpaid at the time judgment is rendered against the garnishee, and it shall be lawful for the court to continue the case against the garnishee until final judgment is rendered against the defendant in attachment." Section 4551 of the Civil Code is taken from this act, and embodies the same provision, in substance. The act of 1856 was dealing with the subject of attachments and garnishments generally, and, construing the act as a whole, it seems that it was the intention of the general assembly to make the same rules apply in all cases, whether the suit was begun in the superior, inferior, or justice's courts. It is also true that it has been held by this court in at least two cases that the law as embodied in section 4551 of the Civil Code was applicable to all cases of garnishment, whether founded on attachment or otherwise; but it is to be noted that in both of these cases the garnishment proceedings were pending in the superior court, and therefore in neither was the question directly before the court as to whether the provision of the act of 1856 embodied in the section above cited was applicable to justice's courts. *Sanders v. Miller*, 60 Ga. 554; *Liverpool & L. & G. Ins. Co. v. Savannah Grocery Co.*, 97 Ga. 746, 25 S. E. 828. It may be that prior to the adoption of the constitution of 1868 the law allowing the garnishee two terms at which to make an answer was applicable to justice's courts, but, under the provisions of that constitution, which declared that "the justices of the peace * * * may sit at any time for the trial" of cases within their jurisdiction (Code 1873, § 5104), thus abolishing terms altogether, so far as that court was concerned, the act of 1856 could not be applicable to such a court. In order to carry into effect the constitutional provision allowing the justices of the peace to sit at any time, the general assembly in 1873 passed an act which declared that, "when process of garnishment is sued out, returnable to any justice's court, and served upon the garnishee, it shall be the duty of the garnishee to answer within ten days from the day of service; and in case of failure so to answer, the justice of the peace shall enter a default against the garnishee, and shall enter up judgment in favor of the plaintiff against the garnishee for such an amount as may have been obtained by judgment against the defendant, or for such an amount as may thereafter be recovered in the pending suit, after judgment obtained." Acts 1873, p. 47.

By the very terms of this act, the garnishee had 10 days from the date of service to answer, and no more, in case judgment had been obtained against the principal debtor at or before the expiration of the time allowed the garnishee to answer. Such was the condition of the law in regard to garnishments in the justice's court at the time of the adoption of the present constitution, in which it is declared that justices of the peace "shall sit monthly at fixed times and places." Civ. Code, § 5856. The effect of this change in the law in reference to the justice's court was to again make it one of the courts in this state having fixed terms. It therefore became necessary for the general assembly to adjust the law in reference to these courts to the radical change which was made by the constitutional provision above alluded to. The act of 1873, requiring the garnishee to answer within 10 days after service, was entirely inapplicable to the new state of affairs, as a compliance with its terms would result in the garnishee's answer being filed in vacation, which was contrary to the spirit of the scheme provided in the new constitution. See *Hearn v. Adamson*, 64 Ga. 608. To remedy this, the act of 1880 was passed, which amended the act of 1873. Acts 1880, p. 56. The act of 1873, as amended by the act of 1880, is now embraced, in substance, in section 4153 of the Civil Code, which declares that, "when a process of garnishment is issued out, returnable to any justice's court and served upon the garnishee, it shall be the duty of the garnishee to answer at the term to which the garnishment is made returnable. And in case of failure so to answer, the justice of the peace shall enter a default against the garnishee, and shall enter up judgment in favor of the plaintiff against the garnishee, for such an amount as may have been obtained by judgment against the defendant, or for such an amount as may thereafter be recovered in the pending suit." It is therefore seen that under the very terms of the statute, after judgment has been obtained against the principal debtor, the justice of the peace has not only the right, but it is his duty, to enter a judgment by default against a garnishee who fails to answer at the term to which the summons is returnable. It is true, in the case of *Arnold v. Gullat*, 68 Ga. 810, it is declared in the headnote that since the act of 1880 the law applicable to judgments against garnishees in justice courts is similar to that applicable to other courts, and that Justice Crawford in the opinion uses this language: "We think that the act of 1880 was mainly to carry into effect the constitution of 1877, and to put back the justices' courts where they stood before the constitution of 1868, and the law applicable to it, so far as respects answers in garnishments." The court in that case, however, was not dealing with the question now under consideration, but

the question then before the court was whether a judgment could be entered against a garnishee before final judgment was entered against the principal debtor, and whether an answer filed by the garnishee any time before final judgment was rendered against the principal debtor was in time to save a judgment by default against him. The court did not intend to rule that the garnishee, under the act of 1880, had two terms in which to answer, but, as stated above, the sole question decided was that the garnishee's answer filed at any time before a judgment could be lawfully entered against him was in time to save a judgment by default. It may be true, as stated above, that prior to the constitution of 1868 a garnishee in a justice's court had two terms to answer, and it may be true that since the adoption of the constitution of 1877 the purpose of the general assembly in the acts passed from time to time has been to restore the rules in regard to proceedings in the justice's court as they existed prior to the constitution of 1868; still, where an act passed since 1877 is entirely inconsistent with such rules and is not inconsistent with the constitutional provision, the act will prevail, notwithstanding the existence of a contrary rule prior to 1868.

It was further contended that the judgment against the garnishee was void because the summons did not bear date 20 days before the term of the court to which it was returnable. We know of no law which requires a summons of garnishment issued, returnable to the justice's court, to bear date 20 days before the term to which it is returnable. It must be served 10 days before the term to which it is returnable, and, as it may be served on the day on which it is issued, it would seem to follow that, if it bore date 10 days before the term to which it was returnable, it would be sufficient, provided service was made on the same day. See *Massengale v. McGinty*, 73 Ga. 120.

It was further insisted that the judgment was void because it was rendered against the garnishee at the same time that the judgment was rendered against the defendant. In support of this contention the case of *Bank v. Mayer*, 89 Ga. 108, 14 S. E. 891, is cited. In that case it was held that "a joint judgment cannot be rendered against the defendant in attachment and the garnishee." We have been unable to find in the record anything which would indicate that a joint judgment was rendered. The judgment against the garnishee does not appear in the record, but, from the recitals in the bill of exceptions and the record, it would appear that judgments against the principal debtor and the garnishee were rendered on the same day. Nothing therein appears, however, to indicate either that a joint judgment was rendered, or that the judgment against the garnishee was render-

ed before the judgment against the principal debtor. The recitals in the record before us are entirely consistent with a regular proceeding, which would be entering up judgment against the principal debtor, followed immediately by an entry of judgment by default against the garnishee. The judgment against the garnishee at the term to which the summons was returnable being lawful and proper, the justice's court did right in refusing to receive an answer at a subsequent term, notwithstanding the fact may be that the garnishee "owes the defendant nothing."

2. The proposition stated in the second headnote was directly ruled by this court in the case of *Rogers v. Felker*, 77 Ga. 46. Judgment affirmed. All the justices concurring.

(105 Ga. 508)

CROSBY v. CENTRAL OF GEORGIA RY. CO.

(Supreme Court of Georgia. July 23, 1898.)

APPEAL—REVIEW—GRANT OF NEW TRIAL.

This court will not interfere with the discretion of a judge of the superior court in sustaining a certiorari, and ordering a new trial, when his judgment is based on the ground that there was a preponderance of evidence against the verdict in the justice's court, and is sustained by the record.

(Syllabus by the Court.)

Error from superior court, Chatham county; *R. Falligant, Judge.*

Action by B. F. Crosby, by his next friend, against the Central of Georgia Railway Company. From an order granting defendant a new trial, plaintiff brings error. Affirmed.

J. G. & D. H. Clark, for plaintiff in error.
Lawton & Cunningham, for defendant in error.

PER CURIAM. Judgment affirmed.

(105 Ga. 144)

GORDAN v. IRVINE.

(Supreme Court of Georgia. July 23, 1898.)

DECEIT—WHEN ACTION LIES—SALE OF NOTE—INTERROGATION OF WITNESS—HARMLESS ERROR.

1. The holder of a promissory note who has knowledge of the insolvency of its maker is under a legal and moral obligation to impart such knowledge to an innocent purchaser before negotiating it. When he fails to do so, and the purchaser is thereby injured, an action of deceit will lie by the latter against the former.

2. If the vendor of the note is aware of such facts as will lead a reasonable man to infer the insolvency and worthlessness of the paper, this is equivalent to actual knowledge on his part.

3. The judge has a right to interrogate a witness introduced by either party, but this should not be done in such a way as would have a tendency to cast discredit upon the witness. While the form of the question put to the witness in this case by the judge was not entirely proper, yet a new trial will not be granted on this account, when it appears from the entire evidence that the verdict is manifestly correct.

4. The charge, construed as a whole, fairly covered the issues in the case, and, the verdict being right under all the testimony, the court did not err in overruling the motion for a new trial.

(Syllabus by the Court.)

Error from city court of Macon; J. P. Ross, Judge.

Action by E. D. Irvine against W. W. Gordan. Judgment for plaintiff. Defendant brings error. Affirmed.

Hardeman, Davis & Turner, for plaintiff in error. H. F. Strohecker, for defendant in error.

LEWIS, J. Irvine brought his action against Gordan, alleging that the defendant had damaged him by deceit and fraud in the sum of \$240, besides interest and protest fees, for that the defendant, keeping himself concealed, procured his clerk, one Chapman, to come to plaintiff's store about June 1, 1896, and state he wished to examine a piano for another party, whose name he did not give, but who, plaintiff charges, was the defendant, with a view of buying a piano, plaintiff being a dealer in pianos. Chapman selected a piano of the value of \$450, and said he would see his party and return. About June 8, 1896, Chapman returned to plaintiff's store, and said he was ready to buy the piano, and said he wished to pay part cash and part in a note, not saying what kind of note. To this plaintiff assented. Chapman then paid plaintiff by his individual check, a part of the purchase money, and handed plaintiff a promissory note signed by George T. Harris, for \$246, due October 1, 1896. Plaintiff, suspecting nothing, and not knowing that Harris was insolvent, being unacquainted with his business affairs save that he was engaged in an apparently large wholesale business, which was well calculated to deceive those ignorant, as plaintiff was, of his real financial condition, took the note, and asked Chapman where the piano should be delivered, whereupon Chapman replied that he would notify plaintiff later. About June 9, 1896, an order came to deliver the piano at a designated place, which was the residence of the defendant, and the piano was accordingly delivered there, and went into the possession of the defendant. After this delivery of the property plaintiff placed the note in bank, and then for the first time discovered that it was worthless on account of Harris' insolvency; all of which, it was alleged, was known to defendant, who procured the note to be so made that it would not be required to be indorsed in order to be transferred, that he might defraud plaintiff or some other person. Harris was never indebted to Chapman, and never gave him the note, but defendant procured Harris to make the note, knowing at the time Harris made the note, and at the time the defendant procured Chapman to deceive and defraud plaintiff with

the note, that it was worthless and would not be paid. When plaintiff learned that the note was worthless, he applied to the defendant before its maturity to redeem it, and pay him the \$240, and take the note, which defendant refused to do and has not done; and plaintiff now brings the note into court, and makes a continuing tender of it to the defendant. The defendant demurred generally to the declaration. The court overruled the demurrer. To this the defendant excepted. There was a verdict for plaintiff. The defendant's motion for a new trial was overruled, and he excepted.

1. It is contended by plaintiff in error that there was no cause of action set forth in the declaration, because there was no misrepresentation of any material fact alleged, nor were there any facts set forth showing that the defendant had in any way deceived plaintiff. Error is assigned in not sustaining the demurrer on these grounds. The contention of counsel for plaintiff in error seems based upon the theory that, in order to maintain an action on the case for deceit growing out of such a transaction as was had in the present instance, there must have been a positive representation made by the vendor of the note which he knew at the time to be false, and which was innocently acted on by the defendant to his injury. Actual moral fraud may be as successfully perpetrated by silence as by words. This principle is settled by the Code. Section 3534 of the Civil Code provides that "concealment of material facts may in itself amount to a fraud—(1) When direct inquiry is made, and the truth evaded. (2) When, from any reason, one party has a right to expect full communication of the facts from the other. (3) Where one party knows that the other is laboring under a delusion with respect to the property sold or the condition of the other party, and yet keeps silent. (4) Where the concealment is of intrinsic qualities of the article which the other party, by the exercise of ordinary prudence and caution, could not discover." Section 4027 declares that "suppression of a fact material to be known, and which the party is under an obligation to communicate, constitutes fraud."

If the vendor knew of the insolvency of the maker of this note that he sold, or if he had knowledge of any fact which tended to show the worthlessness of the paper, was he under obligation to disclose this fact to the purchaser? The answer to this question will be found in section 3685 of the Civil Code, which declares that "every transferor of a negotiable instrument, whether by indorsement or delivery, warrants (unless otherwise agreed by the parties) that he is the lawful holder and has a right to sell, that the instrument is genuine, and that he has no knowledge of any fact which proves the instrument to be worthless, either by insolvency of the maker, payment, or otherwise." The law governing the rights and liabilities

of parties in regard to such transactions entered into and formed a part of their contract, and, when this note was traded to the defendant in error, the vendor, by keeping silent as to the solvency of its maker, occupied no better position than if he had expressly warranted that he had no knowledge of any fact which tended to prove the instrument to be worthless; and the vendee had the right to act upon the presumption that no such knowledge existed in the vendor, otherwise it would have been disclosed when the contract was made. Some respectable authorities have gone to the extent of saying that, in order to maintain an action for deceit, it does not necessarily follow that a fraudulent intent should be proven. For instance, in the case of *Lobdell v. Baker*, 1 Metc. (Mass.) 193, it was held that the holder of a note who fraudulently procured it to be indorsed by a minor, and afterwards sold it to a person who relied on the validity of such indorsement, was liable to an action by such person, though, at the time of sale, he had no fraudulent intent. Selling the note without erasing such indorsement, or disclosing the minority of the indorser, was tantamount to a direct affirmation by the seller that the indorsement constituted a valid contract. This was an action of trespass upon the case. In the same case, reported in 3 Metc. (Mass.) 409, it was held that, though the seller gave notice to the purchaser that the indorsement by the minor was worthless, yet, if such purchaser sold the note without disclosing the infirmity of the indorsement, his vendee, if he suffers therefrom, may maintain an action for indemnity against the first seller. See *Grinnell, Deceit*, §§ 34, 40, et seq., and authorities cited. Section 3814 of the Civil Code seems, however, to imply that fraudulent intent in the vendor is necessary to support an action for deceit; but that section declares that mere concealment of a material fact, unless done in such a manner as to deceive and mislead, will not support an action, and further declares that, in all cases of deceit, knowledge of the falsehood constitutes an essential element. But, even measured by its rule, we think the right of action on the case for deceit is clearly supported by the allegations in the plaintiff's petition. In the case of *Winter v. Bullock*, 6 Ga. 230, it was held that the holder of a promissory note, who transfers it by delivery, for a valuable consideration, warrants, among other things, by implication, unless otherwise agreed between the parties, that he has no knowledge of any facts which prove the instrument to be worthless, either by the failure of the maker, or by its being already paid, or otherwise to have become void or defunct; and "any concealment of these facts," says the court, "on the part of the transferrer of the note, operates as a fraud on the rights of the transferee, for which a court of equity will entertain jurisdiction, to compel a discovery and

grant relief." This disposes not only of the demurrer, but of several grounds made in the motion for a new trial.

2. Complaint was made in the motion that the court erred in charging the jury, substantially, that they were to determine from the evidence in the case what facts were known to plaintiff and defendant about this note, and about the solvency of Harris, the maker, at the time of the transaction, and charge them both with all the knowledge they had, as disclosed by the testimony; and that they were also to determine what inquiry a prudent man, situated as they were, would have made, in the light of what they actually did know, to find out anything further about the matter; "and you are to charge them with making such inquiry as a prudent man would have made, and with knowing all the facts which you believe such inquiry would have revealed to a prudent man touching the note and the solvency of Mr. Harris." Exception was taken to this charge, as it charged the defendant with the knowledge of such facts as inquiry might have led to. We are not prepared to indorse to its fullest extent the charge of the court above mentioned. But, in the light of the facts of this case, we do not think there was such material error in the charge as would authorize the grant of a new trial. It is true the defendant disclaimed any knowledge of the insolvency of the maker of this note at the time it was negotiated to the plaintiff; but it appears from the evidence, uncontradicted, that the maker of the note, Harris, was a member of the firm of Johnson & Harris; that Johnson had died; that a year before this note was traded the defendant, Gordan, became administrator de bonis non on his estate, and as such filed a bill to marshal the assets of the estate, alleging that the firm was insolvent; that it owed many thousand dollars. It further appears that Gordan himself was a creditor of Harris to the amount of several thousand dollars. It further appeared that the note which was traded really belonged to a company of which the defendant, Gordan, was an official, and represented a debt that had been extended from time to time. It was also disclosed that at the time this note was given several judgments were outstanding against Harris founded upon debts due by the firm of which he was a member. One witness testified that soon after the negotiation of this note the defendant admitted to him that Harris was insolvent, and his paper utterly worthless. This the defendant neither denied nor explained. Knowledge of these facts, if not amounting to an absolute knowledge of the insolvency of the maker of this note, was certainly sufficient to tend to prove that insolvency in the language of the statute, and to charge the conscience of the defendant with the duty of imparting the knowledge he had to an innocent purchaser with whom he was dealing through his agent. What Justice Hall quoted in *Hunt v. Dunn*,

74 Ga. 124, from *Jordan v. Pollock*, 14 Ga. 157, might well be applied to the facts in this case: "That notice is sufficiently actual which, by the proof, either positive or presumptive, brings home to the purchaser such knowledge of the circumstances as authorize the clear and satisfactory conclusion that he had notice of the prior incumbrance, or such as renders proper the conclusion that he was, or should have been, put upon inquiry;" "that such notice is, in the language of Sir Edward Sugden, 'good notice,' and is so because it authorizes a conclusion which affects the conscience of the purchaser, and makes it a legal fraud in him to buy under the circumstances." If, under such notice, he afterwards buys, "mala fides marks the transaction."

3. Objection was made by defendant's counsel, and error assigned thereon, to certain questions asked by the judge of one of defendant's witnesses while on the stand. Chapman, the agent of the defendant, had, on the direct examination by defendant's counsel, testified to the fact that the note of Harris used in the purchase of the piano was a part of the assets of the Progress Loan & Improvement Company, of which company the defendant was an officer and a creditor, and that the note was taken from Harris in renewal of prior notes to the company. After the examination in chief had been concluded, plaintiff's counsel stated that he had no questions for the witness; whereupon the judge began to interrogate the witness as to payments made by Harris upon the indebtedness for which the note was given, and as to renewals of notes for the same debt, and as to when the witness first proposed to the plaintiff to use the note in the purchase of the piano; why he used the note for this purpose, whether the defendant suggested it, or whether he (the witness) conceived in his own mind this method of selling the note. He then put the following questions: "You just voluntarily decided to take some of the assets of the Improvement company and use them in buying an article for Gordan?" "You just voluntarily conceived the idea?" "It was your idea, and not Gordan's, that you put these notes in as part of the trade?" While unquestionably the trial judge has a right to ask a witness upon the stand such questions as he thinks might elucidate the issue, or give information which the jury should have, yet caution should be used by the presiding judge in conducting the examination in such a manner as not to reflect either upon the credibility of the witness, or to indicate in the mind of the court any bias or prejudice whatever for one party or the other. The rather rigid cross-examination and repeated pressure upon the witness on a particular point in his testimony might possibly have been calculated to lead the jury to infer that the judge had very decided convictions in his own mind as to what was the real truth of the transactions. The form

and character of the questions at this particular point of the trial had too much the appearance of the court taking charge of the plaintiff's case. We cannot, therefore, approve the way in which the judge conducted this examination. But, under our view of this case, the verdict is manifestly correct, and we do not think the court's interference by interrogating the witness is so serious as to require a new trial.

4. There were several other grounds taken in the motion for a new trial which are unnecessary to be considered, as we have dealt with all that seem to have any merit in them. The charge of the court, construed as a whole, fairly covered the issues in the case, and, the verdict being clearly right in the light of the entire testimony, the court did not err in overruling the motion for a new trial. Judgment affirmed. All the justices concurring.

(105 Ga. 166)

RUSHING v. WILLINGHAM.

(Supreme Court of Georgia. July 23, 1898.)

APPEAL—ASSIGNMENT OF ERROR—RECORD—REVIEW—USURY—FRAUDULENT CONVEYANCES.

1. An assignment of error in a bill of exceptions cannot be considered by the court where it clearly appears from the transcript of the record that the ruling complained of was not excepted to within the time required by law, although the contrary is stated in the bill of exceptions.

2. Alleged errors in admitting testimony in a case cannot be considered when the record does not disclose that the party complaining made any objection at the time of the admission of such testimony.

3. Where the parties, in their contract, only intend to charge the legal rate of interest, but, by inadvertence or mistake in calculation, there was included in the contract interest amounting to a few cents more than the legal rate, the contract is not thereby rendered usurious.

4. There was no material error in the charges of the court complained of on the subject of voluntary conveyances by a person insolvent at the time being void as against creditors.

5. The evidence was sufficient to sustain the verdict in this case, and there was no error in overruling the motion for a new trial.

(Syllabus by the Court.)

Error from superior court, Houston county; W. H. Felton, Jr., Judge.

Action by C. B. Willingham against J. W. Rushing. Judgment for plaintiff. Defendant brings error. Affirmed.

M. G. Bayne, for plaintiff in error. Harde-man, Davis & Turner, for defendant in error.

LEWIS, J. 1. Plaintiff assigns error in the bill of exceptions in overruling his motion to dismiss the attachment. It does not appear that exceptions pendente lite were taken on this ruling of the court. It appears from the record that this writ of error was sued out some two months or longer after the judgment of the court complained of; and, while the bill of exceptions states that error

thereon was assigned within the time allowed by law, yet, in case the record shows the contrary, the latter will control. *Dismuke v. Trammell*, 64 Ga. 428.

2. A number of grounds are taken in the motion for a new trial, alleging error in admitting certain testimony; but the record fails to disclose that the party complaining made any objection at the time such testimony was admitted. Under repeated rulings of this court, we cannot consider such grounds in the motion for a new trial. Error is assigned in refusing to admit the answer of B. H. Ray to a certain interrogatory, on the ground that there was higher evidence of the fact testified to. We presume that this was a mistake of the draftsman, or in copying the motion in the record, and that he did not intend to use the word "refusing," but intended to object to the admission of the testimony. But, even if there was any error in admitting this testimony, it was cured by legal proof of the fact from the testimony of the defendant himself when he was upon the stand.

3. It is very clearly disclosed by the testimony in the record that the excess in the note, which was the basis of this suit, of a few cents above the legal rate of interest, was merely through inadvertence or mistake when the calculation of interest was made and embodied in the face of the note. There was manifestly no intent to violate the law of usury, and the charge of the court upon this subject complained of was proper. "To rebut the presumption of usurious intent arising from the taking or reserving of interest greater than the legal rate, it is always competent for the party to show that the excess was the result of an honest mistake, and that there was in fact no intentional agreement for usury. Such mistakes most frequently occur in the computation of interest for fractional parts of a year; and whenever the creditor can show where the mistake occurred, and that he acted in good faith, the charge of usury is thereby rebutted. It is usually a question for the jury whether a sum in excess of lawful interest was taken through an honest mistake, or corruptly." 27 Am. & Eng. Enc. Law, p. 970, and citations. The excess of interest claimed in this case being such a very small fractional part, scarcely appreciable, we think, apart from the rule above laid down, we might say, as did Justice Simmons (now chief justice) in *Banking Co. v. Abbott*, 87 Ga. 134, 13 S. E. 204, "De minimis non curat lex."

4, 5. It is unnecessary to deal separately with the several grounds in the motion complaining of charges of the court. If there is any error at all in any portion of the charge, it is so immaterial as not to authorize the grant of a new trial. The entire charge fairly submitted to the jury the contention of the parties and the issues involved. The evidence was amply sufficient to sustain the verdict. Judgment affirmed. All the justices concurring.

(105 Ga. 151)

WATERS v. SUPREME CONCLAVE KNIGHTS OF DAMON.

(Supreme Court of Georgia. July 23, 1898.)

MUTUAL BENEFIT INSURANCE—FORFEITURE—DIRECTING VERDICT.

1. Where, in a contract of life insurance in a mutual benefit society, it is stipulated that the insurer shall not be responsible under it if the health of the insured shall become impaired by the use of narcotics or alcoholic, vinous, or malt liquors, this stipulation amounts to a promissory warranty on the part of the insured, and a breach thereof will work a forfeiture of the policy.

2. The uncontradicted evidence in this case showing such a breach of warranty by the insured, it was not error in the court to direct a verdict for the defendant; and it is immaterial at what stage of the trial, after evidence, and argument is closed, this direction is given.

(Syllabus by the Court.)

Error from city court of Macon; J. P. Ross, Judge.

Action by Mary J. Waters against the Supreme Conclave Knights of Damon. Verdict directed for defendant, and plaintiff brings error. Affirmed.

Hardeman, Davis & Turner, for plaintiff in error. Steed & Wimberly and A. W. Lane, for defendant in error.

SIMMONS, C. J. 1. Waters made application to the Supreme Conclave Knights of Damon for benefit insurance. In his application he stated: "I further agree that this order shall not be responsible under this contract if my health shall become impaired by the use of narcotics or alcoholic, vinous, or malt liquors." In the statement he made to the medical examiner is the following: "I agree that the excessive use of liquor or narcotics shall forfeit my membership." The policy issued to him contained the following: "Upon condition that the statements made by said person in the petition for this membership in said conclave, and the statements certified by said petitioner to the medical examiner, both of which are filed in the supreme secretary's office, be made a part of this contract." Waters accepted the policy with this condition in it. The policy made the statements in his application and to the medical examiner a part of the contract of insurance. By this acceptance of the policy with these words in it, he agreed that his statement should form part of the contract, and the agreement above quoted became a promissory warranty. 1 May, Ins. § 158; 1 Bac. Ben. Soc. §§ 194, 201; *Schultz v. Insurance Co.*, 6 Fed. 672; *Jeffries v. Insurance Co.*, 22 Wall. 47. He therefore warranted that he would not use narcotics or alcoholic, vinous, or malt liquors to such an extent as to impair his health, and further agreed that a breach of this warranty would work a forfeiture of the policy, not only for himself, but for the beneficiaries named therein. This agreement was a material part of the contract of insurance; and, if the evidence dis-

closed that there had been a breach of it, this avoided the policy, and the beneficiary could not recover.

2. We have carefully read the evidence in the record, and say unhesitatingly that all of it which concerns the breach of this agreement or warranty shows conclusively that Waters did use alcoholic liquors to such an extent as to impair his health. The witnesses, for both plaintiff and defendant, all agree upon this point. Even the widow, the beneficiary, in her testimony, says that her husband drank liquor to such an extent as to deprive him at times of his reason; so much so that she had to leave him, and to return to her father. At the time of his death he had delirium tremens, and so far lost his reason as to cut his own throat. This testimony shows clearly a breach of the warranty, which rendered void the policy. A great deal of the testimony and much of the argument here were upon the question as to whether Waters died from the wound inflicted by himself, or from the effects of anæsthetics administered to him by physicians. Under the view we take of the case, it does not matter whether he died from the one or the other. It was clearly established that he had drunk liquor to such excess as to impair his health, and this was a breach of the warranty, which rendered the policy void. This being conclusively established, the judge did not err in directing a verdict, although the jury had been in consultation for a long period of time. If there was no evidence to sustain a verdict for the plaintiff, the judge rightly directed one for the defendant; and it does not matter whether he did it at the close of the testimony, or after the argument of counsel had concluded, or after the jury had retired, and had been in consultation for a whole day. The question is whether the direction of the verdict was right under the evidence. In this case there can be no doubt that it was, and the action of the judge is therefore affirmed. All the justices concurring.

(105 Ga. 159)

SEAMANS v. HOGE.

(Supreme Court of Georgia. July 23, 1898.)

MALICIOUS PROSECUTION—PROBABLE CAUSE.

In an action for malicious prosecution, there can be no recovery where there was a probable cause for such prosecution, even though the defendant was actuated by improper motives.

(Syllabus by the Court.)

Error from city court of Macon; J. P. Ross, Judge.

Action by J. O. Seamans against Sol. Hoge. Judgment for defendant. Plaintiff brings error. Affirmed.

T. R. R. Cobb, for plaintiff in error. Deasman, Bartlett & Ellis, for defendant in error.

SIMMONS, C. J. In order for a plaintiff to recover in an action for malicious prosecu-

tion, the burden is on him to show that the prosecution was instituted without probable cause. The want of probable cause is the gravamen of the action. Plaintiff may show express malice on the part of the prosecutor, and still, if he fail to show that the prosecutor acted without probable cause, he cannot recover. The prosecutor in a criminal case may have improper motives, may have hatred and malice towards the accused, and yet, if he have probable cause for the prosecution, damages cannot be recovered against him. The prosecutor need not be fully satisfied of the truth of the charge when he institutes the prosecution; all that is necessary is that he should have probable cause for its institution. If he have probable cause, it is sufficient to relieve him of damages in an action against him for instituting the prosecution. *Rigden v. Jordan*, 81 Ga. 668, 7 S. E. 857; *Marable v. Mayer*, 78 Ga. 710, 3 S. E. 429; *Joiner v. Steamship Co.*, 86 Ga. 238, 12 S. E. 361. Judgment affirmed. All the justices concurring.

(105 Ga. 509)

BIBB MFG. CO. v. SKINNER.

(Supreme Court of Georgia. July 25, 1898.)

APPEAL—REVIEW.

There being no error of law complained of, there being evidence to support the verdict, and the trial judge being satisfied therewith, this court will not interfere with his discretion in refusing a new trial.

(Syllabus by the Court.)

Error from city court of Macon; J. P. Ross, Judge.

Action by Ella Skinner, for use, etc., against the Bibb Manufacturing Company. Judgment for plaintiff, and defendant brings error. Affirmed.

Hardeman, Davis & Turner, for plaintiff in error. M. G. Bayne, for defendant in error.

PER CURIAM. Judgment affirmed.

(105 Ga. 235)

MANLY MFG. CO. v. WESTERN UNION TEL. CO.

(Supreme Court of Georgia. July 25, 1898.)

TELEGRAM—ERROR IN TRANSMITTING—NEGLIGENCE.

1. When, on account of an error in transmitting a telegraphic message, the receiver thereof is left in doubt as to its meaning, the question whether or not due diligence required him to ask that the message be repeated, so as to remove its ambiguity, is one of fact for a jury.

2. In the present case the issue as to this matter was fairly and correctly submitted to the jury by the judge in his charge, the evidence was sufficient to sustain the verdict, and there was no error in overruling the motion for new trial.

(Syllabus by the Court.)

Error from superior court, Whitfield county; A. W. Fite, Judge.

Action by the Manly Manufacturing Company against the Western Union Telegraph Company. Judgment for defendant. Plaintiff brings error. Affirmed.

R. J. & J. McCamy, for plaintiff in error.
McHenry & Nunnally, for defendant in error.

SIMMONS, C. J. An employé of the Manly Manufacturing Company delivered to the Western Union Telegraph Company the following message, to be sent to Manly, the president of the manufacturing company, in another state: "Pierce not finished. Expects no trouble collecting. Don't say when." In transmitting the message the telegraph company substituted the word "to" for the word "no." When Manly received the message, he left the other state, and proceeded to Dalton, Ga., where he ascertained the meaning of the telegram sent him. He returned to the other state, and the Manly Manufacturing Company brought suit against the telegraph company to recover the necessary expenses incurred in making the trip to and from Dalton, and the loss of time. The jury returned a verdict for the defendant, the plaintiff moved for a new trial, and, when this motion was overruled, excepted.

The court instructed the jury, in substance, that if they believed from the evidence that the message received by Manly was unintelligible or ambiguous, and that a reasonably prudent man would not have acted upon it without having it repeated, or telegraphing to the sender, plaintiff could not recover; but that if, on the other hand, they believed that a reasonably prudent man would have acted upon it without having it repeated, plaintiff could recover. Under the facts of the case, we think this charge was correct. The message delivered to Manly was not intelligible; certainly it was ambiguous; and the jury was fully authorized to find that he should not have acted upon it without further investigation. He testifies himself that he did not understand the message, and asked the operator who received it what it meant. The operator replied "that was all he could give" Manly. It seems to us that a prudent man would have made further inquiries, either by telegraphing to the sender or by having the message repeated from the sending station. It is a well-recognized principle of law that a party injured by another's negligence must himself use all reasonable diligence to lessen his damage. He cannot shut his eyes to the damage he has received or is about to receive on account of the negligence of the other, and claim compensation from him, where he could have avoided the damage by the exercise of due care. In this case the exercise of any sort of diligence would have prevented the damage which plaintiff claims to have sustained. Whether this is so or not, the jury, under the charge of the court, has found that Manly did not act as a reasonably prudent man ought to have acted, and their verdict is sustained by the evidence. The court therefore did not err in refusing to grant a

new trial. Upon this particular question see the following authorities: Civ. Code, § 3830; *Telegraph Co. v. Reid*, 88 Ga. 401, 10 S. E. 919; *Telegraph Co. v. Neff*, 57 Tex. 283; *Hart v. Cable Co.*, 86 N. Y. 633; *Crosw. Electricity*, § 431; *Gray, Telegraph*, § 76; 25 Am. & Eng. Enc. Law, 808 et seq. Judgment affirmed. All the justices concurring.

(106 Ga. 237)

WESTERN & A. R. CO. v. GOODWIN.
(Supreme Court of Georgia. July 25, 1898.)
CARRIERS—INJURY TO PASSENGER—CONTRIBUTORY NEGLIGENCE.

1. In an action of tort against a railroad company for damages resulting from personal injuries, when it appears that such injuries were caused by plaintiff jumping from a moving train of the defendant, and at a time when there was no apparent necessity for his leaving it, and when he was not induced so to act by the defendant, but was told by its agent not to do so, there can be no recovery.

2. Irrespective of the alleged errors in the charge and rulings of the court, the verdict being contrary to evidence, the court erred in overruling the motion for a new trial.

(Syllabus by the Court.)

Error from city court of Cartersville; K. S. Anderson, Judge pro hac.

Action by William Goodwin against the Western & Atlantic Railroad Company. Judgment for plaintiff. Defendant brings error. Reversed.

Payne & Tye and J. M. Niel, for plaintiff in error. John W. Akin, for defendant in error.

LEWIS, J. Goodwin sued the railroad company for damages, and obtained a verdict for \$150. He alleged in his petition substantially as follows: On January 1, 1897, about 4 o'clock in the morning, he boarded defendant's train at Dalton, with a view of going to his home at Kingston. The conductor told him what the fare was, and said the train did not usually stop there, but agreed to put him off at Kingston, and he accordingly paid his fare to that point. There was some discussion about the fare. Plaintiff lacked about 10 cents of having the amount, which was finally furnished him by a passenger on board. During this discussion he alleged that the conductor talked very roughly and insultingly to him, charged him with trying to swindle, and was about to stop the train, and put him off in the woods. As the train was approaching Kingston, and a short distance from the town, the conductor passed plaintiff on the train, and told him that he was nearing the town, and to look out, and get off quick; and the conductor then went forward out of the coach in which plaintiff was riding. The train, instead of stopping at Kingston, passed the town at full speed, and the rate of speed was so great that, if plaintiff had attempted to get off, it would have killed him. He started to hunt the conductor, but before he was able to find him, the train had run beyond Kingston two or

three miles to a place called "Best Sideling," and it there began to slow up, and plaintiff prepared to get off there, as he did not wish to be carried any further away from home. Watching his chance, he stepped off at a time when the train was going at the slowest rate of speed during the slow-up, and the train increased its speed, and went on without stopping. On account of his age and weight and the speed of the train when he got off, and on account of the unevenness of the ground, he was hurled to the ground, and received bodily injuries, described, which impaired his capacity to labor, and caused him pecuniary damages to an extent stated. Negligence was charged against the defendant in not complying with the special contract to land plaintiff safely in the town of Kingston, and to furnish him a safe place and ample time to alight from its car; in leading him to believe that he must prepare to get off quickly, and that the train would stop at the proper place for him to alight; in carrying him by the place contracted, and in slowing up and inducing him to get off at a place that was dangerous, and in not having a light to show the dangerous condition of the place; in not slowing up sufficiently for him to alight in safety, and in allowing and inducing him to alight in ignorance of the rate of speed at which the car was moving in the dark; in roughly and insultingly talking to him, through its agent, the conductor, and in thus publicly humiliating him by insinuating and making false charges against him and his honesty. Compensatory and punitive damages were claimed in the sum of \$1,000. The defendant demurred to the declaration, which was overruled, and after the rendition of the verdict defendant's motion for a new trial was likewise overruled, and it excepted.

1, 2. The defendant's demurrer was based upon the idea that plaintiff predicated his action upon the breach of an alleged contract, and it therefore demurred to that portion of the petition which was founded on an alleged tort upon the part of the conductor. We think the petition sufficient as an action of tort, and that there was no error in overruling the demurrer. Several grounds were taken in the motion for a new trial, but, under the view we take of this case, we deem it necessary only to consider the general ground that the verdict was contrary to the evidence. There appears in the record absolutely no testimony whatever to sustain any action *ex delicto* against the company. There was no proof of any rough treatment or insulting language used by the conductor to the plaintiff at any time during his trip. The plaintiff testified to the special contract as set out in his declaration. He testified to nothing in the demeanor of the conductor towards him to which he could take any rational exception. He did not see the conductor after the train left Kingston. There was no proof that the conductor knew, after

leaving Kingston, that the purpose of plaintiff was to get off at the "sideling" some three miles beyond his destination, or that the train was slowing up with the view of allowing him to depart therefrom. As they were approaching the "sideling," plaintiff stated that the porter on the train said, "they are going to stop now." Plaintiff thought this meant that arrangements were being made for him to get off; but he said that when he went out of the door and got upon the steps with the view of getting off, the porter told him not to jump. He further said, when on the stand the second time, that as he was starting to the door the porter told him he could not get off. The conduct of plaintiff in leaving the train while it was in motion was not induced by any act of the defendant, was entirely voluntary on his part, and was unnecessary. The only damage he sustained resulted from injuries received by jumping from the car while in motion, and when he was told not to undertake the risk. Under the repeated rulings of this court there can be no recovery in such a case. *Dixon v. Railroad Co.*, 80 Ga. 212, 5 S. E. 496; *Watson v. Railroad Co.*, 81 Ga. 476, 7 S. E. 854; *Railway Co. v. Watts*, 82 Ga. 229, 9 S. E. 129; *Jarrett v. Railroad Co.*, 83 Ga. 347, 9 S. E. 681; *Whelan v. Railroad Co.*, 84 Ga. 506, 10 S. E. 1091; *Railroad Co. v. Dickerson*, 89 Ga. 455, 15 S. E. 534. Judgment reversed. All the justices concurring.

(105 Ga. 229)

ARMSTRONG v. PENN.

(Supreme Court of Georgia. July 25, 1898.)

CANCELLATION OF INSTRUMENTS—FRAUD—FORGERY
—PLEADING—EVIDENCE—BURDEN OF
PROOF—INSTRUCTIONS.

1. The petition, as amended, when fairly construed, contains two counts as grounds for the cancellation of the note held by the defendant against the plaintiff; one upon the ground of fraud in its procurement, and the other upon the ground of forgery, or a fraudulent alteration of the note. The amendment set forth with sufficient certainty and definiteness the allegations of fraud and forgery relied on by the plaintiff, and there was no error in overruling the special demurrer filed by the defendant.

2. In an equitable petition brought against a defendant to cancel a note held by him against the plaintiff upon the ground of fraud in its procurement, and the further ground of a material and fraudulent alteration of it by the defendant, the burden of proof is upon the plaintiff to establish the allegations in the petition; but where the defendant assumes the burden of proof, and claims, and is allowed, the privilege of opening and concluding the argument, he cannot complain of error in the charge of the court to the effect that the burden was on him of establishing by a preponderance of the evidence his answer denying the allegations of plaintiff's petition.

3. There was no evidence to sustain the allegation of fraud in the procurement of the note by any representation or device on the part of the defendant which led the plaintiff to believe that the note was for a smaller amount than the sum actually stated therein. It was, therefore, error for the court, in its charge to the jury, to submit this issue to them.

4. The pleadings presenting the issue as to whether or not the note in question had been altered by the defendant in the particular of changing its date, and the date of a credit entered thereon, so as to avoid the bar by the statute of limitations, and there being no pretense, either from the pleadings or testimony, that such alteration, if made, was with the consent of the maker of the note, it was not error in the court to refuse to charge the jury either on the subject of the maker's consent or on the materiality of the alteration.

5. Where one party relies mainly, if not entirely, upon circumstantial evidence to establish a fact, and his adversary upon positive testimony to show the contrary, it is error for the court, especially in a close case on the facts, to charge the jury as follows: "I charge you that circumstantial evidence is just as reliable, just as much to be depended upon, and just as good, as positive and direct evidence, when properly linked and connected together." The weight to be given circumstantial evidence on the one side and positive testimony on the other is a question entirely for the jury.

6. As the record fails to show that the answer of the defendant to the amended petition was made under oath, it does not appear there was error in the court charging the jury that they could not consider such answer as evidence, although the original petition did not waive discovery.

(Syllabus by the Court.)

Error from superior court, Gordon county; A. W. Fite, Judge.

Action by Ann Armstrong against L. D. Armstrong. On plaintiff's death, W. H. Penn, administrator, was substituted. There was a judgment for plaintiff, and defendant brings error. Reversed.

W. H. Dabney and J. M. Neil, for plaintiff in error. W. R. Rankin and R. J. & J. McCamy, for defendant in error.

LEWIS, J. Mrs. Ann Armstrong brought her petition against L. D. Armstrong, alleging, in brief, that she was informed and believed that he held a note for \$1,000, dated 1877, and due one day after date, purporting to have been made to him by her, and that, if he held such a note, it was not made by her, nor by any one authorized by her to make it, and was fraudulent, and a forgery; that the defendant had used for his own benefit certain money arising from the sale of cotton belonging to her, and which she regarded as an advancement to him from her estate; that in her will she had directed that her daughters be each paid from her estate a stated sum, as the equivalent of this advancement, before the defendant should receive anything further from the estate; and that she believed he intended to use the note in question for the purpose of getting an unfair advantage in the final distribution of the estate; and she prayed that he be enjoined from negotiating it, or attempting to collect it, and that it be delivered up and canceled. The defendant answered under oath that he had a note for the amount stated, which had been executed to him by the plaintiff in settlement of indebtedness due him by her. He denied that the money arising from the sale of the cotton was an advancement, and aver-

red that the plaintiff let him have it as a gift, and he so received it, and did not become a debtor for it. Attached to the answer was a copy of the note, dated November 16, 1877, and due one day after date, and upon which appeared a credit of \$20, dated May 25, 1878. Subsequently the defendant filed an amendment, under oath, denying the charges of fraud, and setting out an itemized statement of the indebtedness alleged to have been the consideration of the note. By this amendment he struck out the averment in the original answer that the money arising from the sale of the cotton was a gift, and averred that the cotton was turned over to him by the plaintiff in payment of his share of his deceased brother's estate; and that his counsel, in drafting the answer, misunderstood him, and stated it was a gift, and he (defendant) overlooked this statement at the time he swore to the answer. The plaintiff died, and W. H. Penn, administrator with the will annexed, having been substituted as plaintiff, filed an amendment to the petition, in which amendment he alleged the note now in issue was obtained by defendant from his testatrix, if ever executed by her at all, fraudulently, in that the defendant, at the time the paper was executed, if executed at all, had some small claim against her, and drew up the note now in controversy, filling the same fraudulently with the amount therein named, when the same should have been for some small amount, if any was due by her. The testatrix, having full confidence in her son, the defendant, and relying upon his integrity and honesty, "to which she wrongly thought he was entitled," acting on the representation of defendant that it was for the amount she owed him, signed the note, if she signed it at all, in ignorance of the fact that it was for \$1,000, and thinking it was for the small amount she owed him. The note, if given at all, and under the circumstances above detailed, was made in the year 1873, and not in the year 1877; and petitioner states his belief, and charges it as a fact, that his testatrix, having repaid the small amount she owed the defendant, had entirely forgotten the execution of any paper, if she had in fact executed it. The alteration by defendant, both as to the date of the note and the credit indorsed thereon, was fraudulently made, and by the holder of the note, the defendant, and was done for the purpose of relieving said paper from the bar of the statute of limitations, the paper having been executed by plaintiff's testatrix, if made at all, in the year 1873, and the payment being made in 1875. The fraudulent alteration rendered the note void, and no recovery could be had thereon, even if the same was originally bona fide paper, for the reason that all action thereon was barred by the statute of limitations, and, in addition thereto, that the paper was rendered void by said alteration. Petitioner's testatrix had no knowledge of the fact above set out, nor had petitioner him-

self till the case was tried at the last term, when he discovered by inspection the alteration aforesaid. Discovery on oath as to this amendment is waived. To the petition as amended the defendant demurred on several grounds, which demurrer was overruled, and he excepted. A verdict was rendered for the plaintiff, and error is assigned by the defendant upon the judgment of the court overruling his motion for a new trial.

1. The special grounds of the defendant's demurrer insisted on before this court related to inconsistent and contradictory allegations in plaintiff's petition, and want of sufficient certainty in its allegations of fraud and forgery. For the reasons set out in the first headnote, we do not think there was any error in overruling the demurrer. The declaration with sufficient clearness seeks a cancellation of the note—First, on the ground of fraud in its procurement; and, second, on the ground of forgery, and a fraudulent alteration of the note. Parties are, under the statute, allowed to file conflicting pleas, and we know of no rule which would exclude the plaintiff from having different counts in his declaration as the basis of his cause of action, not entirely consistent one with the other.

2. The court, in his charge, stated that the burden of proof was upon the defendant to show, first, that the note was signed, was not obtained from his mother by fraud, and that she signed with knowledge of its contents, and that the note has not since been altered in a material point. The defendant assumed the burden of proof, and upon this assumption claimed, and was allowed, the privilege of opening and concluding. This assumption meant that he would undertake to overcome by a preponderance of the testimony the material allegations in plaintiff's petition. We do not see upon what idea he was allowed this privilege, or burden, whichever it may be called, unless it was granted by consent of the parties. The law imposes upon the plaintiff the onus of making good the material allegations in an equitable petition based upon alleged fraudulent conduct of the defendant; but where the defendant claims, and is allowed, the right to open and conclude a case, he cannot exercise such a privilege without also bearing the burdens which it legally imposes.

3. 4. Error is assigned on the following charge of the court: "If you find that the note was given, as insisted on here by the plaintiff, if given at all, upon misrepresentations by Armstrong, thinking that she was giving it for a less amount than that which was actually due, and that her signature was thus obtained by fraud, then the defendant, Armstrong, could not recover anything in the case. Fraud would vitiate the whole contract, and he could not recover whatever amount might have been due at the time." As an abstract proposition of law, we think this charge free from error.

But we fail to find in the record any testimony whatever which authorizes a submission of this issue in the pleadings to the jury. The defendant introduced the attesting witness to the note, who swore to its execution by the plaintiff's intestate. An effort was made to impeach this witness by proof of bad character, and also an effort to sustain her by proof of good character. The defendant was a witness in his own behalf, and his testimony tended to sustain his answer. There was no testimony, direct or indirect, tending to show that when the note was given the defendant's mother was due him but a small amount, or that there was any sort of artifice or device used by him to induce her to sign the note for one amount, when she thought that it was for a smaller sum. Slight circumstances may be sufficient to carry conviction of the existence of fraud, but there should be at least some circumstance which tends to show that the particular fraudulent act charged has been perpetrated.

Complaint was further made that the court erred in refusing to charge the jury, in substance, that, in order for the alteration of the note to authorize a finding against its validity, it should appear that the same was altered in a material part after it was given by the maker, and without her consent. There was no pretense, either in the pleadings or the evidence, that the maker of the note ever consented to any alteration. The alteration claimed by the plaintiff was a change in the date of the note so as to prevent a bar of it by the statute of limitations. The naked issue presented to the jury was whether or not this change had been made. The defendant insisted that the note was exactly as when given; the plaintiff insisting that there had been an erasure by changing the figure "3" in the face of the note to a "7," so as to make it appear that the note was given in 1877, when in point of fact it was given in 1873. It was further insisted that the credit on the note was made in 1875, and that the figure "5" had been changed to "8." If such a change had been made, it was certainly a material alteration, the purpose of it being to bring into life a paper that had become defunct under the statute. To submit to the jury, then, the question as to whether or not the maker consented to the alteration, or whether such alteration was material, would have been presenting a question which was really not at issue.

5. The identical proposition embodied in the fifth headnote was decided by this court in the case of *Hudson v. Best* (Ga.) 30 S. E. 688.

6. In the original petition filed by the plaintiff she failed to waive discovery. She did waive discovery in an amendment to the petition. The court charged the jury that, while the answer to the original petition was evidence for the defendant, the answer

to the amendment was not. In the light of the record before us, no error appears in this ruling, as the record does not show that the answer to the amendment was made on oath.

The above covers every material ground taken in the motion for a new trial, and as to those grounds which are not covered by this decision we should be understood as ruling that they are insufficient to authorize a new trial. This being a very close case on the facts, we have concluded that a new trial should be granted on account of the errors set forth in the third and fifth headnotes. As the case goes back for another trial, we refrain from expressing any opinion on the sufficiency of the testimony to sustain the finding in favor of the plaintiff. Judgment reversed. All the justices concurring.

(105 Ga. 340)

NATIONAL FURNITURE CO. v. EDWARDS.

SOUTHERN FURNITURE CO. v. SAME.

(Supreme Court of Georgia. July 25, 1898.)

APPEAL FROM JUSTICE — DISMISSAL — REINSTATEMENT.

Where a claim case was tried before a justice of the peace, and from the judgment rendered by him in favor of the plaintiff in *fa. fa.* the claimant appealed to the superior court, it was error for the court, upon the call of the case for trial on the appeal, to dismiss the appeal upon the ground of appellant's absence, and a failure of the magistrate to approve the appeal bond. The court should, therefore, have sustained the motion to reinstate the case made by claimant during the term of the court at which the appeal was dismissed, it appearing that the appeal bond was filed with the magistrate in time, and by him transmitted with the papers to the superior court.

(Syllabus by the Court.)

Error from superior court, Bartow county; John S. Candler, Judge.

The National Furniture Company and the Southern Furniture Company, on levy of execution by M. A. Edwards, filed a claim. From orders dismissing their bills, claimants bring error. Reversed.

Dean & Dean and A. M. Foute, for plaintiffs in error. J. B. Conyers, for defendant in error.

LEWIS, J. We know of no law that requires the approval of an appeal bond by the magistrate. If the security given by the appellant is insufficient, the appellee has his remedy under section 5123 of the Civil Code; and that remedy is not the dismissal of the appeal without allowing the appellant an opportunity to offer an amendment and give new security. Even if it were the duty of the magistrate to make upon the appeal bond a formal entry of approval, we do not think the failure to perform such a ministerial act should work any injury to the appellant if he has complied with all the law required of him in paying costs and filing his bond

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within the time provided by the statute. Section 5125 of the Civil Code declares: "The mistake or misprision of a clerk or other ministerial officer shall in no case work to the injury of a party, where by amendment justice may be promoted." In the case of *Pearce v. Renfore*, 68 Ga. 194, it was held to be no cause for the dismissal of an appeal that the magistrate did not file the papers in the office of the clerk of the superior court within the time required by law; nor that he did not send up the judgment rendered by him; nor that he made no proper certificate that the appellant had, within the proper time, paid the costs and given bond. "When an appellant has done his duty," says the court, "the mistake of the magistrate may be corrected." See, also, *Nisbet v. Lawson*; 1 Kelly, 275; *Thomas v. Railroad Co.*, 38 Ga. 222. An appeal is a *de novo* investigation. After the case has been properly appealed to the superior court from an inferior judicatory, procedure on the trial of the appeal should be just as if the case had been originally brought in the superior court, and was being heard for the first time. The proper practice in a claim case, where the claimant fails to put in an appearance, would be either to dismiss the claim, or for the plaintiff to make out his case before he would be entitled to a verdict or judgment subjecting the property. He certainly could not, on account of the failure of the claimant to appear, take judgment by default. The effect of dismissing an appeal is to affirm the judgment of the court below. Plaintiff might in this case have moved a dismissal of the claim, but he could not, in this *de novo* investigation, obtain such a judgment upon mere motion as would have the effect of finally subjecting the property in dispute to his execution. The principle ruled in *Manufacturing Co. v. Walker*, 77 Ga. 649, we think, controls this case. There it was decided that, where an appeal has been entered by a defendant, it is a *de novo* investigation, and should not be dismissed because of the absence of the defendant. See, also, *Marble Works v. Padgett*, 77 Ga. 497. Judgment reversed. All the justices concurring.

(105 Ga. 204)

CEMENT GRAVEL CO. v. WYLLY et al.

(Supreme Court of Georgia. July 25, 1898.)

ABATEMENT—ANOTHER ACTION PENDING—INJUNCTION AGAINST LEGAL PROCEEDINGS.

Under the facts appearing in the present record, there was no error in granting the injunction.

(Syllabus by the Court.)

Error from superior court, Richmond county; E. H. Callaway, Judge.

Petition by Wyllly, Wilson & Black against the Cement Gravel Company for injunction. There was a judgment for plaintiffs, and defendant brings error. Affirmed.

Henry C. Hammond, for plaintiff in error.
Frank H. Miller and W. K. Miller, for defendants in error.

COBB, J. The present controversy involves the right to take gravel and sand from a lot of land situated in the state of South Carolina. One party claimed to be the owner of a lease under which that right was acquired; the other party claimed to be the owner of the lot, and that the lease under which the first party claimed had expired. The persons claiming to be the owners of the lease applied to the court of common pleas in South Carolina for an injunction to restrain the parties claiming to be the owners of the land from mining and removing sand and gravel therefrom during the continuance of the lease under which the applicants claimed. Upon the hearing of this application for injunction, the court ordered that the persons claiming to be the owners of the property should give bond in a sum stated, conditioned to pay to the persons applying for the injunction such damages as might be sustained by them by reason of the removal by the obligors of the sand and gravel, should the persons who claimed to be the owners of the lease finally prevail in the suit; and that, upon the execution of such a bond, the injunction would be denied. A bond of the character required in the order was promptly executed and filed, and the persons claiming to be the owners of the lot, as they had a right to do under the order, continued to remove the sand and gravel. Portions of such sand and gravel were brought into this state for sale, and upon arrival here the parties claiming to be owners of the lease caused the same to be seized under sundry attachment and bail trover proceedings instituted in the different counties where the property was found. The parties claiming to be the owners of the land brought their petition to the superior court of the county in which the persons claiming to be the owners of the lease resided, praying that the proceedings instituted by attachment and bail trover in this state be enjoined, and that further proceedings of a similar nature which were threatened be also enjoined, until the question at issue (title to the land) could be settled by the court of common pleas of South Carolina, to which court the persons claiming to be the owners of the lease had voluntarily submitted their rights for adjudication. Upon this application an injunction was granted as prayed for.

We see no error in this ruling. The persons claiming to have acquired an interest in the land in South Carolina by the lease, although residents of this state, having voluntarily submitted this question for adjudication to a court of that state, must abide by the judgment of that court as long as the proceeding is pending there, and they cannot, while having their adversaries under bond to respond in damages in a suit instituted in that state,

institute in the courts of this state proceedings of a character which, if they had been begun in the state of South Carolina, would have amounted to a contempt of the order which they had obtained in their behalf there. The question at issue between the parties involving the title to the land in controversy can only be settled properly by the courts of the state in which the land is situated; and that the parties will be remitted to the remedies given them by the courts of that state is certainly true, where there have been, before the beginning of any suits in this state, appropriate proceedings begun there by the parties who are undertaking to use the processes of the courts of this state to accomplish that which they have failed to accomplish when they called into exercise the processes of the court of the other state. As long as the proceedings in South Carolina begun by the defendants in the present case are pending, and they are secure from loss by the bond required to be given in that state, it is inequitable for them to attempt, by proceedings instituted in this state, to acquire an advantage over their adversaries which could not be acquired in any way whatever in the courts of the state where they have voluntarily gone to have their rights adjudicated. If they had not applied to the courts of South Carolina in the first instance, their right to claim by appropriate proceedings the property as it came into this state, might have existed; but they cannot appeal to the courts of South Carolina, and, being disappointed there, because a satisfactory order is not secured, make another appeal to the courts of this state, without abandoning entirely the application to the South Carolina court. As stated above, they have secured a bond in South Carolina to indemnify them against loss on account of the conduct of their adversaries. If this bond is inadequate, it is only one of the many unfortunate consequences which sometimes result in litigation. If the right to appeal to the courts of this state by attachment, bail trover, or other appropriate proceedings, is more advantageous than the remedy which they have acquired under the order of the South Carolina court, a dismissal of the South Carolina action is necessary as a condition precedent to removing the controversy to the courts of this state. Judgment affirmed. All the justices concurring.

(105 Ga. 188)

WIMBERLY v. STATE.

(Supreme Court of Georgia. July 25, 1898.)

CRIMINAL LAW — CONFESSION — SUFFICIENCY OF EVIDENCE — INSTRUCTIONS.

1. A conviction may be lawfully had upon a free and voluntary confession, though the same be not otherwise corroborated than by proof of the corpus delicti.

2. In charging the jury that such is the law, the judge should not use language from which they may infer that such a confession, thus cor-

roborated, will require a conviction, but he should leave them free to pass upon the question whether or not the corroborative evidence, together with that relating to the confession, is sufficient to satisfy them beyond a reasonable doubt of the guilt of the accused.

3. The charge complained of in the present case, taken in connection with the other instructions given upon this subject, does not afford cause for a new trial.

(Syllabus by the Court.)

Error from superior court, Twiggs county; C. C. Smith, Judge.

Owen Wimberly was convicted of arson, and he brings error. Affirmed.

Joha R. Cooper, for plaintiff in error. Tom Eason, Sol. Gen., for the State.

LITTLE, J. Owen Wimberly, with others, was jointly indicted for the offense of arson, and, upon a separate trial, he was found guilty. His motion for a new trial was overruled, and he excepted. The charge was that he maliciously burned a gin house.

The only ground of the motion which requires discussion at our hands is one alleging that the court erred in charging the jury as follows: "If you believe from the evidence in this case that the house charged in the indictment was a gin house; if you should find that the house was burned maliciously, burned in the manner as charged in the indictment, and defendant has confessed that he did it that way,—then that is sufficient corroboration." In connection with this charge the jury were also instructed in the following language: "I charge you, if you find there is any confession, and that it has been corroborated by other facts and circumstances satisfactory to your mind beyond a reasonable doubt, it is your duty to convict the defendant." It is not now an open question in this state that a conviction may be sustained upon a free and voluntary confession of guilt which has been corroborated by clear and positive proof of the corpus delicti, though there be no other corroboration. It has been too often ruled to be now gainsaid that such proof of the corpus delicti may be considered as a circumstance sufficiently corroborating a confession. This principle has been ruled in *Holsenbake v. State*, 45 Ga. 43; *Daniel v. State*, 63 Ga. 339; *Paul v. State*, 65 Ga. 152; *Williams v. State*, 69 Ga. 14; *Schaefer v. State*, 93 Ga. 177, 18 S. E. 552. The charge complained of therefore stated a proposition of law which this court has many times sustained as correct. Following the decisions rendered in the cases above cited, and others to the same effect, the doctrine that proof of the corpus delicti may, in a legal sense, be sufficient corroboration of a confession to authorize a conviction is established. Properly understood, the charge first referred to amounts to no more than an abstract statement of this doctrine. But it was urgently insisted in the argument here that it, in effect, instructed the jury that proof of the corpus delicti was sufficient

corroboration of the confession to require a conviction. Even if this charge, taken alone, and without explanation, was susceptible of this construction, the same, when considered in connection with the other portions of the charge above quoted, could not, we think, have been so understood by the jury. They must have apprehended the real meaning of the judge, which evidently was, not that a conviction was demanded by proof of a confession and the corpus delicti, but that, in order to warrant a conviction, the confession must be corroborated in such manner as to satisfy the jury beyond a reasonable doubt of the guilt of the accused. This is the true rule on this subject. It was plainly recognized in the *Holsenbake Case*, supra, for Judge McCay said: "Each case must stand upon its own footing, the jury being the judges. And, if they convict on a confession which is corroborated by only one circumstance, the rule is complied with. The strength of that circumstance is to be judged of by the jury, according to the case." This clearly means that the jury must pass upon the nature, strength, and sufficiency of the evidence offered to corroborate the confession, and determine for themselves whether or not it will warrant a conviction. The judge cannot do so for them, and ought not to attempt it. All the later cases, as we understand them, are in accord with what we have just said. Judges charging on this subject should make it clear and distinct that the juries are in every instance to judge of the sufficiency of the corroborating evidence. This should be so carefully and accurately done as to leave in their minds no room for doubt as to this important matter. While we think that the charge complained of in this case, when considered in connection with the other instruction, does not afford cause for a new trial, we take this occasion to urge upon our brethren of the trial courts the necessity of charging on this subject in such clear and explicit language that juries cannot fail to understand that a conviction upon a confession will not be warranted unless the corroboration, whatever it may be, is, in their judgment, sufficient to convince them beyond a reasonable doubt of the guilt of the accused. Judgment affirmed. All the justices concurring.

(106 Ga. 228)

BOAZ v. JACKSON.

(Supreme Court of Georgia. July 25, 1898.)
EJECTMENT—DEFAULT OF DEFENDANT—DIRECTING VERDICT.

When an action brought under the pleading act of 1893 for the recovery of land in the possession of the defendant was at the trial term in default, and the allegations of the plaintiff's petition, taken as true, showed that the plaintiff was, as against the defendant, entitled to possession, there was no error in directing a verdict in the plaintiff's favor for the premises in dispute.

(Syllabus by the Court.)

Error from superior court, Gordon county; John S. Candler, Judge.

Action by Rebecca Jackson against James Boaz. Judgment for plaintiff. Defendant brings error. Affirmed.

Thos. W. S. Kelley, Starr & Erwin, and W. H. Dabney, for plaintiff in error. J. O. Harkins and R. J. McCamy, for defendant in error.

LUMPKIN, P. J. The assignment of error in the present bill of exceptions is not clear and distinct. It appears, however, from the record, that Mrs. Jackson brought an action against Boaz for the recovery of certain land of which he was in possession. The petition was framed under the pleading act of 1893, and set forth in orderly paragraphs all the facts relied upon for a recovery. Without going into a statement of its contents, it is sufficient to say that it made a case showing that, as against the defendant, the plaintiff was entitled to the possession of the land. At the trial term the case was apparently in default, and the question arose as to whether or not the defendant had filed an answer at the appearance term. Upon the facts presented, the judge held that no answer had been filed at that term, and struck an answer which had subsequently, without leave of the court, been filed by the defendant. After striking this answer, the court directed a verdict for the plaintiff for the premises in dispute. The bill of exceptions recites that the court sustained the plaintiff's motion to strike the defendant's answer, "and, there being no claim for mesne profits, directed a verdict for the plaintiff for the premises in dispute, to which ruling of the court the [defendant] then and there excepted, and now assigns the same as error." Treating the language just quoted as assigning error upon both the striking of the answer and the directing of the verdict, will surely be giving to the plaintiff in error the full benefit of all he can claim under this bill of exceptions. It will be observed that no exception is taken to the ruling whereby the court held that no answer was filed at the appearance term. This being so, it is certainly proper to regard the case as having been in default at the close of that term, and, in legal contemplation, it was still in default at the trial term, for the filing of the answer after the appearance term was totally unauthorized, and counted for nothing. Under these circumstances, we think the trial court was right in directing a verdict for the plaintiff for the premises in dispute. The allegations of her petition stood admitted as the truth of the case, and, as above remarked, entitled her to a recovery of the possession of the property. It is true that this court, in the case of *Brewster v. Wooldridge*, 100 Ga. 305, 28 S. E. 43, decided that the common-law action of ejectment, as a remedy for the recovery of the

possession of land and for trying questions of title, was not abolished by the pleading act of 1893. In other words, we held that, notwithstanding the passage of the act, any party might bring an action of ejectment in the fictitious form; but it was by no means ruled in that case that this was the exclusive method of suing for the recovery of realty, or that a person was not at liberty to bring a statutory action to recover the possession of land, and, in so doing, frame his petition in accord with the requirements of the act just mentioned. The plaintiff in the present case chose to bring her action under this act, and we are of the opinion that its provisions are applicable to the case. Judgment affirmed. All the justices concurring.

(105 Ga. 252)

LOVEJOY v. WOOLFOLK.

(Supreme Court of Georgia. July 26, 1898.)

JUSTICE OF THE PEACE—JURISDICTION.

An action for the breach of a bond given under section 4708 of the Civil Code, for the purpose of obtaining a garnishment, is an action arising ex contractu, and consequently within the jurisdiction of a justice's court, when the amount of the damages claimed does not exceed \$100.

(Syllabus by the Court.)

Error from superior court, Fulton county; J. H. Lumpkin, Judge.

Action by Eleanor Lovejoy against Hillard Woolfolk. Judgment for defendant. Plaintiff brings error. Reversed.

Kontz & Conyers, for plaintiff in error. John Clay Smith, for defendant in error.

LUMPKIN, P. J. The only question presented in this case is whether or not an action for the breach of a bond given under section 4708 of the Civil Code, for the purpose of obtaining a garnishment, is an action arising ex contractu or ex delicto. Manifestly, it is of the former class. The plaintiff in a garnishment case, in giving such a bond, contracts with the defendant in the suit or judgment upon which the garnishment proceeding is based "to pay said defendant all costs and damages that he may sustain in consequence of suing out said garnishment, in the event that the plaintiff fails to recover in the suit, or it should appear that the amount sworn to be due on such judgment was not due, or that the property or money sought to be garnished was not subject to process of garnishment." When, therefore, it has been judicially determined that the property or money sought to be reached by the garnishment was not subject thereto, and it appears that the defendant to whom the bond was payable has suffered actual damages by reason of the suing out of the garnishment, it becomes the duty of the principal and surety in the garnishment bond to pay over to the obligee therein the amount of such damages. A failure or refusal so to do on demand is a breach of the contract expressed in the bond, and

such breach clearly gives rise to an action ex contractu. It follows that, if the damages claimed in a case of this kind do not exceed \$100, the action may be brought in a justice's court. Judgment reversed. All the justices concurring.

(105 Ga. 253)

WALKER v. MADDOX et al.

(Supreme Court of Georgia. July 26, 1898.)

OBJECTIONS TO EVIDENCE—BOND FOR TITLE—ASSIGNMENT—INJUNCTION.

1. The judgment of a trial court will not be reversed because of alleged error in admitting in evidence an affidavit objected to as a whole, and containing some matter which was undoubtedly admissible, although a portion of its contents, on specific objection thereto, should have been excluded.

2. The assignee of a bond for title acquires all the rights and equities to which the assignor was entitled thereunder.

3. When the evidence submitted at an interlocutory hearing upon an equitable petition warranted the granting of an injunction restraining the defendant from assigning to any person other than the plaintiff a bond for title held by the former, and which she had contracted to assign to the latter, there was no error in also enjoining the defendant from the further prosecution of an application for a homestead in the land described in such bond until the respective rights of the parties with reference thereto could be ascertained and fixed by a final judgment in the equitable proceeding.

(Syllabus by the Court.)

Error from superior court, Fulton county; J. H. Lumpkin, Judge.

Action by J. J. & J. E. Maddox against Nettie Walker. Judgment for plaintiffs. Defendant brings error. Affirmed.

R. O. Lovett, for plaintiff in error. Maddox & Terrell, for defendants in error.

LUMPKIN, P. J. An action was brought in the superior court of Fulton county by J. J. & J. E. Maddox against Mrs. Walker, in which they claimed the right to recover \$1,073.90. On January 5, 1898, while the trial of the case was in progress, a compromise was reached, and under its terms the plaintiffs took a consent verdict for \$700. On the next day the agreement which had resulted in the compromise verdict was reduced to writing, and signed by counsel for the respective parties. By its terms, J. J. & J. E. Maddox not only reduced the amount of their claim, as indicated, but also relinquished certain valuable rights. In this agreement it was stipulated that Mrs. Walker was to transfer to them, as security for the payment of the judgment entered upon the verdict in their favor, a bond for title held by her to certain real estate. Subsequently they demanded from Mrs. Walker an assignment of this bond. She refused to comply with their demand, giving as a reason for so doing that the consent verdict was not binding upon her, and that she had not authorized her counsel to sign the agreement with reference to the same. She also filed with the ordinary

an application for a homestead in the land described in the bond for title. Thereupon J. J. & J. E. Maddox brought an equitable petition, in which, among other things, they prayed that she be enjoined from making any disposition of the bond for title otherwise than by assigning the same to them, and also that she be enjoined from prosecuting her application for a homestead until the respective rights of the parties with reference to this bond could be ascertained and fixed by a final judgment upon their petition. The judge granted the injunction as prayed for, and Mrs. Walker excepted.

1. At the interlocutory hearing the plaintiffs tendered in evidence an affidavit made by James A. Anderson and A. H. Davis, who had been the attorneys of Mrs. Walker in the original suit. This affidavit was objected to as a whole on the ground that "it was not competent for said attorneys to swear to the facts set out in said affidavit, said statement being as to communications had with their client." Complaint is made that the court erred in overruling this objection. We find, upon an examination of this affidavit, that it contained much matter as to which the attorneys were undoubtedly competent to testify, and the admissibility of which could not be questioned under any rule of evidence. In other particulars the affidavit may have contained matter as to which these attorneys were incompetent to testify; but, be this as it may, the ruling of the trial judge permitting the affidavit to be read will not be disturbed. If the affidavit contained any objectionable matter, it was incumbent upon defendant's counsel to point it out, and object to it specifically, and this they utterly failed to do. See *Harris v. Lumber Co.*, 97 Ga. 465, 25 S. E. 519.

2. The proposition stated in the second headnote is obviously true. If, therefore, Mrs. Walker had actually assigned to the defendants in error the bond for title in controversy, they would have acquired all the rights and equities to which she was entitled thereunder; and, if she really entered into a valid and binding obligation to make to them such an assignment, they are entitled to an enforcement of the contract, in order that they may secure all the rights they would thereby acquire.

3. An examination of the evidence submitted at the hearing fully satisfies us that the judge was right in granting the injunction restraining Mrs. Walker from assigning this bond for title to any person other than the plaintiffs. The effect of granting this injunction was simply to preserve the status until the respective rights of the parties in regard thereto could be ascertained by the finding of a jury at the final hearing. We are also of the opinion that there was no error in enjoining Mrs. Walker from a further prosecution of her application for a homestead in the land described in the bond. It does not appear that she had any legal title to the

land, or, indeed, any interest therein other than was secured to her by this bond; and, if the title to it was equitably in the defendants in error, we are at a loss to perceive upon what theory Mrs. Walker could claim a right to take a homestead in the land, even if, under the law, she is a person entitled to an exemption of her property from levy and sale. Be this as it may, the litigation between herself and the plaintiffs is already sufficiently complicated. It could do no possible harm, and may go very far towards simplifying matters, to allow the homestead application to remain suspended until the present case can be tried and disposed of on its merits. Judgment affirmed. All the justices concurring.

(105 Ga. 289)

HAYES et al. v. HILL.

(Supreme Court of Georgia. July 26, 1898.)

CLAIM CASE—EVIDENCE.

It being a material question, in the trial of a claim case, whether the defendant in *fi. fa.* owed the debt which was the consideration of an alleged deed from him to the claimants, it was error for the court to refuse to admit in evidence a letter written by the defendant in *fi. fa.*, acknowledging the debt, before the pendency of the litigation, or the existence of the claim which the plaintiff was seeking to enforce. (Syllabus by the Court.)

Error from superior court, Murray county; A. W. Flite, Judge.

Action by J. W. Hill against Walter Hayes and others. Judgment for plaintiff. Execution issued, when defendant, as next friend of his minor children, claimed the land. Judgment for plaintiff, and claimant brings error. Reversed.

J. R. & J. McCamy, for plaintiff in error. C. N. King and Shumate & Maddox, for defendant in error.

SIMMONS, C. J. Hill obtained a judgment against Hayes. An execution issued thereon was levied upon a certain tract of land. Hayes, as next friend of his two minor children, claimed the land. The claimants contended that prior to the creation of the debt by Hayes to Hill the former owed his wife a considerable sum of money; that in payment of this he made to her and the claimants, the two children, a deed to the land levied upon. It appears that this deed was attested by but one witness at the time it was executed. The jury found the land subject. A motion for new trial was overruled, and claimants excepted.

The main question at issue on the trial seems to have been whether the deed from Hayes to his wife and children was fraudulent. To establish his good faith in the matter, the claimants tendered in evidence a letter written by Hayes to his wife long prior to the creation of the debt upon which the judgment was founded. This letter acknowledged the writer's indebtedness to his

wife, and spoke of her as having purchased some land, the material portion being as follows: "I am afraid I won't get you up \$400, as you have bought the Jim Wilson place, and I will have to get it up, as I owe you. So you get up all you can, and have the cotton ready for market. So I get you up \$400, that will do you, as I owe others." This letter was excluded by the court, and this ruling constitutes one of the errors complained of as ground for a new trial. We think the court erred in rejecting this evidence. The bona fides of the debt and of its settlement by the conveyance was to be passed upon by the jury. The admissions made in this letter were circumstances from which the jury could easily have inferred that the husband was at that time indebted to the wife, and that in the settlement of this indebtedness he, in good faith, conveyed the land to her and the claimants. It is not probable that he would commence, long prior to the creation of the debt, to concoct schemes to defraud his future creditor, or that he would falsely make such admissions against his interest as were contained in this letter. What weight the jury would have given this letter we are, of course, unable to say. I will say for myself, however, that, had I been a member of the jury, it would have had great weight with me in determining the question of the bona fides of the indebtedness and conveyance. This being the principal question in the case, we think, under the ruling in *Lampkin v. Clary* (Ga.) 30 S. E. 596, the letter was admissible in evidence. We are inclined to think, also, that under the ruling in *Smith v. Cox*, 20 Ga. 240, the letter was admissible as a saying or admission of the defendant in *fi. fa.* against his interest, before the commencement of litigation. For these reasons the judgment of the court below must be reversed.

It appears that the deed from Hayes to his wife and children was attested at the time of its execution by but one witness. As to this question, see *Howard v. Russell* (Ga.) 30 S. E. 802. Judgment reversed. All the justices concurring.

(105 Ga. 510)

KERR v. CROWN COTTON MILLS.

(Supreme Court of Georgia. July 26, 1898.)

INJURY TO EMPLOYE—NEGLIGENCE OF FELLOW SERVANT.

In a suit by an employé against a master, a manufacturing company, for damages resulting from personal injuries, it was not error for the court to grant a nonsuit, where the evidence did not show that the injury was the result of defendant's negligence, but showed that, if it was due to the fault of any one, it was owing to the negligence of a fellow servant of the plaintiff. *McDonald v. Manufacturing Co.*, 67 Ga. 761; *Id.*, 68 Ga. 839; *McGovern v. Manufacturing Co.*, 5 S. E. 492, 80 Ga. 227.

(Syllabus by the Court.)

Error from superior court, Whitfield county; A. W. Flite, Judge.

Action by John Kerr against the Crown Cotton Mills. Judgment of nonsuit, and plaintiff brings error. Affirmed.

Sam P. Maddox, O. N. Starr, and J. M. Neel, for plaintiff in error. I. E. Shumate and R. J. McCamy, for defendant in error.

PER CURIAM. Judgment reversed.

(105 Ga. 511)

DANIEL et al. v. NEW ENGLAND CO.

(Supreme Court of Georgia. July 26, 1898.)

INTERLOCUTORY INJUNCTION—BOND—TRESPASS TO LAND.

This being an application for an injunction to restrain a trespass upon land, and the evidence being conflicting as to the ownership of the land, an order requiring the defendants to give bond for any damages that might be assessed against them at the final hearing, and, upon failure to give such bond, that an interlocutory injunction issue, will not be disturbed by this court.

(Syllabus by the Court.)

Error from superior court, Dade county; A. W. Fite, Judge.

Action by the New England Company against M. C. Daniel and others. Judgment for plaintiff. Defendants bring error. Affirmed.

R. J. McCamy and T. J. Lumpkin, for plaintiffs in error. R. T. Brock and Jacoway & Jacoway, for defendant in error.

PER CURIAM. Judgment affirmed.

(105 Ga. 269)

DALE et al., County Com'rs, v. BARNETT.

(Supreme Court of Georgia. July 26, 1898.)

BRIDGE—REBUILDING—DISCRETION OF COUNTY COMMISSIONERS.

1. The rebuilding of a bridge which was a part of a system of public roads in a county is a matter that is left to the discretion of the county authorities, and this discretion will not be controlled unless it is abused.

2. The record in the present case showing that the two bridges in question were a part of the same public road, and both necessary in order to complete it as such, and that one of them has been destroyed for more than 20 years, and the other for a number of years, and the action of the county commissioners from time to time on the question of rebuilding showing a practical abandonment and abolition of the bridges as a part of the public-road system of the county, the county authorities did not abuse their discretion in refusing to rebuild the same; and it was error in the judgment of the superior court to grant a mandamus absolute, compelling the erection of the bridges.

(Syllabus by the Court.)

Error from superior court, Chatham county; R. Falligant, Judge.

Action by Wolf Barnett against J. J. Dale and others, commissioners of Chatham county. Judgment for plaintiff. Defendants bring error. Reversed.

J. R. Saussy, for plaintiffs in error. Charlton, Mackall & Anderson, for defendant in error.

COBB, J. An application was made for mandamus against the commissioners of Chatham county, to require them to construct and restore a bridge across the Skidaway river, connecting the Isle of Hope with Long Island, and a bridge across Skidaway Narrows, connecting Long Island with Skidaway Island. The acts of the general assembly bearing upon the question involved in this proceeding, and which are hereinafter referred to in the synopsis of the petition and answer, were as follows: By an act approved December 26, 1831, it was declared that "It shall and may be lawful for the planters and inhabitants of the Island of Skidaway, in the county of Chatham, to erect, at their own expense, a bridge for the purpose of connecting the said island with the main land, provided the same is executed with the consent of the commissioners of the roads in said county aforesaid," and that "the said bridge shall be deemed a public way free for all persons travelling over the same." Acts 1831, p. 78. On October 17, 1870, an act was passed which was entitled "An act to make the roads and bridges from the Isle of Hope, across Long Island to the main road on Skidaway Island, in the county of Chatham, a part of the public roads, in conformity with the act assented to December 26, 1831." By this act it was declared that "the bridges having been built, and the right-of-way secured from the Isle of Hope to the main road on the Skidaway Island, from the year 1858 till the present time, the roads and bridges are now declared a part of the public roads of Chatham county." Acts 1870, p. 453. On December 13, 1871, an act was approved, which, in its preamble, recited that it was supposed that the act of 1870, quoted above, deprived the local authorities of Chatham county of the right to abolish, alter, or change the road referred to in such act, and provided that the persons having control of such matters were "authorized and empowered to abolish, alter or change the said roads and bridges from the Isle of Hope, across Long Island, to the main road on Skidaway Island, in the county of Chatham, as if the said act, approved October 17th, 1870, had not been passed." Acts 1871, p. 242. The petition alleged, in substance: Petitioner is a citizen of this state, having his place of residence in Chatham county. The commissioners of Chatham county are charged with such public duties in regard to the county of Chatham as were prior to the year 1873 performed by the ordinary. On October 17, 1870, the legislature passed an act, the substance of which is set forth above. At the time of the passage of the act, the ordinary, being vested with jurisdiction over such matters, took charge of the said roads and bridges, and maintained the same as a

part of the public-road system of the county. Prior to this time the roads and bridges had been maintained at the expense of the citizens of the county, having large interests upon Skidaway Island. In consequence of storm, decay, and neglect, the bridge across the Skidaway river, forming a part of said road, and connecting the Isle of Hope with Long Island, and the bridge across the Skidaway Narrows, connecting Long Island with Skidaway Island, also forming a part of the road referred to in the act of 1870, have become utterly destroyed. The petitioner and a number of other citizens of the county have demanded that the defendants discharge their public duty in this respect, and restore the bridges, but the defendants have declined to do so. The defendants filed an answer, in which they admitted that the bridge across the Skidaway river connecting the Island of Skidaway with the mainland, had been destroyed in consequence of storm, decay, and failure to keep it in repair, and that they had refused to rebuild it; but they alleged, upon information and belief, that it had been destroyed at or before the passage of the act of 1870, and never existed as one of the public bridges of the county. They contended that the act of the legislature passed December 26, 1831, which authorized the building of the bridge connecting Skidaway Island with the mainland, conferred this right specially upon the planters and inhabitants of the island, and required it to be built at their expense, and the bridge was accepted as a part of the public-road system of the county by the board of public-road commissioners with the same proviso, that the county should be under no obligation, even as to annual repairs, or at the expense of rebuilding the bridge at any time; that the act of 1870 does not impose on the county the expense of rebuilding the bridge, but only confirms the action of the public-road commissioners above referred to; that this act was virtually repealed by the act of 1871, and the county authorities having jurisdiction over the public roads and bridges virtually abolished said bridge as a public bridge, if it had ever been a public bridge of the character which imposes on the county the obligation to repair; that the mature and well-considered judgment of the defendants and their predecessors having jurisdiction over the public roads and bridges is that this bridge is not of sufficient public utility to authorize the expenditure of so large an amount of public money for the convenience of a few individuals, composing the planters and residents of the island, there being ample facilities for communicating with the island by water, and the usual and customary mode of communication having been for many years by water, in boats; that the power to establish or abolish the bridge, if a public bridge, being in the exclusive jurisdiction of the defendants, the

court should not interfere with such jurisdiction by mandamus; and that, no bridge connecting the mainland and the island having existed for more than 20 years, its discontinuance for so long a period is conclusive evidence that if it was ever a public bridge, duly established by law, with the obligation on the county authorities to rebuild, it has been abolished by the authorities having jurisdiction. A mandamus nisi was granted, and at the final hearing the case was by consent heard by the judge without a jury, who adjudged that the mandamus be made absolute, and to this the defendants excepted.

1. By an act approved February 21, 1873, a body styled "Commissioners of Chatham County and Ex Officio Judges" was created, and given jurisdiction of sundry matters connected with the affairs of that county. It was in this act provided that "said commissioners and ex officio judges in and for the county of Chatham shall have the same jurisdiction, to the exclusion of the ordinary of said county, as is exercised by said ordinary when sitting for county purposes." Acts 1873, p. 235. Whatever power is conferred by the general law of the state upon the ordinary is thus conferred upon the body created by this act. The Code provides that "the ordinary, when sitting for county purposes, has original and exclusive jurisdiction" over certain subject-matters therein enumerated, among them being the following: "In establishing, altering or abolishing all roads, bridges and ferries, in conformity to law." In the case of *Patterson v. Taylor*, 98 Ga. 646, 25 S. E. 771, it was held that under the section quoted the matter of establishing bridges was one vested in the ordinary, to be exercised in his discretion, and that no recommendation of the grand jury could deprive him of the right to exercise his discretion, and that consequently a mandamus would not be granted to compel him to have a bridge built. That case was dealing with the matter of establishing a new bridge, but the very same sentence of the Code provision which confers upon the ordinary the power to establish new bridges also confers upon him the power to alter or abolish existing bridges. It therefore follows that the same discretion which could be exercised in the one case could also be exercised in the other. Whenever a public officer has vested in him the right to exercise his discretion about a matter within his jurisdiction, the courts will not interfere with him in the exercise of his duties, unless it is manifest that he has abused his discretion in dealing with the matter. The commissioners of Chatham county having vested in them the same discretion in regard to the roads and bridges of the county that the ordinary has, their decision in regard to these matters will not be controlled by mandamus unless, as has been stated, it is plainly

shown that the decision made was an abuse of the discretion which the law vested in them.

2. It is clear, we think, that under the act of 1870 the bridges which had been erected in conformity to the act of 1831 became a part of the public-road system of Chatham county. The right to alter or abolish the same was vested in the officials of that county having control of county matters, fully and completely, and the act of 1871 was simply declaratory of the law as it existed at the time of the passage of the act. The question to be now considered is, does it appear from this record that the county commissioners abused the discretion which the law vested in them, by refusing to rebuild the bridges? It appears from the record that one of these bridges had been destroyed for more than 20 years before the application for mandamus was filed, and that the other had been destroyed for many years,—the exact period not appearing in the record. Applications were made from time to time to the county authorities, through a period of many years, to rebuild the bridges, but they persistently refused to do so. The effect of their action amounts really to an abolition of the bridges as a part of the public-road system of the county, though no resolution in terms abolishing them was ever passed. It further appears that it was the judgment of the county authorities who passed upon the applications to rebuild that the bridges were not of sufficient public utility to authorize the expenditure of the large amount of money which would be required to rebuild them. The facts which appear in the record in regard to the cost of the bridges, the value of property upon the islands, the number of residents, and the business carried on between such islands and the other parts of the county, were all of a character going to sustain the judgment of the commissioners in the decision that they had reached in regard to the advisability of rebuilding the bridges. A careful investigation of this record has failed to disclose to us a state of facts which would authorize a holding that the county commissioners have abused their discretion in regard to this matter. Such being the case, it was error to grant the mandamus. Judgment reversed. All the justices concurring.

(105 Ga. 511)

KEITH v. FORK et al.

(Supreme Court of Georgia. July 26, 1898.)

ACTION ON NOTE—INDORSEE FOR VALUE—FAILURE OF CONSIDERATION.

This being an action by the holder of a negotiable promissory note, who acquired the same for value, and before due, and the record failing to disclose any evidence showing any fact inconsistent with good faith on the part of the holder, or that he had notice, or reasonable grounds to suspect the existence, of any defect in or defense to the note, a verdict in favor of

the maker on a plea of failure of consideration was contrary to law, and should have been set aside. *Bank v. Adams*, 23 S. E. 496, 96 Ga. 529.

(Syllabus by the Court.)

Error from superior court, Murray county; A. W. Flite, Judge.

Action by A. L. Keith against J. W. Fork and others. Judgment for defendants. Plaintiff brings error. Reversed.

R. J. & J. McCamy and Shumate & Maddox, for plaintiff in error. Jones, Martin & Jones, for defendants in error.

PER CURIAM. Judgment reversed.

(106 Ga. 295)

GLAZE v. BOGLE et al., Road and Revenue Com'rs.

(Supreme Court of Georgia. July 26, 1898.)

OBSTRUCTIONS IN HIGHWAY—JUDGMENT—RES JUDICATA—INJUNCTION—PLEADING.

1. The board of commissioners of roads and revenues of the county of Whitfield has jurisdiction to hear and determine a petition by citizens interested in the matter to remove obstructions from an alleged public highway in the county; and where a party files objections to the granting of such petition on the ground that such alleged highway is not a public road, and the issue thus made is decided against her by the board, and the decision is affirmed by the judgment of the superior court upon certiorari proceedings instituted by her, to which no exceptions are filed, such issue, as to her, becomes res adjudicata.

2. Where a petition for injunction is brought against the board of commissioners of a certain county and the road commissioners of a district of that county, such petition cannot be amended by making the county a party defendant, and praying damages against it.

3. Where a plea of res adjudicata sets up a judgment in a former suit between the same parties, and in the same court, and a copy of the former record is annexed, the question cannot be determined upon the pleadings, but there must be proof of the truth of the plea, or an admission of its truth by the plaintiff.

(Syllabus by the Court.)

Error from superior court, Whitfield county; A. W. Flite, Judge.

Suit by Lydia Glaze against the commissioners of roads and revenues of Whitfield county and others. Judgment for defendants, and plaintiff brings error. Reversed.

R. J. & J. McCamy, for plaintiff in error. Jones, Martin & Jones, for defendants in error.

SIMMONS, C. J. In December, 1893, Dyer and others filed an application to the board of commissioners of roads and revenues of Whitfield county, alleging that a certain road in that county was a public road, and had been so for forty-odd years, and asking that an overseer be appointed and assigned to put the same in good order, and to remove obstructions from it. Mrs. Glaze, the present plaintiff in error, appeared before the board, and filed objections to the granting of the petition, on the ground that the road was not a public, but a private, one. A trial was

had before the board, each side introducing its witnesses, who testified pro and con as to whether the road was public or private. The board found that it was a public road, and ordered it opened and put in order. Mrs. Glaze filed her petition for certiorari to the superior court, complaining that the board of commissioners had found contrary to law and the evidence. The certiorari was sanctioned, and, at the hearing thereof by the judge of the superior court it was overruled. No further action was taken by Mrs. Glaze in this proceeding. In 1895 she filed her equitable petition against the board of commissioners of roads and revenues of the county and the three road commissioners of the militia district wherein the road lay, praying that they be enjoined from opening the road, and making, in the petition, the same allegations which she had already filed before the board. While the petition was pending, before the final trial, she offered to amend the petition by making Whitfield county a party defendant, and praying damages against the county. This amendment was disallowed, and she filed exceptions pendente lite which are a part of the record in this case, error being properly assigned thereon in this court. The defendant answered the petition and filed a plea of *res adjudicata*, attaching thereto the petition for certiorari in the former case, the answer of the board, and the judgment of the judge of the superior court overruling the same. When this plea was read, it appears from the record that defendants' counsel moved the court to direct a verdict in defendants' favor. The court granted this motion and Mrs. Glaze excepted. Three questions are raised by the bill of exceptions. The first, and most important, in the case is whether the plea of *res adjudicata* filed by defendants set up such a judgment of such a court as barred plaintiff from taking any further action in the case; second, whether the refusal of the judge to grant the amendment making the county a party defendant was error; and, third, whether, even if the plea set up a judgment which was a bar, the court erred, when the plea was read, in directing a verdict without requiring proof as to the truth of the plea.

1. On the first question it was argued by counsel for plaintiff in error that the judgment pleaded by the defendants was not the judgment of a court that had jurisdiction of the subject-matter, and that the judgment was therefore void, and could not bar plaintiff from obtaining relief in this action. We think that the board did have jurisdiction to determine the matter in dispute. It will be recollected that the sole question before the board was whether the road was a public or a private one. No rights of property, real or personal, were involved. If the road had been properly established as a public road, it was the duty of the board to have it opened and worked. The board, under the

act creating it, had the same powers over roads as had the justices of the inferior courts prior to 1868, when those courts were abolished. The justices of the inferior courts had power and jurisdiction over all public roads which had been established by an act of the general assembly or by an order of the justices of the inferior court. Code 1863, § 574 et seq. The board found, upon sufficient evidence, and upon pleadings so authorizing, that this road had been established by the justices of the inferior court of Murray county before the county of Whitfield had been created by the legislature, and that the road had never been abandoned as a public road. It could not, therefore, have been a private road, as contended for by plaintiff in error. It not being a private road, she was not entitled to any damages from the public, nor was the title of her land involved. It was, therefore, not a proceeding to condemn a right of way as provided in the Code. If the board, in the trial of this question, had found from the evidence that the road had never been established by proper authority, or that it had been abandoned by the action of the county authorities, its judgment would doubtless have been different. We think, therefore, that the board had jurisdiction of the subject-matter, and that the plea filed by defendants, if it had been properly proved, would have barred the plaintiff from any further action in the matter.

2. The cause of action alleged in the original petition was to enjoin the board of commissioners of roads and revenues and the road commissioners from opening the road. By the amendment offered it was sought to make the county a party defendant, and damages were prayed against it. There was no error in disallowing this amendment. It sought to introduce a new and distinct party, and a new and distinct cause of action. See *Arnett v. Board*, 75 Ga. 782; *Hunnicut v. Stone*, 85 Ga. 435, 11 S. E. 663; *Bennett v. Walker*, 64 Ga. 326.

3. The court, when the plea of *res adjudicata* was read, without any evidence having been introduced, directed the jury to sustain the plea by finding a verdict for the defendants. We think this was error. This plea should have been proved just as any other. While it was true that the judgment pleaded was alleged to have been rendered by the same court, upon the same cause of action, and that this judgment was on the records of the court, still we think that the burden was on the defendants to show the truth of the plea, and that the court could not, without proof, take such judicial cognizance of its records as to direct a verdict in this case. When such a plea is filed, the defendant assumes the burden, and must show its truth to the court and jury. There is nothing in the record to show any admission by the plaintiff of the truth of the plea, and the judgment set up, not being rendered in the same case, could not be judicially recognized

by the court without proof. In the case of *People v. De La Guerra*, 24 Cal. 73, Sawyer, J., in discussing this identical question, said: "But, if considered as a part of the answer, still the question cannot be determined upon the pleadings. The pleadings raised an issue. The issue must be tried, and the facts found, before the answer can be assumed to be true. In the trial of one case the court can no more take judicial notice of the record in another case in the same court, without its formal introduction in evidence, then if it were a record in another court. Much less can this court take notice of the existence of a record not introduced in evidence in the court below. There was no trial in this case, but the question was determined upon an inspection of the pleadings." Judgment reversed. All the justices concurring.

(105 Ga. 514)

ROBINSON v. HAAS.

(Supreme Court of Georgia. July 26, 1898.)

APPEAL—REVIEW.

No question of law is presented by the record in this case, the evidence warranted the verdict, and the newly-discovered evidence was not of such a character as would justify this court in ordering a new trial.

(Syllabus by the Court.)

Error from superior court, Carroll county; S. W. Harris, Judge.

Action between H. B. Robinson and David Haas. From the judgment, Robinson brings error. Affirmed.

Felix N. Cobb, for plaintiff in error. S. E. Grow and S. Holderness, for defendant in error.

PER CURIAM. Judgment affirmed.

(105 Ga. 513)

WILSON et al. v. IRON BELT MERCANTILE CO. et al.

(Supreme Court of Georgia. July 26, 1898.)

APPEAL—REVIEW—FINDINGS OF FACT.

The issue being one of fraud or no fraud, and, there being evidence of circumstances from which its existence could be inferred, this court will not interfere with a finding that there was fraud, the verdict of the jury having been approved by the trial judge, and no question of law being presented for determination here.

(Syllabus by the Court.)

Error from superior court, Carroll county; S. W. Harris, Judge.

Action by the Iron Belt Mercantile Company and others against I. T. Wilson and others. Judgment for plaintiffs. Defendants bring error. Affirmed.

W. D. Hamrick and Reese & Gordon, for plaintiffs in error. S. Holderness, for defendants in error.

PER CURIAM. Judgment affirmed.

(105 Ga. 514)

GOODWYNE v. BELLERBY.

(Supreme Court of Georgia. July 26, 1898.)

APPEAL—REVIEW.

This case falls within the rule so repeatedly announced by this court, and now embodied in section 5585 of the Civil Code, relating to the first grant of a new trial.

(Syllabus by the Court.)

Error from superior court, Monroe county; M. W. Beck, Judge.

Action between C. O. Goodwyne and John Bellerby. From a grant of a new trial, Goodwyne brings error. Affirmed.

Robt. L. Berner, for plaintiff in error Steed & Wimberly and Cabaniss & Willingham, for defendant in error.

PER CURIAM. Judgment affirmed.

(105 Ga. 251)

WHITLEY v. BERRY.

(Supreme Court of Georgia. July 26, 1898.)

INJUNCTION—HEARING—EVIDENCE—RECEIVER—RIGHT TO ASSETS.

1. There was no error, at the interlocutory hearing of an equitable petition for an injunction and the appointment of a receiver, in refusing to admit in evidence affidavits not "intituled in the cause," and not shown to have been taken for the purpose of being used as evidence therein.

2. When, at such a hearing, the parties on both sides conceded that it was proper to appoint a receiver to take charge of and sell property belonging to them jointly, and divide its proceeds between them, it was also proper to require one of them to pay over to the receiver money in his hands, arising from a sale by him of other property, which had also belonged to himself and the other person, the title to which they had derived by virtue of the same transaction as that by which they acquired the ownership of the property first above mentioned; it further appearing that there had been no accounting and settlement between them as to the property so sold.

(Syllabus by the Court.)

Error from superior court, Sumter county; Z. A. Littlejohn, Judge.

Action by M. O. Berry against C. R. Whitley. Judgment for plaintiff. Defendant brings error. Affirmed.

J. A. Ansley, Jr., and J. F. Watson, for plaintiff in error. E. C. Speer, R. E. Lee, and Shipp & Sheppard, for defendant in error.

LUMPKIN, P. J. The Ocmulgee Brick Company was indebted to Berry, and also to Whitley. At a sale of its property under an execution, Berry and Whitley became the purchasers, and thus acquired a joint ownership thereof. Whitley, with the consent of Berry, afterwards sold a portion of the property, and collected the proceeds of the same. They were, however, unable to agree upon either a division or sale of the remainder of the property. In this condition of affairs, Berry brought a petition against Whitley for the appointment of a receiver to take charge of and dispose of the unsold property thus

held in common, and make between them a division of its proceeds, of which Berry, in his petition, claimed a specified proportion. In his answer Whitley denied Berry's right to such a proportion, and set forth his version of the manner in which the proceeds of the property owned jointly by them should be divided. In these respects the parties were widely at variance. At the hearing both agreed that the appointment of a receiver was necessary and proper. It was a matter of controversy, however, whether Whitley should be required to turn over to the receiver the cash received for the property which he (Whitley) had sold. It was, under the pleadings, essential to a fair settlement between the parties that this cash be taken into account. Whitley offered to give a bond to account for the same. Nevertheless, in the order appointing a receiver, the judge directed him to pay over to the receiver a portion of the money derived as above stated. To this much of the order he excepted.

1. The question of practice to which the first headnote relates was dealt with in *Warren v. Monnish*, 97 Ga. 390, 23 S. E. 823.

2. We do not think the judge committed any error in passing the order above mentioned. The object of the receivership was an administration of all the assets jointly belonging to the plaintiff and the defendant. The money in Whitley's hands was as much a part of these assets as any other item of the property, and in no view of the matter had Whitley any right to retain in his possession any greater proportion of the money than would inevitably fall to his share upon a proper division of the same. His offer to give a bond was properly regarded by the judge as constituting no reason for allowing him to retain in his possession more of the fund than he was unquestionably entitled to keep. The prime object of the receivership was to make a division of all the joint assets as to which there was a dispute, and certainly the judge was right in declining to frame his order in such manner as to deprive the receiver of the custody and control of a portion of these very assets. In short, the receivership was rightly made broad enough to cover every item of property as to which there was a controversy between the parties. Judgment affirmed. All the justices concurring.

(106 Ga. 276)

WALDEN v. WESTERN UNION TEL. CO.
(Supreme Court of Georgia. July 26, 1898.)

FAILURE TO TRANSMIT TELEGRAM—DAMAGES.

In an action against a telegraph company, claiming damages for failure to transmit a message containing an order for goods, which had, before the delivery of the message to the telegraph company, been sold by the sender, the profits lost by the failure to receive the goods are not too remote to be the subject of recovery.

(Syllabus by the Court.)

Error from superior court, Glascock county;
S. Reese, Judge.

Action by T. A. Walden against the Western Union Telegraph Company. Judgment for defendant. Plaintiff brings error. Reversed.

K. J. Hawkins and T. W. Hardwick, for plaintiff in error.

COBB, J. Walden sued the telegraph company in the justice's court. The cause of action set forth in the summons was one claiming "damages in the sum of \$85, upon breach of contract trust and duty, for that heretofore, to wit, on the 29th day of January, 1897, complainant delivered to defendant's agent at Gibson, Ga., a message to be transmitted to the Patapsco Guano Company, at Augusta, Ga., and the defendant, for the consideration of 35 cents, agreed to do it. The message was written on one of defendant's printed blanks, and was as follows: "35 cents paid. Gibson, Ga., January 29th, 1897. To Patapsco Guano Co., Augusta, Ga.: Ship me five tons Patapsco, four per cent.; three two per cent.; three Sea Gull. [Signed] T. A. Walden." It was averred that the message was not transmitted, and that the failure so to do was due to gross negligence, carelessness, and indifference on the part of the telegraph company, and that by reason of such failure the complainant was damaged in the sum above stated. The case was appealed to the superior court, and, coming on for trial, the defendant demurred to the summons upon the ground that the damages claimed were too remote to be the basis of a recovery. Thereupon the plaintiff offered an amendment as follows: "Complainant was a guano dealer on a small scale; that he had no house in which to store his guano, by reason of which he was forced to contract with his customers for sales before ordering the guano shipped; that complainant had contracted with certain farmers for the sale and delivery to them of 15 tons of guano, the same to be delivered on a certain day; that it was this particular 15 tons of guano that complainant incorporated in said telegram (which is set out in the original summons); and that, by reason of said telegram not being transmitted by the defendant to the Patapsco Guano Co., complainant missed the sale of the said 15 tons of guano to the parties contracted with, thereby losing his commissions on the same, to his damage in the sum of \$45; that by reason of defendant's failure to transmit said message one ton of the said 15 tons of guano, when the same had been shipped to complainant after great delay, got wet, could not be sold at any price, and wasted on complainant's hands, to his damage in the sum of \$16; that by reason of the conduct of defendant in failing to transmit said telegram, complainant's guano business was closed for ten days, to his damage in the sum of \$25; that defendant has acted in bad faith, been stubbornly litigious, and has put the complainant to unnecessary trou-

ble, expense, and delay, necessitating him to employ counsel to bring this suit, to his damage in the sum of \$25." The court refused to allow the amendment, and dismissed the case. This ruling is assigned as error.

It does not distinctly appear from the record whether the amendment was refused by the court on the ground that there was nothing to amend by, or whether the court was of the opinion that the subject-matter of the amendment was such as to make it demurrable. Nothing like the particularity required in a petition to the superior court is necessary in a summons issuing from a justice's court. It is declared by the Civil Code that in the superior court "a petition showing a plaintiff, and a defendant, and setting out sufficient to indicate and specify some particular fact or transaction as a cause of action, is enough to amend by. The jurisdiction of the court may be shown, and the details and circumstances of the particular transaction may be amplified and varied by amendment. If the declaration omit to allege facts, essential to raise the duty or obligation involved in the cause of action which was evidently originally intended to be declared upon, the omitted fact may be supplied by amendment." Civ. Code, § 5008. Applying the rules laid down in the section quoted to the case under consideration, it is apparent at once that there was enough in the summons to amend by.

The next matter to be considered is whether the amendment was demurrable for the reason that it did not set forth sufficient facts, taken in connection with the original summons, to make a cause of action. The nature of the telegram set forth in the original summons was such as to put the telegraph company on notice that the message related to a commercial transaction, and that, therefore, damages might be the result of a failure on their part to comply with their contract to transmit the message properly, and deliver the same within a reasonable time. The amendment set forth that contracts for the sale of the guano ordered in the telegram had already been made with the customers of the plaintiff, and that, on account of the failure on the part of the telegraph company to transmit the message, commissions which would have accrued to the plaintiff on the sales thus made were lost to him. In the case of *Telegraph Co. v. Fatman*, 73 Ga. 286, it was held that: "Where, by reason of the failure on the part of a telegraph company to deliver a message directed to a ship broker, he lost a contract, by which he would have made certain commissions had the message been promptly delivered, a recovery of the amount of such commissions was not too remote or speculative a measure of damages." Following the principle laid down in the case cited, the amendment offered, so far as it claimed damages on account of loss of commissions which would have accrued on contracts already made at

the time the message was delivered to the telegraph company, was proper, and should have been allowed. See, also, Civ. Code, §§ 3798, 3799. That part of the amendment in reference to the claim for counsel fees should also have been allowed, as the same was sufficiently broad to have authorized the proof necessary to establish the claim for damages of this character. The other damages claimed were too remote to be the basis of a recovery. Judgment reversed. All the justices concurring.

(105 Ga. 233)

**BEMIS et al. v. ARMOUR PACKING CO.
et al.**

(Supreme Court of Georgia. July 26, 1898.)

EQUITY—RIGHT TO JURY TRIAL.

There is, in equity cases, no constitutional right of trial by jury in this state; but such right, so far as it exists, is statutory only.

(Syllabus by the Court.)

Error from superior court, Whitfield county; A. W. Fite, Judge.

Action by the Armour Packing Company and others against C. C. Bemis and D. M. Peeples. Judgment for plaintiffs, and defendants bring error. Affirmed.

Jones, Martin & Jones and R. J. & J. McCamy, for plaintiffs in error. J. H. McLean, Francis Marth, Martin & White, and I. B. Shumate, for defendants in error.

LUMPKIN, P. J. The Armour Packing Company and others, creditors of the W. O. Peeples Grocery Company, a Tennessee corporation, brought an equitable petition against it and against C. C. Bemis and D. M. Peeples in the superior court of Whitfield county. The case was referred to an auditor, to whose report numerous exceptions, both of law and of fact, were filed. The court sustained some of the exceptions of law, and overruled the others. It is only necessary in this connection to remark that none of the exceptions sustained by the court were of sufficient importance or materiality to affect the final result; nor do we find that any error was committed in overruling the remaining exceptions of law. The court disapproved all the exceptions of fact, and entered a final judgment in favor of the plaintiffs below. The main and controlling question in the case arises upon the refusal of the judge to submit to a jury the exceptions of fact filed by the plaintiffs in error to the auditor's report. They insisted in the trial court, and earnestly contended here, that it was their constitutional right to have these exceptions of fact passed upon by a jury. It was urged that in so far as the act of December 13, 1894 (Acts 1894, p. 123), providing for the appointment of auditors, prescribing their duties, etc., and the act amendatory thereof, approved December 16, 1895 (Acts 1895, p. 47), denied the right of trial by jury in cases like the present, they were unconstitutional, be-

cause in conflict with paragraph 1, § 18, art. 6, of the constitution (Civ. Code, § 5876), which declares, "The right of trial by jury, except where it is otherwise provided in this constitution, shall remain inviolate," etc. This is no new question. It has, in one way or another, been before this court on several occasions. In *Mahan v. Cavender*, 77 Ga. 118, a majority of this court held that the right to jury trial in equity cases was statutory only. While Chief Justice Jackson did not concur in this view, yet the decision has stood for more than 11 years, and the general assembly has not in the meantime chosen, though it had the power to do so, to give a right of jury trial in such cases. On the contrary, in the two acts above cited it legislated in the other direction. Moreover, the conclusion announced in *Mahan v. Cavender* has several times received the sanction and approval of a full bench. See *Poullain v. Brown*, 80 Ga. 27, 5 S. E. 107; *Mackenzie v. Flannery*, 90 Ga. 590, 16 S. E. 710; *Trust Co. v. Thurman*, 94 Ga. 735, 20 S. E. 141; *Hearn v. Laird* (Ga.) 29 S. E. 973. The case last referred to was decided by the present bench, consisting of six justices, and all concurred. It is true that some of the above-mentioned cases may not have directly and necessarily called for a decision of this important question, but all of them at least serve to show that this court has given the subject much consideration, and has steadily adhered to the ruling made by the majority in 77 Ga. We do not care to reopen the question, or to enter upon a further discussion of it. We believe it has been correctly decided, and therefore leave the matter as it stands. Judgment affirmed.

LITTLE, J. I concur upon the authority of the previous decisions of this court, which are binding upon me. As an open question, I would be disposed to hold that the plaintiffs in error had a constitutional right to a trial by jury upon the issues presented by their exceptions of fact to the auditor's report, of which they could not be deprived by legislative enactment.

(105 Ga. 510)

WOODRUFF et al. v. SWANN et al.

(Supreme Court of Georgia. July 26, 1898.)

WRIT OF ERROR—BILL OF EXCEPTIONS—DISMISSAL.

Where the certificate made by the judge to a bill of exceptions states that it is in many respects untrue, and points out particulars wherein it is inaccurate, the certificate does not conform to law, and the writ of error must be dismissed. It is not the office of the certificate to correct errors in the bill of exceptions, for the same should not be certified at all until it shall have been made to speak the truth. See *Hawkins v. Mayor, etc.* (Ga.) 80 S. E. 519.

(Syllabus by the Court.)

Error from superior court, Bartow county; J. S. Candler, Judge.

Action between W. W. Woodruff and others and Stella H. Swann and others. From the judgment, Woodruff and others bring error. Dismissed.

J. W. Harris, Jr., for plaintiffs in error.
John W. Akin, for defendants in error.

PER CURIAM. Writ of error dismissed.

(105 Ga. 510)

CASE v. BROTHERTON.

(Supreme Court of Georgia. July 26, 1898.)

ERROR—BILL OF EXCEPTIONS—DISMISSAL.

When the recitals of fact contained in a bill of exceptions are so qualified by marginal notes entered thereon by the judge that this court is unable to know with certainty what occurred at the trial, and when, moreover, there is in the bill of exceptions no assignment of error upon any ruling or decision of the trial court, the writ of error will be dismissed.

(Syllabus by the Court.)

Error from superior court, Catoosa county; George F. Gober, Judge.

Action between J. P. Case and G. W. Brotherton. From the judgment, Case brings error. Dismissed.

W. E. Mann, for plaintiff in error. Payne & Tye and L. E. Shumate, for defendant in error.

PER CURIAM. Writ of error dismissed.

(105 Ga. 285)

TINSLEY v. RICE et al.

RICE et al. v. TINSLEY.

(Supreme Court of Georgia. July 26, 1898.)

LIS PENDENS—LACHES.

1. The protection afforded to a plaintiff under the doctrine that lis pendens is notice to all the world may be lost by a failure on his part to prosecute his action with due diligence.

2. Under this rule the auditor in the present case, in any view of the evidence introduced before him, was right in finding and reporting that the plaintiff's claim of title to the premises in dispute, even if good when his petition was originally filed, was, so far as the main defendant in error is concerned, rendered invalid against her by his own laches and long delay in bringing his action to trial, and that as against him the title of this defendant in error to the land in dispute was good.

(Syllabus by the Court.)

Error from superior court, Bartow county; A. W. Fite, Judge.

Suit by J. J. W. Tinsley against Ada S. Rice and others. Verdict directed in favor of defendants. Both parties bring error. Judgment on main bill of exceptions affirmed, and cross bill dismissed.

T. W. Milner and J. W. Harris, for plaintiff. J. M. Neel and John W. Akin, for defendants.

LITTLE, J. The plaintiff in error filed his bill against John A. Crawford, Mrs. Elizabeth Barna, and John Underwood, in the superior court of Bartow county, in the year

1867. The subject-matter of the bill was the title to lot of land No. 544 in the Seventeenth district, Third section, of Bartow county, to which complainant claimed title by virtue of a conveyance from Mrs. Barna. The prayer of the bill was that as the defendants, who formerly owned the legal and equitable title to the lot, had received and used the purchase money paid to them by complainant, the court decree to the complainant a good and sufficient title to the lot, and that the defendants be required to pay rents for the land while complainant was deprived of possession by them, and that defendants be required to deliver to complainant possession of the lot; that if legal title was found to exist in the estate of George W. Underwood, of which John A. Crawford was administrator, and the other defendants heirs at law, the estate be divided, the lot of land be assigned to Mrs. Barna, and that she hold the same in trust for complainant, and she be decreed to deliver possession to complainant in accordance with the deed theretofore made by her; that the defendants be enjoined from taking the rents and profits of the land, but that the same be paid over to some person to be appointed by the court to receive them. The defendants answered this bill in October, 1867. The record shows that the injunction was granted as prayed for. The record discloses the facts that Crawford (one of the defendants) died in April or May, 1875; that B. O. Crawford was soon thereafter appointed administrator of his estate; that Elizabeth Barna died testate in 1876, and her son B. A. Barna qualified as executor. The date of the death of John Underwood is not shown, but the record does show that Thomas A. Milam was appointed administrator of his estate in 1887. The record further discloses that no proceedings were had under the bill and answer until February 7, 1890, when, on application of complainant, James T. and Ada S. Rice were made parties. On January 14, 1892, T. J. Milam, administrator of John Underwood, was made a party defendant. On the same date, Barna, executor of Barna, was also made a party defendant. It is not shown that Crawford's administrator has ever been made a party. After James T. and Ada S. Rice were made parties, the defendant Ada S. Rice answered; claimed title to the land by prescription, and that she and those under whom she claimed held open, notorious, continuous, and peaceable possession of the land for more than 20 years before she was made a party in said suit. The case, by order of the court, was referred to an auditor in February, 1896; and he made a report, in which, among other things, is included the following: "On the 1st of June, 1881, the sheriff of Bartow county levied a *fi. fa.* of Hardwick v. Wofford and others, and other *fi. fas.* against W. T. Wofford, on the lot of land in dispute. At that time Wofford was in possession, claiming it as his own. It was lev-

led on as the property of Wofford, and, after being duly advertised, was sold in April, 1882, to L. E. and H. L. Wofford, to whom the sheriff made a deed, under which they went into immediate possession. That L. E. and H. L. Wofford were bona fide purchasers, and on the 16th of June, 1883, they conveyed the same to Ada S. Rice; having in September, 1882, made to her a bond for titles, under which Mrs. Rice went into possession, and remained until the 7th of February, 1890, when she was made a party defendant to the bill. That L. E. and H. L. Wofford were in peaceable possession of the land from the time they purchased it up to the time of the sale to Mrs. Rice," etc. The auditor decided that title in Mrs. Rice was good against the complainant; that a decree should be taken in favor of the defendants and against the complainant. To the auditor's report both the complainant and Mrs. Rice, respectively, filed exceptions of law and fact, which the court overruled, and directed the jury to render a verdict finding in favor of the defendants; and a decree was entered on the verdict in accordance therewith. The plaintiff in error excepted, alleging that the court erred in disallowing his exceptions to the auditor's report, in directing a verdict, and in rendering the decree. From the view which we take of the case, it is not necessary to review in detail all the exceptions of fact filed by the complainant to the auditor's report. We have very carefully considered all of the exceptions made, and examined the evidence reported by the auditor on which his findings are based; but, confining ourselves to such as we consider to be controlling questions in the case, we omit any discussion as to the others.

1. The fourth, fifth, and sixth exceptions of law filed by the plaintiff in error raise the question as to whether the pendency of the bill filed by the plaintiff in error charged the defendant Rice with notice of the claim of title to the lot of land in question at the time she purchased, received a conveyance, and entered into possession of the same. The original bill, asserting the title to be in the complainant, was filed in July, 1867, and was ancillary to a statutory action to recover possession of the land filed by the complainant on the 20th of February, 1868. The date of the deed executed by the sheriff, conveying the interest of W. T. Wofford in the land to L. E. and H. L. Wofford, was in April, 1882, while the date of the deed from the latter to Mrs. Rice was June 16, 1883; Mrs. Rice being then in possession under a bond for titles executed in September, 1882. The question, therefore, presented, is whether the pendency of the action to recover possession of the lot of land and the ancillary bill filed by the complainant charged the Messrs. Wofford and Mrs. Rice with notice of the complainant's claim of title. Section 3986 of the Civil Code declares that a pending suit is a general notice

of an equity or claim to all the world from the time the petition is filed and docketed. *Lis pendens*, which is defined to be the jurisdiction, power, or control which the court acquires over the property involved in the suit pending the continuance of the action, and until its final judgment therein, has for its object the keeping of the subject or res within the power of the court until the judgment or decree shall be entered, and thus to make it possible for courts of justice to give effect to their judgments and decrees. 13 Am. & Eng. Enc. Law, pp. 869, 870, and authorities cited. In order that there may be an effective *lis pendens*, the property involved must be of a character to be subject to the rule, the court must have jurisdiction both of the person and the res, and the property involved must be sufficiently described in the pleadings. Ben. Lis. Pend. 153. Notice by *lis pendens* is said to commence at the point of time at which the court first acquires jurisdiction, and to terminate at the point of time at which the court ceases to have full jurisdiction. 13 Am. & Eng. Enc. Law, p. 883. But, while our Code declares that a pending suit is a general notice of an equity or claim, it does not provide in all cases that one who purchases property involved in such suit is necessarily affected by the decree rendered therein. The provision of the section (3936, *supra*) is that if such pending suit is duly prosecuted, and is not collusive, one who purchases pending the suit is affected by the decree rendered therein. In order, therefore, to charge a purchaser with notice under the law of *lis pendens*, it is necessary to inquire what legal effect should be given to the words "duly prosecuted," which we find in the statute. The rule laid down is that, for the *lis pendens* to retain its vitality and binding force as against innocent *pendente lite* purchasers, it is essential that there shall have been a "full prosecution" of the cause from the commencement to the final termination thereof. In order that there may be said to have been a full prosecution of the suit, it must appear that there has been no such negligent "intermission" as may appear to be inexcusable, and which cannot be satisfactorily explained. 13 Am. & Eng. Enc. Law, p. 889. The rule that a purchaser *pendente lite* of the subject of the litigation, if he buys in good faith and without actual notice of the claims of the litigants, is not affected by the pending suit, unless the suit has been prosecuted with due diligence, was first formulated by Lord Bacon, and is stated by him in the following language: "No decree bindeth any that cometh in bona fide by conveyance from the defendant before the bill exhibited, and is made no party, neither by bill nor the order; but where he comes in *pendente lite*, and while the suit is in full prosecution, and without any color of allowance or privity of the court, there, regularly, the decree bindeth; but if there were any intermission of suit, or the court made acquainted with the

conveyance, the court is to give order upon the special matter according to justice." Ordinance 12 in Chancery, 15 Bacon's Works, 353. It is uniformly held that, in order that a purchaser *pendente lite* may be affected by the *lis pendens*, the suit must be prosecuted in good faith, with all reasonable diligence, and without unnecessary delay, and that the question of reasonable diligence in prosecuting the suit must depend upon the circumstances of each case. 2 Pom. Eq. Jur. § 634; 1 Freem. Judgm. § 202; Wade, Notice, § 359; Ben. Lis. Pend. §§ 100-102 et seq. It is likewise held that a continuous or full prosecution does not require that the suit be brought to a close within any limited time, or that given steps shall be taken in the course of the prosecution of the cause within any limited period, but that the rule simply contemplates that the suit shall be prosecuted without such negligent intermission as may be shown to be inexcusable, or as shall not be satisfactorily explained,—a reasonable excuse for delay being always available to keep the *lis pendens* in life. Ben. Lis. Pend. §§ 100-102; 13 Am. & Eng. Enc. Law, p. 889. While it is true that the question as to whether or not an intermission of prosecution has occurred, which shall be fatal to the continuity of the *lis pendens*, depends upon the facts of each case, it has been well said that it will not do to concede to the courts the discretion, in passing collaterally upon the validity of judgments and decrees about which there is a contention in respect to whether or not *lis pendens* was or was not lost for want of full prosecution, to determine such question independent of some rule of decision, as such a course would be exceedingly dangerous. The ground upon which to place the invalidity of *lis pendens* for a failure to take action in pending suits for want of full prosecution is not, as in many cases seems to be supposed, negligence, merely as such, but estoppel, as warranted by such negligence and other conduct on the part of those seeking the enforcement of *lis pendens*. Were the invalidity of *lis pendens* based upon the ground of negligence alone, power would be left in the courts to say in each instance what is and what is not such negligence as should invalidate *lis pendens*. It would thus, in effect, make it a question, the decision of which would rest in the discretion of the court. If the principle of estoppel is applied to such cases, the court will have for a rule of decision the established doctrines of the law of estoppel. In order to constitute estoppel by conduct, there must concur—First, a false representation or concealment of facts; second, that it must be within the knowledge of the party making the one or concealing the other; third, the person affected thereby must be ignorant of the truth; fourth, the person seeking to influence the conduct of the other must act intentionally for that purpose; and, fifth, persons complaining shall have been induced to act by reason of such conduct of the other.

In passing upon this question of negligent prosecutions, the court may well, in applying these elements, assume it to be the duty of every complainant to make full prosecution of suits, and that third parties have a right to expect and believe that such diligence has been used, and, in the absence of information to the contrary, treat the fact of nonprosecution of suits as fraudulent concealment on the part of plaintiffs, with their knowledge and intention. Ben. Lis Pend. § 109, citing Bigelow, Estop. p. 490; 13 Am. & Eng. Enc. Law, pp. 890, 891. In the case of *Petree v. Bell*, 2 Bush, 62, it was held that a delay of two years, without a step taken in the case, or a motion made indicating an intention to prosecute the suit, in the absence of any excuse or satisfactory reason for the delay, is such gross and culpable negligence as to destroy the force of the lis pendens. In the case of *Bybee v. Summers*, 4 Or. 361, it is said that, to give effect to lis pendens, the suit should be prosecuted with such diligence as to give the proceedings some degree of notoriety, and that a delay of five years to prosecute a suit was such unreasonable delay as to invalidate lis pendens. In the case of *Mann v. Roberts*, 11 Lea, 57, a delay of five years was held to invalidate the lis pendens. In the case of *Erhman v. Kendrick*, 1 Metc. (Ky.) 146, suit was brought in 1852 to enforce a mechanic's lien, which was ready for hearing in 1853. In 1856 the lien debtor mortgaged the property. In 1857, when the mortgage was sought to be foreclosed, the holder of the mechanic's lien claimed priority. It was held that this priority was lost because no action had been taken to enforce it for four years. In the case of *Fox v. Reeder*, 28 Ohio St. 181, where a bill was filed in 1842 to foreclose a mortgage, the case went to a decree, was referred to the master to report, and an order of sale was made; but no step was taken in the case for 27 years, when the suit was dismissed for want of prosecution, and reinstated. The purchaser had been in possession under his purchase, holding adversely, for 21 years, and had made valuable improvements. It was held that the lis pendens could not avail. So, too, in the case of *Gossom v. Donaldson*, 18 B. Mon. 237, where a like ruling was made, it appeared that the purchaser went into adverse possession after final decree, had continued there more than 20 years, and had made valuable improvements. A like ruling was made in the case of *Kinsman v. Kinsman*, 1 Russ. & M. 617, where it appeared that a decree which was substantially final had been rendered, but some act remained to be done to carry it into execution. No attempt was made to execute the decree for more than 27 years, during which time the purchasers held adverse possession, and had erected valuable improvements.

2. It would seem from what has been said that, if one who purchases pending the suit is not to be affected by constructive notice

under the law of lis pendens unless the suit be duly prosecuted, then the finding of the auditor was correct in this case. As shown above, the original defendants all died within a few years after the institution of the original action,—Crawford in 1875, Mrs. Barna in 1876, and John Underwood before the year 1887. The representative of Crawford has never yet been made a party. The executor of Barna was not made a party until 1892,—16 years after her decease. It is true that Mrs. Rice was made a party in 1890, but from 1876 to 1890 two proper parties had not been made. It is difficult to assign this delay to any other cause than the laches of the plaintiff in error. The representatives of the deceased defendants had all been promptly appointed, and nothing was required upon the part of the plaintiff to speed his suit, except to make parties. If there is a case which may not be said to have been duly prosecuted, this is the case; and, unless it was duly prosecuted, the defendant Mrs. Rice was protected in her purchase from the constructive notice of lis pendens. It may be stated, however, that the delay was subject to explanation; but the only attempt in the way of explanation which we find in the record is in the evidence of the plaintiff himself, who says: "I have tried, almost every court, to get my case up for trial. I had every counsel in the case who came into it after it was brought. Judge James Milner was one; also, Judge Dawson A. Walker; also, the present Judge Milner, and Cols. Wat Harris and Warren Aiken. I have tried all the time to get a trial of the case. I commenced the case in 1864, and employed first Judge James Milner, then General Wofford. John W. Wofford was also my lawyer. He left here in 1877. I do not know when General Wofford quit being my lawyer. I do not know what he quit for. I had no falling out with him. He may have quit being my lawyer because he thought there was no money in it. I paid him nothing. General Wofford quit the case. I did not rely on him after he quit the case. I got Judge Parrott next, who represented me until he went on the bench. The present Judge Milner took Parrott's place, and represented me until he went on the bench. Since then, Aiken and Harris took his place. Judge Walker came into the case after Judge Parrott went on the bench, and represented me until his death, which was three or four years. I urged my lawyers all the time to have parties made to the case so that it could be tried. Don't know what my lawyers did in the matter." In no view could this explanation be a satisfactory account of the delay. Something over 30 years elapsed from the time the complainant says he commenced his case until the trial, and during a greater portion of this time the case was without parties owing to the laches of the plaintiff. It will not answer for him to say that he did not know what his attorneys did in the matter. It was his business to know and his

business to have his case prepared for trial. It was incumbent on him to see that his attorneys gave the case proper attention, and, if he permitted them to neglect it, he cannot claim rights which are only given to the diligent who duly prosecute their cases when they voluntarily bring them into court; and we are constrained to hold that, so far as it is contended that the defendant Rice was affected at the time she obtained a conveyance to the land with actual notice of the claim of title by the plaintiff in this case, that contention must fail, and the defendant Rice must also be held unaffected with constructive notice of the pending suit. There was no error in refusing to approve the exceptions of fact, nor in refusing to sustain the exceptions of law filed by the plaintiff in error. Judgment on main bill of exceptions affirmed. Cross bill dismissed. All the justices concurring.

(105 Ga. 268)

CARR v. HOUSTON GUANO & WAREHOUSE CO.

(Supreme Court of Georgia. July 26, 1898.)

REPLEVIN — FORTHCOMING BOND — BREACH — DEFENSES.

1. In an action for an alleged breach of a forthcoming bond executed under the provisions of section 2766 of the Civil Code, the obligors are liable for the full value of the property replevied, if it does not exceed the amount of the mortgage debt, or, in case it does exceed such debt, then in a sum equal to the latter, unless they show affirmatively that their failure to return the property when called for by the levying officer was caused by the act of God, and was in no wise the result of their conduct or negligence.

(a) In such a case, where the property replevied consisted of live stock, and the defendants introduced evidence tending merely to show that such live stock, while in the possession of the principal obligor, had died, and there was no evidence going to show that such death was caused by the act of God and was in no wise the result of their conduct or negligence, a verdict for the plaintiff for the value of the property, which did not exceed in amount the mortgage debt, was not contrary to law or to the evidence.

2. The charges complained of, when taken in connection with the entire charge, were not erroneous; the charge, as a whole, fairly and fully submitted to the jury the issues involved; and no sufficient reason appears why the discretion of the presiding judge in overruling the motion for a new trial should be disturbed.

(Syllabus by the Court.)

Error from superior court, Crawford county; W. H. Felton, Jr., Judge.

Action by the Houston Guano & Warehouse Company against W. P. Carr and others. Judgment for plaintiff. Defendant Carr brings error. Affirmed.

R. D. Smith, for plaintiff in error. L. L. Brown, for defendant in error.

LITTLE, J. Lockhart, as principal, and Carr, as security, executed a forthcoming bond, the condition of which was that two mules which had been levied on as the property of the principal, under a mortgage *fi. fa.*

against him, to which he had interposed an affidavit of illegality, should be turned over by him to the levying officer in case the issue should be determined against him. The illegality was dismissed, and the *fi. fa.* ordered to proceed, and the mules were advertised for sale by the sheriff, but were not forthcoming on the day of sale, having died before that time. The plaintiff in execution brought suit against the principal and the surety on the bond, and the defendants filed a plea setting up that the death of the mules was the act of God, and was due to no fault or negligence on their part. The evidence upon which the defendants relied to show the death of the mules, and their consequent release of liability under the forthcoming bond, is as follows: J. L. Hammett testified: "One of the mules was killed by lightning, one died with blind staggers, and two more in the pasture in a swamp." R. H. Lockhart, Jr., testified that: "One of the mules mortgaged was killed by lightning before the levy. One died with blind staggers. The other two died in a swamp in the pasture. The pasture was a good one. A fine crop of corn and peas had been raised that year, and there was also a fine crop of hay. The mules were in bad condition. My father turned them in there to fatten them up." W. P. Carr, one of the defendants, testified: "One of the mules died with blind staggers. Two were turned in a swamp in a pasture. It was a fair pasture, and there was other stock in there. Mr. Lockhart gave good attention to the mules, and kept corn in the trough in the pasture all the time. They died in the pasture. I do not know what was the matter with them. They took sick and died. I do not know what attention these mules received, as I do not live with Lockhart. I saw Lockhart carry corn down there." A. T. Simley testified: "One of the mules died with blind staggers. The other two died in the pasture." There was a verdict for the plaintiff for \$100. The defendants made a motion to set aside the verdict and for a new trial; and, on this motion being overruled, Carr, one of the defendants, excepted, and assigns as error the refusal of the court to grant a new trial on the grounds set out in the motion. The first three grounds of the motion are that the verdict is contrary to evidence; against the weight of evidence; is contrary to law and the principles of equity and justice.

The bond given in this case was based on the provisions of section 2766 of the Civil Code, and the condition of the bond, as prescribed by that statute, is that the property replevied shall be returned when called for by the levying officer. A failure to return the property causes a breach of the bond, unless, as has been held by the court, a return was prevented by the act of God. Such was the plea of the defendants, and the evidence reported above is what is relied on to sustain that plea. We do not deem that evi-

dence sufficient to prevent a recovery in the case. In the case of *Young v. Walldrip*, 91 Ga. 765, 18 S. E. 23, which was a suit on a replevy bond given under the same statute for the forthcoming of a mule, by a person who had interposed a claim, executed a bond, and replevied the property, the evidence in relation to the death of the mule was to the effect that the mule was killed by having its leg broken by stepping in a post hole which was concealed by an overgrowth of grass, from which the mule died, without fault or negligence on the part of the obligor or surety on the bond, and without the fault of any other person. In that case the court ruled that: "When the claimant takes the property in his possession, he is responsible for its care and safe-keeping; and, if it is injured or wasted while in his possession, it is at his risk. If it is a live animal, and dies while in his possession, he is responsible for its value, unless he can show that his death was caused by the act of God, and is in no wise the result of his own conduct. We are clear that nothing else than this will or ought to excuse the claimant for a nonproduction of the property according to the terms of the bond." The court then rules as a matter of law that the falling of the animal into a hole overgrown and concealed with grass, if it occurred on the premises of the person chargeable, is not the act of God, and will not relieve the claimant from producing the mule under his contract. That case rules the one at bar. The plaintiff in error was responsible for the care and safe-keeping of the animals which he had agreed to produce when called on to do so. The value of the animal which was stricken by lightning, as shown by the proof, is not involved in this case. The evidence, at best, establishes the facts that one of the animals died with a disease known as "blind staggers," and that two more died in a pasture in a swamp, that the pasture was a fair one, and that a crop of corn and peas had been raised that year on the land which furnished the pasture. The proof is otherwise silent as to the cause of the disease, and the care and attention which the animals received from the obligors. This testimony is not sufficient to show that the death of the animals did not result from improper care and attention on the part of the principal obligor, in whose possession the mules were suffered to remain after the execution of the bond; and in our judgment the verdict of the jury is authorized by law, and is in accord with the evidence.

2. The remaining grounds of the motion for a new trial consist in exceptions to different parts of the charge given to the jury by the court. We have carefully examined the extracts which are alleged to be error, in connection with the entire charge; and in our opinion no error was committed in the charges so excepted to, when they are construed with other parts of the charge. Judgment affirmed. All the justices concurring.

(106 Ga. 271)

GEORGIA S. & F. RY. CO. v. JOSSEY.
(Supreme Court of Georgia. July 26, 1898.)
NEGLECTANCE OF SERVANT—LIABILITY TO MASTER.

When a baggage master on a railroad train has been intrusted with a trunk, to be delivered to the company's agent at a certain station on its road, and negligently carries the same beyond this point, and delivers it, in the exercise of his own discretion, and without authority of the company, to its agent at another station, to be returned to the proper place, such baggage master is liable to the company for the loss it sustained in consequence of the trunk being stolen from the custody of such agent.

(Syllabus by the Court.)

Error from superior court, Bibb county; W. H. Felton, Jr., Judge.

Action by R. M. Jossey against the Georgia Southern & Florida Railway Company. Judgment for plaintiff. Defendant brings error. Reversed.

Hall & Hardeman and Smith & Jones, for plaintiff in error. R. K. Hines and Guerry & Hall, for defendant in error.

COBB, J. Jossey sued the Georgia Southern & Florida Railway Company upon an account for services rendered as baggage master and flagman. The defendant admitted that it became indebted to the plaintiff as alleged, but pleaded as a set-off that plaintiff was due it a sum larger than the amount sued for, by reason of the fact that, while in the employment of the defendant as baggage master, plaintiff was intrusted with the trunk of a passenger, to be delivered at Sparks, a place on the defendant's line of road, and by reason of his negligence the trunk was not delivered at Sparks, but was carried on and left at another station, where it was stolen, and the defendant became liable to the passenger for the value of the trunk, and that defendant had paid in discharge of that liability the amount pleaded as a set-off. It appears from the evidence that Sparks is a station on the defendant's railway situated between Cordele and Valdosta, and that there are several stations between Sparks and Valdosta. The trunk was delivered to the plaintiff at Cordele, and it was his duty to deliver it at Sparks. He failed to do this, according to his own admission, by mistake, and carried it to Valdosta, where he delivered it to the agent of the railway company. The trunk was left upon the platform of the depot, and was stolen, and the company was compelled to pay to the passenger its value. It was admitted at the trial that the company had rendered itself liable to the passenger, and that the amount of the set-off was the amount which had been paid by it to the passenger. There was no evidence going to show that the baggage master had authority to deliver baggage to any other agent than the one in charge at the place at which the baggage ought to have been delivered, or that he had authority to deliver it at any other place. There was no evidence either of a

rule of the company, or of a custom so well established as to be binding upon the railroad, authorizing baggage masters who have carried baggage beyond its destination to deliver the same to depot agents along the line of road at other places than where the baggage should have been left. The case therefore narrows itself down to one where it was the duty of the baggage master to deliver the trunk at a certain station, which he negligently failed to do, and in consequence of its being left by him at a place at which he was not authorized to deliver it the baggage was lost, and the railway company sustained damage. The baggage master, being an agent for hire, was bound to exercise about the duties of his position that ordinary care and diligence required of a bailee for hire. Civ. Code, § 3009. If the baggage master had delivered the baggage at the station to which it was checked, he would have fully discharged his duty, and would have been relieved from all liability. His negligent failure to do this left the baggage in his possession, to be taken care of by him at his own risk. He was bound to exercise ordinary care to see that the baggage was not lost. When he delivered it to the agent of the railway company at Valdosta, who was not authorized to receive the same in behalf of the railway company, this person became his agent, and he became liable for the negligence of such agent. The gross negligence of the agent at Valdosta in allowing the baggage to remain in an unprotected and exposed condition, and its consequent loss, rendered the baggage master liable. The principal, the railway company, having been required, on account of the negligent conduct of the baggage master and his agent, to indemnify the passenger against loss on account of the theft of the baggage, was entitled to reimbursement at the hands of the baggage master for the amount which it had paid out. Judge Story, in his work on Agency, in dealing with this subject, says: "Wherever an agent violates his duties or obligations to his principal, whether it be by exceeding his authority, or by positive misconduct, or by mere negligence or omission in the proper functions of his agency, or in any other manner, and any loss or damage thereby falls on his principal, he is responsible therefor, and bound to make a full indemnity. In such cases it is wholly immaterial whether the loss or damage be direct to the property of the principal, or whether it arise from the compensation or reparation which he has been obliged to make to third persons in discharge of his liability to them for the acts or omissions of his agent. The loss or damage need not be directly or immediately caused by the act which is done or is omitted to be done. It will be sufficient if it be fairly attributable to it as a natural result or a just consequence." Story, Ag. (9th Ed.) p. 259, § 217c. See, also, Wood, Mast. & Serv. (2d Ed.) § 325; Smith v. Foran, 43 Conn. 244.

It being admitted that the railway company was rendered liable by the loss of the trunk, and the evidence in the present record clearly showing that the baggage master, whose conduct may be treated as a violation of his contract to faithfully perform the duties incident to his employment, failed to deliver the baggage at the station at which it was his duty to deliver it, and there being no evidence that under such circumstances he had authority, either by rule of the company or a well-established custom, to deliver to any other agent of the company, a verdict in favor of the plaintiff, finding against the plea of set-off, was contrary to law, and should have been set aside. Judgment reversed. All the justices concurring.

(105 Ga. 264)

FINLAY v. LUDDEN & BATES SOUTHERN MUSIC HOUSE.

(Supreme Court of Georgia. July 26, 1896.)

CONDITIONAL SALE—CONSTRUCTION OF CONTRACT.

1. A stipulation in a contract of conditional sale of personal property to the effect that, if default shall be made in any of the payments therein mentioned, the buyer agrees to return the property, and that the seller or its agent may resume actual possession of the same, taken in connection with the entire language of the contract, is to be construed as placing upon the buyer the duty of delivering the property to the seller, when demanded, after a breach of the contract by the former.

2. Such a stipulation does not authorize the buyer to voluntarily return the property, and demand a rescission of the contract, upon a breach of the obligations undertaken by him in the contract.

3. The verdict is supported by the evidence, and there was no error requiring the granting of a new trial.

(Syllabus by the Court.)

Error from city court of Macon; J. P. Ross, Judge.

Action by the Ludden & Bates Southern Music House against H. C. S. Finlay. Judgment for plaintiff, and defendant brings error. Affirmed.

Preston & Ayer, for plaintiff in error. Estes & Jones, for defendant in error.

COBB, J. The Ludden & Bates Southern Music House sued H. C. S. Finlay for \$260 principal, and 8 per cent. interest from November 3, 1896, alleged to be due on the sale of a piano upon a contract, the material parts of which are as follows: "This certifies that I, H. C. S. Finlay, now residing at Macon, have conditionally purchased of Ludden & Bates Southern Music House, of Savannah, Ga., one piano [described], valued at \$280, which I am to use with care during the continuance of this contract; and, in case of loss or damage to said instrument before it is fully paid for, I agree to make good such loss or damage. I further agree to pay for the said instrument in the following manner, viz.: \$5.00 cash on July 23rd, \$5.00 on Sept. 23rd, \$5.00 on Oct. 23rd, and the

balance, \$260.00, on Nov. 23rd, 1896, amounting in the aggregate to \$280.00. I also agree to pay eight per cent. per annum on all past-due payments. And I further agree that, until all of the above-specified payments are fully made, all right and title in the instrument shall remain in said Ludden & Bates Southern Music House, and if default shall be made in either of said payments, or if I shall sell, offer for sale, remove, or attempt to remove, the said instrument from my aforesaid residence without the written consent of said L. & B. S. M. H., then and in that case I agree to return the same, and that it or its agent may resume actual possession thereof; and I hereby authorize and empower the said L. & B. S. M. H., or its agent, to enter the premises, wherever said instrument may be, and take and carry the same away. And I further agree to pay all expenses incurred by the said L. & B. S. M. H. in the returning of the said instrument to their warerooms at Savannah, including ten per cent. attorney's fees, and all other legal expenses which may be incurred in obtaining possession of said instrument, or in the collection of any payments due thereon." The defendant in his answer denied the alleged indebtedness, and contended that under the terms of the contract he had the right, upon default in payment, and without any demand upon the part of the plaintiff, to redeliver the piano without expense to the plaintiff, and, being unable to pay for the piano, he had done this, and was therefore discharged from any liability; also, that the plaintiff was bound to return to him \$70 which he had paid on the contract. Upon the trial there was a verdict for the plaintiff for the amount sued for, and, defendant's motion for a new trial being overruled, he excepted.

The motion was upon the grounds that the verdict was contrary to law and the evidence, and that the court erred as follows: In holding that under the contract upon which the suit was based the defendant did not have the right to rescind, upon being unable to comply with the terms thereof, by redelivery, without the consent of the plaintiff, and in charging the jury as follows: "As a matter of right, under the law, the defendant did not have a legal right, of his own volition, without the consent of the plaintiff, to rescind the purchase of the piano. Under the contract between the parties, the option to rescind the contract and retake the piano was with the seller of the piano, the plaintiff in this case. Upon a failure to pay any payment, the plaintiff could have rescinded the contract, upon doing and performing those things which the law would make incumbent upon him. For instance, the plaintiff, upon failure to meet any payment when it was due, could have retaken the piano upon refunding to the purchaser all that the purchaser had paid on it, except a reasonable amount for rental. He

could not retake it and collect the balance due. That was the option of the seller. The purchaser could not, as a matter of right, rescind the contract, by refusing to pay anything else and returning the piano, against the will of the seller,—especially without also tendering, along with the piano, a reasonable amount for the rental during the time he had it." It is claimed by the plaintiff in error that not only the part of the charge excepted to, but the entire charge of the court, was erroneous, as being simply an elaboration of the errors which are claimed to exist in the extract which is above quoted. His contention is that he had a right, under the contract, whenever default was made in the payment of any amount due thereon, to rescind the contract and return the property. While the contract does say that in case of default in any of the payments the buyer agrees to return the property (and, if the language relied on by the defendant be considered alone, there might be some foundation for his contention), yet, considering the contract as a whole, the relation of debtor and creditor clearly exists, and the title to the property sold is retained in the seller for the purpose of securing the debt created by the contract; and, the evident intention of the parties being that the property should be security for the debt, it would be unreasonable to hold that the defendant,—the party executing the contract,—by refusing to pay according to the terms of his contract, would have a right to redeliver the property, rescind the contract, and demand a return of all payments made. Taking into consideration our knowledge of human nature, it is not reasonable that a seller of personal property would give to the buyer the right to set aside the contract at any time by simply refusing to comply with its terms. While the particular language used in the contract and above referred to is peculiar, and,—as has been said,—standing alone, might be construed as contended for by the defendant, still, taken in connection with its context, it cannot be said that the seller intended that it should have such interpretation; nor can it be reasonably said that the buyer would so understand such a contract. Civ. Code, § 3673. If the meaning of a contract be doubtful, it must be most strongly construed against the party executing the instrument or undertaking the obligation. Therefore the law will not construe a contract so as to give the debtor the right to destroy it by a simple refusal to comply with it, unless the terms of the contract are so clear and unambiguous as to make irresistible the conclusion that no other result could possibly be reached, and that such was the intention of the parties. Civ. Code, § 3675, par. 4. Nor will a contract be so construed as to authorize one of the parties to take advantage of his own wrong, unless it be plain and manifest that such was the intention of the parties. The ver-

dict was supported by the evidence, and there was no error in refusing a new trial. Judgment affirmed. All the justices concurring.

(105 Ga. 316)

SOUTHERN RY. CO. v. BRYANT (two cases).

(Supreme Court of Georgia. July 26, 1898.)
CARRIERS—CONTRACT OF CARRIAGE—DAMAGE FOR BREACH.

1. In an action for damages growing out of a breach of contract of carriage entered into between a passenger and a railway company, it was error to charge that: "In every tort there may be aggravating circumstances, either in the act or the intention; and in that event the jury may give additional damages, either to deter the wrongdoer from repeating the trespass, or as compensation for the wounded feelings of the plaintiff" (Civ. Code, § 3906),—and: "In some torts the entire injury is to the peace, happiness, or feelings of the plaintiff. In such cases no measure of damages can be prescribed, except the enlightened conscience of impartial jurors. The worldly circumstances of the parties, the amount of bad faith in the transaction, and all the attendant facts, should be weighed" (Id. § 3907).

2. Under the facts of the present cases, verdicts for \$250 and \$300 were excessive in amount.

(Syllabus by the Court.)

Error from superior court, Polk county; O. G. Jones, Judge.

Actions by Clara and Kate Bryant, by their next friend, against the Southern Railway Company. Judgment for plaintiffs. Defendant brings error. Reversed.

Shumate & Maddox, for plaintiff in error.
Wright & Ewing, for defendants in error.

SIMMONS, C. J. Two young ladies purchased railroad tickets over the line of the Southern Railway Company from Atlanta to a flag station called "Hamlet." It seems that the engineer omitted to give the signal of an approach to Hamlet, by reason whereof the conductor failed to signal the engineer to stop at that place. The conductor did not discover that the train had passed Hamlet until it had gone about half a mile beyond. He then apologized to the ladies for having carried them beyond their station, expressed his regret, and told them that he would either leave them at the next station, or carry them on until he met the down train, put them on that, and have them brought back to Hamlet. They chose to stop at the next station. On arriving there, they alighted, and were carried into the reception room at the station, where there was a good fire and light. There they remained for about three hours, when they boarded the down train. They arrived at Hamlet shortly before day. There was no one to meet them at that place, and they walked a quarter of a mile, through a field, to their father's house. They brought their actions against the railway company for damages, and on the trial of the case the jury returned verdicts for both of them,—\$250 in favor of one, and \$300 in favor of

the other. The railway company moved for new trials. The motions were overruled, and the company excepted. The alleged errors were in giving in charge to the jury the sections of the Code which are set out in the first headnote, and in not granting new trials because the verdict in each case was excessive and contrary to law.

1. The first portion of the charge set out in the headnote is a copy of section 3906 of the Civil Code. In the case of *Railway Co. v. Hardin* (Ga.) 28 S. E. 847, this same section of the Code was given in charge under a state of facts somewhat similar to those above recited, and this court held that the section was inapplicable, and that it was therefore error to give it in charge to the jury. We deem it unnecessary to elaborate here the reasons given in that case by Atkinson, J., as to why it was error to give this section in charge. It is sufficient to say that the decision in that case is controlling in these. In regard to the other portion of the charge given in the headnote (section 3907 of the Civil Code), it is only necessary to say that in several decisions of this court it has been declared error to give the whole of that section in charge in cases like the ones now under consideration, or even in cases where actual physical injuries have been sustained. *Railroad Co. v. Senn*, 73 Ga. 705; *Railroad Co. v. Homer*, Id. 251; *Railway Co. v. Hardage*, 93 Ga. 457, 21 S. E. 100. In cases of this character the worldly circumstances of the defendant should not be considered by the jury. In these particular cases the question of defendant's bad faith should not be considered, for there was no evidence to authorize the judge to charge upon this subject, nor facts shown from which the jury could properly infer bad faith upon the part of defendant. The plaintiffs do not claim to have sustained any pecuniary injury for loss of time or expenses incurred, nor that they have sustained any physical injury; and the only part of this section which should have been given in charge (and even then not in the words of the section) was that the jury could give such damages as their enlightened consciences might approve. These sections of the Code cannot properly be given in every case sounding in tort. They simply announce principles, and, as a whole, are not applicable to every case. The trial judge may give one principle in one case, and another in another case; giving each as the facts of the case may require or warrant.

2. It may have been that these erroneous charges caused the jury to find these excessive verdicts. The jury may have considered, without proof, the worldly circumstances of the railway company, and may have thought that a rich corporation had acted in very bad faith because its engineer had failed to signal the approach to the station, and may have come to the conclusion from these facts that these young ladies were entitled to such large damages for a detention of three hours

in a comfortable room. The evidence shows that they suffered no loss, were not frightened, were well treated and comfortable. The conductor was polite, and the agent at the station where they stopped over treated them with courtesy. Their only annoyance appearing in the record was that one of them thought their father would be disappointed at their not arriving at their home at the time appointed. We cannot conceive how an honest jury, acting without partiality or bias against the defendant, could, under the facts, have returned such verdicts. There are hundreds and thousands of women, and men, too, in this country, who work daily the whole year for less than was given by the jury to these girls for the slight inconvenience of being detained three hours. If these girls had hired a carriage and driver, and the latter had driven them two miles beyond their destination, as a result of unintentional negligence, and brought them back after they had waited three hours in a comfortable room, we have no idea that, in suits by them against the owner of the carriage, these jurors would have returned these verdicts. Yet the law is the same in both cases. The violation of a contract, caused by a negligent omission of duty, is in each case the ground of recovery. We are compelled, after carefully reading the evidence in both the cases now under consideration, and finding only a very slight cause of action, to say that the verdicts are excessive, and must have been brought about not only by the erroneous charge of the court, but by bias and prejudice on the part of the jury. Judgment reversed. All the justices concurring.

(106 Ga. 513)

HARALSON COUNTY v. PITTMAN et al.
(Supreme Court of Georgia. July 26, 1898.)

WRIT OF ERROR—SEPARATE JUDGMENTS.

Where two cases against the same defendant, and in favor of different plaintiffs, who have no privity of interest of any sort between them, are by consent of the parties tried together before an inferior judicatory, the judge of the superior court cannot entertain jurisdiction over the cases by one petition for certiorari, complaining of the verdict in favor of each plaintiff; and this court has no jurisdiction in such a case brought here by one writ of error, complaining of the judgment of the court below in overruling the petition for certiorari. *Patterson v. Hendrix*, 72 Ga. 204; *Hicks v. Walker* (Ga.) 30 S. E. 353. See, also, *Assurance Co. v. Way*, 27 S. E. 167, 98 Ga. 746.

(Syllabus by the Court.)

Error from superior court, Haralson county; O. G. Jones, Judge.

Actions by R. H. Pittman and others against Haralson county. Judgments for defendant, and from an order overruling a petition for certiorari it brings error. Dismissed.

E. S. Griffith, for plaintiff in error. McBride & Craven, for defendants in error.

PER CURIAM. Writ of error dismissed.

(106 Ga. 266)

•SCOTT et al. v. McKEE et al.

(Supreme Court of Georgia. July 26, 1898.)
PLAINTIFFS IN ERROR—OPINION EVIDENCE—SANITY OF TESTATOR.

1. Upon the death of a plaintiff in error, who had offered for probate a copy of an alleged will, in which he was nominated as executor, and who brought to this court for review a judgment rendered by the superior court on an appeal from the court of ordinary denying his application for probate, persons named in the alleged will as legatees or devisees may be made parties to the case as plaintiffs in error.

2. A subscribing witness to a paper alleged to be a will may, though not an expert, testify to his opinion concerning the sanity of the alleged testator, without stating the facts upon which such opinion is founded.

3. The questions presented in this case and not disposed of in the preceding notes are dealt with generally in the opinion.

(Syllabus by the Court.)

Error from superior court, Dekalb county; J. S. Candler, Judge.

Petition by W. D. Varner for the probate of a lost will. H. E. McKee and others, heirs of decedent, were made parties. From a judgment dismissing an appeal and sustaining a judgment of a court of ordinary, petitioner appealed. On the death of petitioner, Janie C. Scott and Sarah Murphey were made plaintiffs in error. Reversed.

J. N. Glenn, Jones & Morrison, and J. A. Wimpy, for plaintiffs in error. Candler & Thomson, for defendants in error.

LUMPKIN, P. J. W. D. Varner presented to the court of ordinary of Dekalb county a petition alleging that Ezekiel Reeves, of that county, had died testate, and that his will had been lost or destroyed. The prayer of the petition was that a copy of the alleged will, thereto attached, be established, and admitted to probate in solemn form in lieu of the lost original. Certain of the heirs at law of the deceased caveated this application on divers grounds. The court of ordinary refused to admit the paper to probate, and the case was appealed to the superior court. On the trial there the judge, at the conclusion of the evidence introduced by the petitioner, passed an order dismissing the appeal and sustaining the judgment of the court of ordinary. To this, and to certain rulings made during the progress of the trial, the petitioner excepted. While the bill of exceptions was pending in this court, Varner died. When the case was reached in its order here, counsel for the deceased plaintiff in error moved that Janie C. Scott and Sarah Murphey, who were named in the alleged will as legatees and devisees, be made parties to the case as plaintiffs in error, in Varner's stead. Upon objection by counsel for the defendants in error, the court reserved the question as to making parties, and permitted counsel to argue the case upon its merits, and they thereupon submitted briefs.

1. After consideration we have reached the conclusion that the motion to make parties

should be granted, and have ordered accordingly. Section 3292 of the Civil Code reads as follows: "The right to offer a will for probate belongs to the executor, if one be named. If the executor be dead, non-resident, or refuses to act, or none be named, any person interested may offer the will for probate." It therefore appears that in case of nonaction by the nominated executor any person interested in a will may offer the same for probate. In the present instance, Varner did not refuse to act, and accordingly persons named in the alleged will as beneficiaries had, primarily, no right to present to the court of ordinary an application for probate. The nominated executor did this, and followed the case to this, the court of last resort. After it reached here, he died intestate, and therefore the case stood unrepresented, and must have continued so to stand, unless persons interested in having the paper propounded established as a will had been permitted to become parties to the case. Had Varner died before instituting probate proceedings in the court of ordinary, Janie C. Scott and Sarah Murphey would undoubtedly have had the right to take action in the premises. Surely, they should not be denied such right after the case has been duly prosecuted and brought to this court, and the nominated executor has died. "Actus Dei nemini facit injuriam." "For every right there shall be a remedy, and every court having jurisdiction of the one may, if necessary, frame the other." Civ. Code, § 4929. While our statute conferring upon persons interested in a will the right to offer the same for probate in the event the nominated executor fails to do so does not, in terms, provide for such an emergency as that here presented, the ruling now made is certainly in strict accord with the spirit of the law, and also with the principles of natural justice.

2. One of the grounds of the caveat was that Ezekiel Reeves was not mentally capable of making a will. Pending the trial in the superior court, the judge refused to allow the propounder to prove by one John Frazier, a subscribing witness to the alleged will, that, in his opinion, Reeves was of sound and disposing mind and memory. This ruling was probably based on the ground that the witness was not asked to state the facts upon which his opinion rested, it not appearing that he was an expert. We say this because we can conceive of no other reason for rejecting the testimony. We are clearly of the opinion that it should have been received. In the case of *Potts v. House*, 6 Ga. 324, this court distinctly ruled that "the opinions of the subscribing witnesses to a will, as to the sanity of the testator, are admissible, without stating the facts upon which they are founded." The reason for this rule is succinctly stated by Judge Lumpkin in the following words (pages 335, 336): "The subscribing witnesses to the will may likewise testify as to the opinion they formed of the testator's

mind at the time of executing the will, the law placing them around the testator to try, judge, and determine whether he is compos to execute it;" citing *Heyward v. Hazard*, 1 Bay, 335; *Pow. Dev.* 69, 71; *Pool v. Richardson*, 3 Mass. 330.

3. The propounder was offered as a witness to prove certain statements by the deceased in reference to "the will," and how he wished it to be carried out, made to the witness in private conversation a short while before the death of the alleged testator. This evidence was objected to and excluded on the ground that the witness was not competent to testify concerning anything said by Reeves except at the time of making the will. Inasmuch as this witness had exclusive knowledge with reference to these matters, and has since died, the question presented is of no practical importance, since it cannot possibly arise at the next hearing; and consequently we make no ruling upon it. The court also, at the trial, rejected certain other evidence, which was manifestly hearsay, and as to which no further comment is necessary. As to the merits of the case, we express no opinion, but leave the same to be investigated when the new trial is had. Judgment reversed. All the justices concurring.

(105 Ga. 300)

HAMILTON et al. v. STEWART.

(Supreme Court of Georgia. July 26, 1898.)

COMPROMISE AND SETTLEMENT—ACCEPTANCE OF PROPOSITION—PRESUMPTION.

Two persons being indebted to each other, one upon an account for money loaned, the other upon two promissory notes, and the open-account creditor having rendered to the other a statement of the account, accompanying the same with a check for the difference between the two debts, and a letter stating that it was to cover the balance due, and requesting that the notes be canceled and returned, such statement and letter were equivalent to a proposition of settlement upon the terms stated in the letter; and a presentation of the check for payment, and the retention of the proceeds of the same, would, after the lapse of a reasonable time from the submission of the proposition, and the failure to return the money, raise a conclusive presumption of the acceptance of the proposition contained in the letter. Especially would this be the result in a case where the open-account creditor, relying upon the retention of the money as an acceptance of his proposition, allowed his claim to become barred by the statute of limitations.

(Syllabus by the Court.)

Error from city court of Floyd; G. A. H. Harris, Judge.

Action by B. M. Stewart against Hamilton & Co. and others. There was a judgment for plaintiff, and defendants bring error. Reversed.

Wright & Hamilton and C. Rowell, for plaintiffs in error. Fouché & Fouché, for defendant in error.

COBB, J. On February 20, 1897, Stewart brought two suits upon promissory notes

against Hamilton & Co., which were afterwards consolidated and tried as one suit. Upon one note appeared a credit of \$200, dated May 7, 1891, and upon the other a credit of \$776.62, dated February 15, 1894. The defendants pleaded that the payment of \$776.62 was made by them in full satisfaction of the note, and was so accepted by the plaintiff. It appeared from the evidence that on the date last mentioned the defendants made out a statement in which the plaintiff was charged with sundry items of cash advanced at various times from December 23, 1891, to October 11, 1892, with interest to February 15, 1894, \$182.02, and with the remittance at the time of \$776.62. The account was balanced by crediting plaintiff with the two notes which are sued on, besides interest. The statement of account just described was sent to the plaintiff in a letter, in which it was stated: "We inclose you statement of your account, and our check to cover balance due you. Kindly cancel our notes, and return to us." No reply having been received to this letter, on March 12, 1894, defendants wrote to plaintiff as follows: "On February 15th last, we sent you statement of your account, and our check to cover balance due you, and requested that you cancel the notes held by you, and return to us. Will you kindly attend to this at once?" It appeared that the plaintiff retained the check which was inclosed in the first letter, and collected the amount due thereon. No objection was made to the terms of the settlement contained in the letter until a few months before the present suit was filed. Upon this evidence the judge directed the jury to return a verdict for the plaintiff for the amount sued for, and overruled a motion for a new trial filed by the defendants, which ruling is assigned as error.

When Hamilton & Co. made out the statement in which was set forth the amount admitted by them to be due, and requested that their notes held by Stewart be canceled and returned to them, this was, in effect, a proposition to compromise the indebtedness of each to the other upon the terms stated in the letter. It was the same as if Hamilton & Co. had written to Stewart: "We will pay you \$776.62 in cash upon the condition that you accept the same in full satisfaction of the notes held against us, and upon no other condition are you authorized to retain the amount which we remit." So construed, it was incumbent upon Stewart either to accept the proposition, or decline it. The effect of the second letter was to ask an answer to the proposition submitted. In such cases it is incumbent upon the party to whom the proposition is made to answer the same, either by accepting or refusing, within a reasonable time. The retention of the amount forwarded, declared to be in full settlement of the claim held by the person to whom it is sent, coupled with a failure with-

in a reasonable time to decline the proposition, will raise a conclusive presumption of an acceptance of the terms and conditions set forth in the proposal. While, of course, a party cannot be bound by a settlement, unless he assents to its terms, still this assent may be implied from the circumstances; and conduct inconsistent with a refusal would raise a presumption of assent, upon which the other party would have a right to act. Nothing could be clearer than the proposition that where one person delivers to another property, to be retained upon a condition stated, the party receiving it cannot retain the property and repudiate the condition. In the case of *Fuller v. Kemp* (N. Y. App.) 83 N. E. 1034, it appeared that the plaintiff had sent a bill of \$670 to the defendant, and that the latter declined to pay the bill rendered, but sent a check for \$400, stating that it was to be in full satisfaction of plaintiff's claim. Plaintiff retained the check, but sent another bill for the same amount as the first bill, on which he credited the amount of the check as part payment. The defendant at once notified plaintiff that he had sent the check on condition that it should be received in full payment of his bill, and that plaintiff must either keep it on that condition, or immediately return it. It was held that the debt, which was unliquidated, was satisfied by the retention of the check, since its acceptance involved the acceptance of the condition also. A similar ruling was made in the case of *Nassoly v. Tomlinson* (N. Y. App.) 42 N. E. 715. In the case of *Petit v. Woodlief* (N. C.) 20 S. E. 208, it was held that "where a draft for part of an indebtedness was sent by letter, both draft and letter stating that it was to be in full payment of the debt, the creditor, by converting the draft into money, elects to accept the compromise, and the debt is thereby discharged in full." The principle announced in these decisions is peculiarly applicable where the person making the proposal to compromise by letter and remittance has acted to his prejudice on the presumption arising from the retention of the proceeds of the check, and the failure to answer within a reasonable time, and allowed the demand which he had against the other to become barred by the statute of limitations. It was error, under the facts of this case, for the judge to direct the jury to return a verdict for the plaintiff, and the issue raised by the pleadings should have been submitted to the jury under proper instructions. Judgment reversed. All the justices concurring.

(105 Ga. 512)

SELIGER et al. v. COKER et al.

(Supreme Court of Georgia. July 26, 1898.)

BILL OF EXCEPTIONS—CERTIFICATION—SERVICE—APPEAL—JURISDICTION—DISMISSAL—NOTICE.

1. An acknowledgment of service of a paper purporting to be a bill of exceptions, followed

by a waiver of copy, notice, and further service thereof, entered thereon before the same is certified by the trial judge, does not amount to a service of the same paper after it has been so certified. *Railway Co. v. Brannon* (Ga.) 27 S. E. 663; *Riley v. Echols*, 25 S. E. 649, 99 Ga. 321, and cases cited.

2. Service of a bill of exceptions, or a waiver thereof, being essential to give this court jurisdiction of the case, and service before the bill of exceptions is certified by the judge being in law no service, a writ of error upon which appears no other service than one purporting to have taken place before the bill of exceptions was certified will be dismissed. The rule of this court requiring notice of motions to dismiss a writ of error to be given 24 hours before the case is called for argument, by its terms, does not apply to a case where jurisdiction is involved. *Sup. Ct. Rule No. 25, 26 S. E. ix; Civ. Code, § 5622.*

(Syllabus by the Court.)

Error from superior court, Floyd county; *W. M. Henry, Judge.*

Action by Seliger & Newman against *W. H. Coker & Co.* There was a judgment for the latter, and the former bring error. Dismissed.

C. A. Thornwell and Fouché & Fouché, for plaintiffs in error. *M. B. Eubanks and McHenry & Nunnally*, for defendants in error.

PER CURIAM. Writ of error dismissed.

(105 Ga. 306)

HENDERSON v. SHIFLETT.

(Supreme Court of Georgia. July 26, 1898.)
LEGITIMATING BASTARD—OBJECTIONS BY MOTHER.

The mother of a bastard child has a legal right to file objections to a petition brought by the father for the purpose of legitimating the child. The uncontradicted evidence on the trial of the issue thus formed in the present case showing that the father was a profligate character, dissipated, worthless, insolvent, and authorizing the judge to conclude that the petition was not filed in good faith, the judgment refusing to legitimate the child was demanded.

(Syllabus by the Court.)

Error from superior court, Floyd county; *W. M. Henry, Judge.*

Application by *C. H. Henderson* for the legitimating of his bastard child. *Lila Shiflett* filed objections. Application denied, and petitioner brings error. Affirmed.

Wright & Ewing, for plaintiff in error. *McHenry & Nunnally*, for defendant in error.

LEWIS, J. The only question presented by this record is whether or not the mother of a bastard child has the right to file objections to proceedings instituted by its father for the purpose of legitimating the child. The natural ties and affection which bind the mother to her offspring certainly give her the deepest concern and interest in its welfare; and, independent of any statute, it would seem that she would have a right to be heard in court whenever steps are taken to place her child under the control or in the custody of another. It is true in this case that the plaintiff stated on the trial he was willing for the mother to re-

tain the custody of the child, but, even if such an agreement could be binding in a proceeding of this sort, it does not provide for the welfare of the child in the event the mother should die during its minority. The statute (section 2494 of the Civil Code) provides that, when such application is made, the mother, if alive, shall have notice. There would be no sense in such a requirement of notice, if the mother were not allowed to be heard in the case. The law is not mandatory upon the judge to grant the prayer of the petitioner simply upon proof of the fact that he is the father of the child, but it says that he "may pass an order declaring said child to be legitimate." As to whether or not it is proper to grant such an order would depend upon the facts and circumstances presented to the court upon the hearing. His refusing the application in the present case was not only no abuse of discretion, but was a wise, just, and humane exercise of it. Judgment affirmed. All the justices concurring.

(105 Ga. 512)

HIGHT v. McCONNELL et al.

(Supreme Court of Georgia. July 26, 1898.)

REFUSAL OF INJUNCTION.

Under the allegations contained in the plaintiff's petition, there was no abuse of discretion in refusing an injunction.

(Syllabus by the Court.)

Error from superior court, Floyd county; *W. M. Henry, Judge.*

Action by *J. L. Hight* against *J. P. McConnell* and others. Judgment for defendants. Plaintiff brings error. Affirmed.

Lumpkin & Printup, for plaintiff in error. *Wright & Ewing*, for defendants in error.

PER CURIAM. Judgment affirmed.

(105 Ga. 305)

MILLER et al. v. MILLER et al.

(Supreme Court of Georgia. July 26, 1898.)

DESCENT AND DISTRIBUTION—ADVANCEMENTS—GUARDIAN AND WARD—ESTOPPEL BY DEED—EXECUTORS—YEAR'S SUPPORT.

1. Where a father, as the legal guardian of certain of his minor children, petitions the ordinary for leave to invest a certain fund of his wards in land, and, under an order granted for this purpose, he, as an individual, conveys to himself, as guardian, certain lands, no part of the lands thus conveyed can be treated as an advancement to these children, although the land may be worth more than the fund which originally belonged to the wards.

2. There was no error in excluding testimony offered which tended to show that the father intended any portion of the investment as an advancement.

3. The title to a year's support set aside to a widow and her minor children vests absolutely in the widow and children. Upon the marriage of one of the minors before the payment of such support by the administrator, no portion of the support should on that account pass back into the estate of the decedent for distribution among heirs and creditors.

(Syllabus by the Court.)

Error from superior court, Floyd county; W. M. Henry, Judge.

Contest between F. W. Miller and others and Della Miller and others. There was a judgment for the latter, and the former bring error. Affirmed.

A. G. Ewing and Wright & Ewing, for plaintiffs in error. J. Branham, J. B. F. Lumpkin, and Nat. Harris, for defendants in error.

SIMMONS, C. J. 1. Under the facts of the present case, there was no error in overruling the objections to the report of the auditor. Plaintiffs in error claim that the land conveyed by Miller to his three wards was worth much more than the amount which he received for it, and that the excess of this value should be treated, in the distribution of Miller's estate, as an advancement to the wards, children by his second wife. We think it cannot be so treated. The transaction which he, as guardian, entered into with himself as an individual, with the approval of the ordinary, was in the nature of a bargain and sale. He was willing, as an individual, to sell to himself, as guardian, the three-fifths interest in the land for the amount of money which belonged to his wards. If the three-fifths undivided interest was worth more than he agreed to take for it, he must have known it, and must at that time have been willing, for the \$1,146.21, to put in his wards the title to this interest. If he were living, and the wards had sued him for the land, he would be estopped from setting up the fact that the land was worth more than he received for it. If he could not himself legally set up such a claim, his children by his first wife cannot do so, although, after the conveyance had been made to himself as guardian, he may have made declarations to the effect that he intended the excess in value of the land as an advancement to his wards, and although he alleged in his petition to the ordinary that he intended to give the other two-fifths undivided interest in the land to his two children by his first wife, so as to make them equal to the three by his second wife.

2. The above being true, there was no error in excluding testimony to the effect that Miller had said upon divers occasions that he intended the excess in the value of the land as an advancement, and that he had made other declarations tending to show that he intended to give his other children (those by his first wife) the other two-fifths interest, so as to make them equal to the others. The petition to the ordinary, and the deed made in pursuance thereof, in which there was no reservation of this sort, would, as before remarked, estop him and his privies

from making any such claim to the excess in the value of the land over the amount he received for it.

3. When Miller died, his widow applied for, and had set apart, a year's support for herself and minor child. When a year's support is thus set apart, the title to the property vests at once in the widow and minor child, and cannot be administered as the estate of the deceased husband and father. Civ. Code, § 3468. If it be set apart for them jointly, they own it in common. If set aside separately, a certain amount to each, what is set aside to the widow vests in her, and what is set aside to the child vests in the child. It does not appear from the record whether this year's support was set apart jointly or severally to the widow and child; nor does it matter, so far as the present case is concerned. In neither event would the child's share revert to the estate of the intestate upon the marriage of the child. If the year's support was set aside to the widow and child jointly, the widow is entitled to use and control it as long as the money lasts, or as long as she lives, even though the child marry or become of age. The child in such case cannot force a division of the property so set apart. *Whitt v. Ketchum*, 84 Ga. 123, 10 S. E. 503; *Roberts v. Dickerson*, 95 Ga. 727, 22 S. E. 654. If a portion of the year's support was set apart to the child separately, the title vested in the child, and the property does not revert to the estate of the father in the event of the child's marriage or death. Judgment affirmed. All the justices concurring.

(105 Ga. 512)

SOUTHERN RY. CO. v. EARLY.

(Supreme Court of Georgia. July 26, 1898.)

RAILROADS—INJURIES TO STOCK—EVIDENCE.

The presumption of negligence against the company arising from proof of the killing of live stock by the running of its train was rebutted and overcome by uncontradicted and unimpeached testimony clearly showing that the defendant was in the exercise of all ordinary and reasonable care and diligence when the injury occurred. The verdict for the plaintiff, therefore, was contrary to evidence, and the judge erred in not sustaining the petition for certiorari on this ground.

(Syllabus by the Court.)

Error from superior court, Floyd county; W. M. Henry, Judge.

Action by L. W. Early against the Southern Railway Company. There was a judgment for plaintiff, and defendant brings error. Reversed.

Shumate & Maddox, C. W. Underwood, and C. Rowell, for plaintiff in error. Fouché & Fouché, for defendant in error.

PER CURIAM. Judgment reversed.

(106 Ga. 312)

WYATT v. CITY OF ROME.

(Supreme Court of Georgia. July 26, 1898.)

MUNICIPAL CORPORATIONS — ENFORCEMENT OF ORDINANCE—LIABILITIES.

A municipal corporation, while enforcing a valid ordinance requiring citizens and residents of the city to submit to vaccination, is exercising a governmental power, and is therefore not liable to a citizen who may sustain damage on account of impure vaccine matter administered to him by one of the officers or agents of such corporation.

(Syllabus by the Court.)

Error from city court of Floyd; G. A. Harris, Judge.

Action by W. R. Wyatt against the city of Rome. Judgment for defendant, and plaintiff brings error. Affirmed.

C. A. Thornwell and Fouché & Fouché, for plaintiff in error. C. W. Underwood, for defendant in error.

LEWIS, J. The right to prescribe regulations looking to the preservation of the public health is one of those sovereign powers that belong to the state. This power can be delegated by the state to any of its subdivisions of government, such as a municipality or a county, and in the use of it by such subdivisions they are in the exercise of a function purely governmental. As a general rule, a subordinate branch of the government is not liable for injuries sustained by any one, growing out of negligence, misfeasance, or nonfeasance of its officers and agents who are charged with the duty of enforcing laws or ordinances enacted for the public good in the exercise of a governmental function, and not in the exercise of a private franchise. The exceptions to this general rule are not founded so much upon principle as judicial precedents. The rule itself is based upon a principle as old as English law,—that “the king can do no wrong.” It is upon this idea that the sovereignty of a state protects it against suits by its subjects; no one having a right to hold it liable for any act of its officers or agents, unless such right is expressly granted by the state itself. When a municipality exercises a governmental power conferred upon it by the state, it is just as if the state itself were in the exercise of the function thus conferred. Among the precedents which have been established by courts of last resort that are apparently exceptions to this general rule, we have been able to find none that would hold a city liable for any injury that may be sustained as the result of enforcing measures legally enacted for the promotion and preservation of the public health. On the contrary, authority is abundant, and almost limitless, establishing the nonliability of a municipality in such cases. We do not think this is an open question in this state, for it has practically been decided in the case of *Love v. City of Atlanta*, 95 Ga. 129, 22 S. E. 29. The reasoning for the decision in that case given in

the lucid opinion of Justice Atkinson follows the uniform trend of judicial expression, and is especially applicable to the case at bar. On page 133, 95 Ga., and page 30, 22 S. E., he says: “If the state delegate to a municipal corporation, either by general law or by particular statute, this power, and impose upon it, within its limits, the duty of taking such steps and such measures as may be necessary to the preservation of the public health, the municipal corporation, likewise, in the discharge of such duty, is in the exercise of a purely governmental function, affecting the welfare not only of the citizens resident within its corporation, but of the citizens of the commonwealth generally, all of whom have an interest in the prevention of infectious or contagious diseases at any point within the state, and in the exercise of such powers is entitled to the same immunity against suit as the state itself enjoys.” Upon the same line, and practically in point, we cite the following as a few of the many decisions and authorities on this subject: 15 Am. & Eng. Enc. Law, pp. 1164, 1165, with citations; 2 Dill. Mun. Corp. § 977; Tied. Mun. Corp. § 332; *Sherbourne v. Yuba Co.*, 21 Cal. 113; *Summers v. County of Daviess*, 103 Ind. 262, 2 N. E. 725, in which it is decided that “counties are instrumentalities of government, and are not liable for injuries caused by the negligence of the commissioners in the selection of an unskillful or incompetent physician for the care of the poor”; *Ogg v. City of Lansing*, 35 Iowa, 495, in which it is ruled that “a city is not liable for the negligence of its officers or agents in executing sanitary regulations adopted for the purpose of preventing the spread of contagious disease, or in taking the care and custody of persons afflicted with such disease, or the houses in which such persons are kept.” The city in the present case was in the exercise of a most important function of government, in which not only the inhabitants of the city, but the public at large, were interested. The measure in question which it adopted looked to the prevention of the spread of a contagious and serious malady with which it was at the time perhaps threatened. To allow any citizen a right of action on account of injuries, real or supposed, that he may have suffered in the interest of the public good, would be to paralyze the arm of the municipal government, and either render it incapable of acting for the public weal, or would render such action so dangerous that the possible evil consequences to it, resulting from the multiplicity of suits, might be as great as the smallpox itself. Hence the wisdom of the law in exempting it from liability on such an alleged injury as is set forth in the petition. It was not claimed, either in the pleadings or argument, that the city of Rome did not have the right to pass the ordinance requiring its citizens and residents to submit to vaccination. On the contrary, the suit was not bas

ed on any alleged want of authority in the city to legislate on the subject, but solely on the negligent manner in which the city, through its officers and agents, enforced this ordinance. Judgment affirmed.

(105 Ga. 319)

HUIE v. McDANIEL et al.

(Supreme Court of Georgia. July 28, 1898.)

DEEDS—CONSTRUCTION—TENANCY IN COMMON—APPEAL—RECORD—REVIEW.

1. The cardinal rule of construction of deeds, as well as other contracts, is to ascertain the intention of the parties. If that intention be clear from the deed and circumstances of the transaction, and contravenes no rule of law, it should be enforced, notwithstanding there might be mere literal repugnancies in different clauses of the conveyance. It follows from the above that where a father, in the granting clause of a deed, conveys to his daughter, "her heirs and assigns," a certain tract of land, and afterwards, in the habendum clause, the conveyance is enlarged by words to have and to hold said land and its appurtenances unto the daughter and her two children (naming them), "made equal as heirs," the real intention of the parties to the conveyance was to pass an estate in common to the daughter and the other two named persons. An action of ejectment for the recovery of a portion of the land embraced in the deed in favor of these three owners as plaintiffs can be maintained.

2. This court cannot consider any ground in the motion for a new trial complaining of errors in the court below in admitting or rejecting testimony, when the motion fails to set forth what was the particular testimony thus admitted or rejected.

3. There was sufficient evidence to sustain the verdict.

(Syllabus by the Court.)

Error from superior court, Carroll county; S. W. Harris, Judge.

Ejectment by W. G. McDaniel, administrator, and others, against D. B. Huie. There was a judgment for plaintiffs, and defendant brings error. Affirmed.

W. Capers Hodnett, for plaintiff in error. W. F. Brown, S. Holderness, C. P. Gordon, and Adamson & Jackson, for defendants in error.

LEWIS, J. Ejectment was brought against Huie for a certain part of lot No. 142, in the Ninth district of Carroll county. Two demises were laid,—one in Mrs. M. E. McDaniel, and the other in Mrs. M. E. and Annie and Mattie McDaniel. J. B. McDaniel, the common grantor of the parties, and who formerly owned the whole of lot 142, made a deed in November, 1874, conveying the south half of the lot to himself, as guardian for certain minors, named Cock, and subsequently, under an order of court, conveyed it, as guardian of these minors, to Samuel A. Brown, who in 1883 executed a deed reciting that, in consideration "of the natural affection of a father to his child, I, S. A. Brown, of the county of Heard, do hereby give and bequeath to daughter M. E. McDaniel, of the county of Carroll, her heirs and assigns, a tract or parcel of land [describing it]." "To

have and to hold said land and its appurtenances, unto said M. E. McDaniel, M. H. McDaniel, A. E. McDaniel, made equal as heirs, her heirs, executors, administrators, and assigns, in fee simple." Then follows: "I warrant the title to said land against the lawful claims of all persons." M. H. and A. E. McDaniel are daughters of M. E. McDaniel. On May 15, 1875, J. B. McDaniel conveyed to the defendant a tract described in the deed as "fifty acres square in the north-west corner of" lot 142. The plaintiffs contended that Huie was in possession of a part of their land in the south half of lot 142. Defendant contended that the land in question was not a part of the south half, but was north of a line established by J. B. McDaniel in 1872 as the boundary line between the north half and the south half of the lot, and that he (Huie) was in possession of the strip of land in dispute before the deed to the south half was made by McDaniel to himself as guardian, and had ever since remained in possession, and had a good prescriptive title to it. The jury rendered a verdict in favor of the plaintiffs for the premises in dispute, and \$140 "for damage and rents." The defendant's motion for a new trial was overruled, and he excepted.

1. One of the grounds in the motion for a new trial is, "Because the court erred in holding, when the question was raised and passed upon, that the deed from Samuel A. Brown to Mrs. M. E. McDaniel conveyed such title to all of the plaintiffs as would authorize them to recover in this case." We do not think there is any serious difficulty in arriving at the real intention of the grantor, Brown, from the words above quoted from his deed. The granting clause of the deed conveys a fee-simple estate to his daughter Mrs. M. E. McDaniel; and the habendum clause manifestly intended to include in the conveyance her daughters, M. H. and A. E. McDaniel. The expression, "made equal as heirs," can have but one reasonable construction; and that is that the three persons named in the habendum clause shall each have an equal interest in the premises conveyed, as tenants in common. The grantor perhaps thought the words "her heirs," in the granting clause of the deed, were sufficient to convey title, also, to the grantee's children. This, of course, was not true. But he had a right to designate in the deed what he meant by his "heirs"; and this he did, in the habendum clause, by specifying the names of his grandchildren, "made equal as heirs." The question arises, shall the real intention of the grantor, as manifested by his writing, be respected by the courts, or shall it be ignored in a literal and rigid enforcement of the ancient rule that, of two repugnant clauses in a deed, the latter must yield to the former? We can see no sound reason why any different rule of interpretation of words in a deed should prevail from what would ordinarily govern in cases of other contracts. Were this an or-

dinary contract, the entire instrument would be so construed together as to make all its parts stand, if possible, and to carry out the real intention of the contracting parties, and reconcile all apparent differences and conflicts in the language used. Section 3673 of the Civil Code declares: "The cardinal rule of construction is to ascertain the intention of the parties. If that intention be clear, and it contravenes no rule of law, and sufficient words be used to arrive at the intention, it shall be enforced, irrespective of all technical or arbitrary rules of construction." This cardinal rule of construction has several times by this court been applied to deeds, in cases where repugnant clauses existed in them. In *Thurmond v. Thurmond*, 88 Ga. 182, 14 S. E. 198, a deed, in its granting, habendum, and warranty clauses, by its terms conveyed the absolute fee-simple title to land to certain grantees named. Following the warranty clause was a provision in the deed that at the death of one of the grantees his interest in the land should go to certain other parties named. It was held in that case, in effect, that, the intention of the grantor being to limit the estate taken by one of the grantees named in the first part of the deed, such intention should be carried into effect, notwithstanding a mere literal repugnancy in the several clauses of the conveyance. See, also, *Henderson v. Sawyer*, 99 Ga. 234, 25 S. E. 312, and cases there cited. These rulings seem based upon the idea that the section of the Code cited modifies the old rule upon the subject of repugnant clauses in a deed. The trend of modern authorities seems to be in the same direction. The rigid rule of construction that once prevailed in regard to such instruments is fast giving place to a more liberal one, which does not hunt up technicalities of the law that oft result in defeating the real and manifest wishes of contracting parties. Where truth was at one time so walled in by a rigid adherence to old doctrines that the light was admitted only here and there, through cracks and crevices of these ancient walls, the tendency now is, and should be, to throw open wider the doors, and admit the full sunlight, with the view of finding and enforcing this cardinal rule of intention. In *Bodine's Adm'rs v. Arthur*, 91 Ky. 53, 14 S. W. 904, it was ruled that where a deed, in the granting clause, conveyed land to a certain party named, and in the habendum clause it included, not only the grantee named, but also the grantee's children, it should be construed as meaning that the grantor intended the habendum to operate as an addendum or proviso to the granting clause.

2. There were several grounds in the motion for a new trial complaining of errors of the court in admitting and rejecting testimony, but these grounds cannot be considered, for the reason that the motion fails to set forth the particular testimony thus admitted or rejected, and hence it is impossible for

us to pass upon its materiality or relevancy. For instance, objection is made to a witness testifying upon a certain subject. Upon examination of his evidence in the record, we find that much, if not all, of his testimony upon this particular matter was relevant and proper; and, our attention not being called to any special portion of it in the motion, we cannot say that the court erred in admitting any part thereof. Again, objection is made to the rejection of the bond for titles from the common grantor to the defendant, without setting forth the terms of the bond, or giving a description of the particular premises it was intended to cover. We are therefore left in the dark whether the bond, if it had been admitted in evidence, would have thrown any light on the case.

3. It is insisted by counsel for plaintiff in error that the verdict is contrary to the evidence, in that the testimony showed a perfect prescriptive title in the defendant, namely, seven years' possession under color of title. This contest arose over a disputed line between coterminous landowners. The narrow strip, in the shape of a trapezoid, which was in dispute, was originally covered with a dense growth of trees, and seems to have remained so until two or three years, perhaps, before the bringing of this suit. The jury might fairly have inferred that the possession by the defendant of this disputed strip did not become openly adverse until he commenced clearing the land for the purposes of cultivation, within a year or two before this action was filed. There is at least sufficient evidence in the case to hold that there was no abuse of discretion by the trial judge in approving the verdict and refusing a new trial. Judgment affirmed. All the justices concurring.

(106 Ga. 514)

ACHBY et al. v. DODSON.

(Supreme Court of Georgia. July 27, 1898.)

INSTRUCTIONS—DEFECTS IN DECREE—NEW TRIAL—CONFLICTING EVIDENCE.

1. The charge complained of, when taken in connection with its context and the entire charge, was not erroneous.

2. The verdict, properly construed, is a general finding for the plaintiff against the defendant, who was claiming title to the land in dispute; and upon such verdict, the case being one in which equitable relief was prayed, a decree should have been rendered in conformity to the pleadings, and the principles of equity applicable in such cases. That the decree entered was not so framed would not be ground for a new trial. Such an error can only be taken advantage of by a bill of exceptions pendente lite, or by a final bill of exceptions, if sued out within due time for such purpose after the date of the decree.

3. There was no error of law requiring the granting of a new trial. Though on the controlling question in the case the evidence was conflicting, still there was some evidence to authorize the verdict; and, the trial judge having approved the finding, his judgment will not be disturbed.

(Syllabus by the Court.)

Error from superior court, Gordon county; A. W. Fite, Judge.

Suit by Harriet Dodson against Frances L. Achey and others. Decree for plaintiff. Defendants bring error. Affirmed.

T. R. R. Cobb and Rosser & Carter, for plaintiffs in error. Rankin & Kiker and R. J. & J. McCamy, for defendant in error.

PER CURIAM. Judgment affirmed.

(105 Ga. 353)

SOUTHERN MIN. CO. v. LOWE et al.

(Supreme Court of Georgia. July 27, 1898.)

**INJUNCTION—RESTRAINING PRISON COMMISSIONERS
—CONVICT CONTRACTS.**

The writ of injunction does not, under any circumstances, or at the instance of any person, lie against the prison commissioners of this state, to restrain them from entering into a contract for the hiring of convicts, nor against any person or persons with whom the commissioners are about to make such a contract, when the granting of the injunction would, either directly or indirectly, interfere with the performance by the commissioners of the duties devolved upon them by the act creating a prison commission for this state.

(Syllabus by the Court.)

Error from superior court, Fulton county; J. H. Lumpkin, Judge.

Action by the Southern Mining Company against W. B. Lowe and others. Judgment for defendants, and plaintiff brings error. Affirmed.

King & Anderson, for plaintiff in error. Jno. L. Hopkins & Sons and J. M. Terrell, Atty. Gen., for defendants in error.

LUMPKIN, P. J. The Southern Mining Company brought an equitable petition against W. B. Lowe, certain named corporations, and the prison commissioners of Georgia. The case made by the plaintiff's allegations, so far as material to the present discussion, was, in brief, as follows: Under the act of December 21, 1897 (Acts 1897, p. 71), the prison commission invited bids for hiring the penitentiary convicts of this state. The plaintiff desired to obtain 300 of them. It entered into an agreement with Lowe whereby he, as its agent, was to deal with the prison commissioners, and in its behalf make bids for the 300 convicts it wished to hire. A number of other named corporations and natural persons made Lowe their agent for the same purpose. He was to bid in behalf of each party for the number of convicts each desired to procure; but, no matter in whose behalf any convicts should be by him obtained from the state, nor whose bids for the same should be accepted, such number of convicts as were in fact awarded to him as the agent of all or any of these parties, whether more or less than the numbers actually bid for, should be distributed pro rata among all the corporations and other persons represented by Lowe. After much discussion, it was finally agreed by Lowe and all the parties so

represented by him that, as their agent, he was to bid \$96 per annum for each convict, though it was nevertheless further agreed that in the event the bids made in behalf of petitioner or the others represented by Lowe should not (any of them) be accepted, he was to continue to represent petitioner and the other parties in the effort to procure convicts, if, by the rejection of bids, further opportunity should be presented to deal with the prison commission so as to accomplish the end in view, viz. to obtain the use of some of the convicts to be hired by the state under the above-mentioned act, who were intended, in the case of the plaintiff, to be employed in working certain coal mines owned and operated by it in Dade county. The plaintiff vested in Lowe full and unconditional power to represent it, and agreed to be bound by any contract made by him in its behalf. There were, in all, but 1,800 convicts to be hired by the prison commission. In pursuance of the agreement above set forth, Lowe filed with the prison commission a paper whereby, as agent of a number of specified parties, he offered to take for each a stated number of convicts at \$96 each per annum. In this paper he referred to plaintiff as the "Dade Coal Mines." Upon opening the bids received by them, the prison commissioners awarded to persons who had bid \$98 per annum for each convict 1,100 convicts. As to the remaining 700, the commissioners declined to accept any bid of less than \$98 per annum for each, and informed Lowe, as agent of the parties for whom he had made bids, that, if he would raise the price offered for each convict from \$96 to \$98 per annum, the commission would award to him, as such agent, the 700 convicts yet to be hired. Lowe accepted this proposition, agreeing with the prison commission to take the 700 convicts at \$98 per annum each, and they were awarded to him at that price. In view of all the facts, the plaintiff will be entitled to receive, at the expiration of the present lease, 122 of the 700 convicts awarded to Lowe as above set forth, this being its just proportion of the same. It has, through its president, demanded of Lowe that he cause to be made and delivered to it a contract executed by the prison commissioners whereby it may be recognized as the lessee of the 122 convicts; but Lowe refuses to recognize petitioner's right to any portion of the convicts, and declines to comply with its demand, all of which is in fraud of its rights, and in violation of the contract made between petitioner and Lowe. Petitioner has demanded of the prison commission not to enter into any contract with Lowe, or with any party named by him, so as to deprive petitioner of its proportion of the said 700 convicts; but, notwithstanding this demand, these officials are proceeding to execute contracts for all of these 700 convicts to certain corporations named by Lowe as being entitled to the same, and refuse to enter into any contract with petitioner. hir-

ing to it any portion of the convicts. The refusal of the prison commission to make a contract with the plaintiff is based entirely upon the ground that it was dealing with Lowe as agent, and that he has denied that plaintiff was one of his principals. The prison commissioners have stated that, if Lowe would name plaintiff as such, they would make a contract with plaintiff, and that if it is held that Lowe was acting for plaintiff, and it is entitled to any of the convicts, they are ready to recognize plaintiff as one of the bidders, and contract with it accordingly. Among other things, the plaintiff prayed that the defendants be enjoined from entering into any contracts with reference to the 700 convicts awarded to Lowe which do not recognize its rights in the premises.

All of the defendants demurred to the petition upon the ground that it was without equity and set forth no cause of action. Lowe answered the petition, admitting that an arrangement was entered into between himself and the president of the plaintiff by which he (Lowe) was authorized to bid for convicts for it at the price of \$96 per annum, but denying that any authority was conferred upon him to make any other bid in behalf of the plaintiff, or to contract for the hiring to it of any convicts at a price higher than that just named. In his answer he also denied that the plaintiff had given him unconditional power or authority to represent it in the matter, or had agreed to be bound by any contract he might make in its behalf. The answer further alleged, in substance, that, in making the contract for the hiring of convicts, Lowe was in no sense representing or acting for the plaintiff.

At the hearing, the judge heard evidence upon the merits, and passed an order refusing to grant the injunction. In this order, however, it is distinctly stated that the injunction is denied "upon purely legal grounds, and not upon any matter of discretion with reference to conflicting evidence." The question is therefore squarely presented whether or not, upon the assumption that the plaintiff's allegations were proved, it was entitled to the injunction for which it prayed. We agree with the trial judge in holding that it was not.

The eleventh section of the act of 1897 provides that the prison commission shall advertise for bids for the hiring of all the penitentiary convicts not disposed of by the preceding sections, and distinctly declares that the commissioners "may reject any and all of said bids, and may make any other contract of hiring on the plan specified which, in their judgment, will carry out the intentions of this act and subserve the best interest of the state." That this language confers upon the commissioners very broad discretionary powers is apparent from a most casual reading. These powers are to be exercised for and in behalf of the state. It is an essential party to the business,—indeed, the only party inter-

ested on one side of the great question of disposing of its convicts. The state owns their labor. No one can acquire an interest therein except by a contract with the state, and, whatever agency may be employed in making such contract, the state is the real lessor. The prison commissioners in the present case are sued as officials, having no personal interest in the subject-matter of the suit. The injunction sought, if granted, would be against representatives of the state in their official capacity, and therefore neither more nor less than a judicial proceeding against the state itself. It has not consented to be sued directly, nor authorized the bringing of an action against the prison commission. It is well settled that executive officers of a state, exercising functions in which they have discretionary powers, cannot be reached by injunction. In *Scofield v. Perkerson*, 46 Ga. 359, Chief Justice Warner said that the issuing of executions by the comptroller general to collect the public revenue due the state was "the act of the executive department of the state government," and that the courts have no power or authority "to restrain that department of the government from doing so." And see, in this connection, *Peoples v. Byrd*, 98 Ga. 688, 694, 695, 25 S. E. 677. It makes no difference that the injunction is not sought against the governor by name, nor against the state as a commonwealth. The effect of granting the injunction would nevertheless be to enjoin the state itself from entering into and carrying out a contract through its officers connected with the executive department. These latter can no more be reached by the process of injunction than can the governor himself. As stated in 2 High, Inj. § 1326: "The true test in all such cases is as to the nature of the specific act in question, rather than to the general functions and duties of the officer. If the act which it is sought to enjoin is executive instead of ministerial in its character, or if it involves the exercise of judgment and discretion upon the part of the officer, as distinguished from a merely ministerial duty, its performance will not be prevented by injunction." The position urged by counsel for the plaintiff in error, that Lowe and his co-defendants other than the prison commissioners could properly be enjoined, cannot be adopted as sound. Such a course would simply result in indirectly enjoining the commissioners, and this cannot be done in any manner. Nothing ruled in any of the following cases conflicts with what is now decided: *The case of Wright v. Railroad Co.*, 64 Ga. 783, is not in point. That case turned upon the propositions that there was no valid law authorizing the collection of the taxes alleged to be due by the railroad company, and that consequently the issuing of the executions by the comptroller general, and the levying thereof by the sheriff, were illegal acts, which a court of equity should restrain. What has just been said is also applicable to

the case of *Mayo v. Renfro*, 66 Ga. 408. The main and controlling issue in the cases of *Penitentiary Co. v. Nelms*, 65 Ga. 67, 499, Id., 67 Ga. 565, and Id., 71 Ga. 301, was whether or not, as matter of law, the Marietta & North Georgia Railroad Company was entitled to certain convicts. The determination of this issue depended upon purely legal questions. The principal keeper of the penitentiary was charged with no duty with reference to these convicts which was otherwise than merely ministerial. Neither the making of a contract by him, nor the exercise of any discretion on his part, was involved.

In reply to the suggestion that the injunction sought in the present case ought to be granted because the prison commissioners raised no question as to the jurisdiction of the court over them, and had assured the plaintiff that, if convinced that Lowe really was its agent in contracting for a portion of the 700 convicts, they would enter into a contract for the hiring to the plaintiff of its proportion of the same, it need only be said that these commissioners cannot, by waiver or otherwise, give to the courts jurisdiction of the state in a case of this nature, nor can they thus delegate to the courts a question the decision of which devolves upon them. It is their duty to ascertain whether the plaintiff was one of the principals for whom Lowe was acting as agent, and to govern their action in the premises accordingly.

We do not deem it necessary to enter into a more elaborate discussion of this case. The principles by which it is controlled were stated and discussed at length in *Peeples v. Byrd*, supra, and the correctness of the doctrine there laid down, and to which we now adhere, could be supported by the citation of authorities ad nauseam. We are fully convinced that the trial judge was right in refusing to grant the injunction, and that his judgment was based upon correct reasons. Judgment affirmed. All the justices concurring.

(105 Ga. 323)

FARLEY v. GATE CITY GASLIGHT CO.

(Supreme Court of Georgia. July 27, 1898.)

NUISANCE—DAMAGES—INADEQUACY—INJUNCTION—INSTRUCTIONS—REMARKS OF COURT—HARMLESS ERROR.

1. Though, in an action to recover damages for the maintenance of a continuing nuisance, the jury return a verdict for only nominal damages, such verdict will not be set aside on the grounds that it is contrary to law and evidence, and so small in amount as to show "bias and prejudice on the part of the jury, and is inadequate and too small," where the evidence is conflicting, and there is evidence which authorizes a finding that the premises of the plaintiff had sustained no injury resulting in pecuniary damage to the plaintiff, and that the same had not been rendered substantially uncomfortable and unhealthy for occupancy by herself and family as a residence.

2. In such a case a charge in the following language, "One who owns a lot has a right to have the air which passes over his or her property to be in a natural state, considering the

location, situation, and surroundings of the lot,"—was inaccurate; yet, where there was evidence tending to show that the premises of the plaintiff were invaded by foul gases and noxious odors, and the soil of her lot permeated with poisonous substances, emanating from other sources, with which the defendant had no connection, and it appeared that this instruction, when read in connection with the entire charge of the court on this particular branch of the case, clearly instructed the jury that the defendant, while answerable for the existence of any nuisance created by its works, would not be responsible for any act or conduct of others, or for the invasion of her premises by foul gases, noxious odors, or poisonous substances emanating from other, independent, sources, such charge is not good cause for a new trial.

3. The charge of the court fully and correctly instructed the jury what damages the former recovery embraced, and also the elements of damages and the measure of the plaintiff's recovery in the present action.

4. Where, in the trial of an action to recover damages for a continuing nuisance, the jury find that the plaintiff has suffered no special damage, and yet find that a nuisance exists, a verdict for nominal damages is proper.

5. In the trial of such a case, where it appears that the plaintiff had previously instituted an action and recovered damages sustained by her by reason of the creation and maintenance of the same nuisance, an announcement made by the presiding judge, in open court, in order to properly confine the range of evidence, as to what damages were embraced or recovered in the former action, and as to what items of damage might be recovered in the subsequent action, is not cause for a new trial, even though made in the presence of the jury, where it appears that such announcement was made by request of counsel for both parties, that they made no request for the jury to retire, and that the judge, in his charge, carefully instructed the jury that they had nothing to do with the admissibility of evidence, or the colloquies on the subject of the admissibility of evidence, but should try the case under the law as given them in charge, and the opinion they entertained of the evidence admitted. Especially will such announcement afford no cause for a new trial where it appears that the announcement, as made, is pertinent to the issues involved, and is not itself an inaccurate statement of the law touching the subject with which it deals.

6. If, in such a case, the plaintiff also seeks to obtain an injunction to prevent a continuance of the nuisance, a charge in the following language: "But the plaintiff must show you that the defendant is not only maintaining a nuisance, but that it will continue to do so in the future, and that it is necessary for the protection of the plaintiff's rights in the future to enjoin the defendant,"—should not be given, because inaccurate; but, nevertheless, the discretion of the trial judge in overruling a motion for a new trial on exception taken to such charge will not be disturbed, where there is evidence warranting a finding that the plaintiff had sustained no special damages, and that her premises had not been rendered substantially uncomfortable or unhealthy for occupancy by herself and family as a residence, and also evidence warranting a finding that subsequent to the institution of the action, but prior to the trial, the defendant had practically abated such nuisance.

(Syllabus by the Court.)

Error from superior court, Fulton county, J. H. Lumpkin, Judge.

Petition by Mary Farley against the Gate City Gaslight Company to enjoin the maintenance of a nuisance, and to recover damages for its maintenance. There was a judg-

ment for plaintiff for nominal damages, and she brings error. Affirmed.

Longino & Gollightly, for plaintiff in error.
Van Epps & Leftwich, for defendant in error.

LITTLE, J. On May 4, 1893, Mrs. Mary Farley filed in the city court of Atlanta her petition against the Gate City Gaslight Company to recover damages from the latter alleged to have been sustained by her, in her person and property, by reason of the maintenance by the defendant of an alleged nuisance. She showed that she was the owner of a house in the city of Atlanta, which she and her family occupied as a dwelling; that there was on the premises a well of pure water,—a rich and valuable garden spot, on which she raised fruits and vegetables; and that large shade trees, shrubbery, and flowers, which contributed to the comfort of petitioner and her family, and to the attractiveness of their home, were also growing on said lot. She showed: That, while occupying and thus in the enjoyment of her home, the defendant purchased a lot in close proximity to that of plaintiff, divided therefrom only by a street 28 feet wide, and that said lot was elevated above the lot of plaintiff. That the lot purchased by defendant had before the purchase been vacant, or occupied by residences, and that the defendant, without the consent of petitioner, and against her will, placed on the lot so purchased buildings, machinery, and appliances for the manufacture of gas, and dug out and constructed wells or reservoirs of large dimensions for the purpose of holding gas and storing same for distribution over the city for illuminating purposes. That these reservoirs were filled with water, and over them were placed large holders, supported by framework, and adjusted so as to move up or down according to the amount of gas therein contained, and to supply the necessary pressure for the distribution of gas. In excavating said wells or reservoirs, the defendant utilized the dirt in building a wall or embankment some 20 feet high on the line of its lot adjoining the street which divides the plaintiff's lot from that of the defendant; the wall or embankment and tops of the reservoirs being some 20 feet higher than the surface of petitioner's lot. The largest reservoir is situated just across the street, and within about 40 feet of the residence and well of petitioner. The reservoirs have capacity for many thousands of gallons of water, are kept nearly full all the time, and there is no outlet for the escape of water, except by an overflow pipe at the top of one of the reservoirs, or by surface leakage, absorption through the walls, or by evaporation. Between the walls of the reservoirs and the walls of the holders there is a space of 2 to 3 feet around the same, which is open and never closed or covered, and in which filth can fall and accumulate, and, when so fallen, there is no way to get it

out, except by removing the water, which is never done. This water, by reason of long standing, and accumulations of filth, and contact with the gas, or other causes, has become stagnant, impure, odious, and offensive, from which petitioner and her family suffer annoyance. There escape and issue from the plant and works, and from the reservoirs and holders, unpleasant, offensive, noxious, and unhealthy odors, gases, and vapors, which permeate and contaminate the atmosphere about the premises of petitioner, producing headache, coughs, nausea, stupidity, dullness of feeling, and depression of spirits, and otherwise injuring the health of petitioner and other members of the family, rendering her home almost uninhabitable. Prior to the erection and operation of the works there was rarely ever any sickness in the family, but since that time, to wit, the 15th day of May, 1889, the health of petitioner and other members of the family had been seriously affected, and there have been two cases of fatal sickness in the family. By reason of the escape, leakage, and drainage from the reservoirs of the impure matter and noxious gases which have seeped through and percolated the soil of her lot, her well of water has been rendered impure and wholly unfit for use, and plaintiff has had to abandon same; and in consequence of the impurity of the atmosphere and pollution of the soil the trees, shrubbery, flowers, etc., on petitioner's premises are dying and have died, depriving petitioner and family of pleasure and comfort, and for the same reason vegetation will not grow and thrive upon the premises; and petitioner has had to abandon her garden spot, which contributed largely to the support of herself and family, and from which she derived considerable income. She alleged: That the gas contained in the holders was explosive and dangerous, and a constant menace or source of annoyance and anxiety to petitioner. The damage to her and her property is gradually and steadily increasing, growing more and more injurious, burdensome, and damaging. The erection, maintenance, and operation of the plant, etc., is a nuisance, and the hurtful, injurious, and damaging character and effects thereof have steadily and continuously increased from its beginning to the present time. She showed: That the noxious and unhealthy odors, gases, and vapors have continuously increased in volume and virulence, and the leakage, drainage, etc., from the reservoirs have constantly increased in quantity and in impurities, forming and constituting a growing and continuous nuisance, to the great damage of petitioner. When the defendant is engaged in manufacturing gas, great volumes of soot, smoke, etc., issue from its works, which permeate the atmosphere in and around petitioner's premises; settling in on her house, furniture, etc. Her property by reason of all of said acts, has been rendered almost valueless, the market and rental value

thereof being decreased in named sums, and she has suffered special damage in all the ways aforesaid. That the defendant had maintained the nuisance from the 15th day of May, 1889, to the filing of the petition, and that same had not been abated. On the trial of the cause in the city court the jury were instructed that if they should find, under the leadings and evidence, that the defendant had maintained the nuisance as charged, they would be authorized to render a verdict in her favor for all appreciable damage to her property, or the enjoyment thereof as a residence, during the four years next preceding the filing of the suit, which resulted by reason of the creation and maintenance of such nuisance. The jury rendered a verdict for \$1,000 in favor of the plaintiff. The defendant made a motion for a new trial, which was overruled, and upon writ of error to this court the judgment of the court below was affirmed. 95 Ga. 796, 23 S. E. 119.

On the 14th day of August, 1894, Mrs. Farley filed in the superior court of Fulton county her equitable petition against the Gate City Gaslight Company, in which, after referring to the previous action brought by her, she alleged that, although by that action it was established that the defendant was maintaining a nuisance as against her, it did not on the 4th day of May, 1893, and had not since that day, and up to the time of filing the present petition, abate said nuisance, but that it was continuing to maintain the same. She alleged that in that suit she was allowed to recover damages only to the date of bringing the same, and did not recover anything either for damage to person or property from the date of the filing of the former suit to the present date. She charged that it was the duty of the defendant to have abated the nuisance, but it failed and refused to do so, but maintained said nuisance from the 4th day of May, 1893, to the date of filing the present petition, knowing the same was wrong, and dangerous to petitioner's health, and damaging her property, and that, therefore, the wrong which defendant was perpetrating was willful, and should subject it to punitive or exemplary damages, more especially from the date the verdict was rendered in the first suit. She alleges that she sustained \$4,000 damages to her person and property; the elements of damage outlined being injury to her well of water, shade trees, shrubbery, flowers, and trees, garden, market, and rental value of her home, its depreciated value to her as a residence, and physical suffering in her person from the effects of the nuisance. She alleged that said nuisance was a continuous and growing one; that the damages inflicted were irreparable; that the discomfort and ill health resulting from such nuisance could not be fully compensated in money; that no jury could or would fully appreciate and understand the extent of her suffering and discomfort from the nuisance; and for this rea-

son she prayed that the company, its agents and employes, be enjoined from operating said works, and also from in any way allowing gas, foul water, and other poisonous substances from said works to go upon her premises, etc. To this petition the defendant, among other things, filed a plea in abatement, averring that at the commencement of this action, to wit, August 14, 1894, there was, and now is, another action brought in the city court of Atlanta between the same parties and for the same cause as that set forth in the petition which is now in supreme court for final determination, wherefore it prayed that the present action be abated and dismissed, and defendant recover costs, etc. On the trial of the case the jury returned a verdict in favor of the plaintiff for five dollars. The plaintiff made a motion for a new trial, which was overruled, and she excepted.

1. The plaintiff contends that the verdict is contrary to law and to the evidence, and is so small in amount as to show bias and prejudice on the part of the jury, and is inadequate and too small. There was evidence in the record from which the jury could have found that the defendant was not, at the time of the filing of the petition, maintaining a nuisance, and had not maintained such between the date of the institution of the former action and the filing of the present petition. On the one hand, there was evidence from which they could have found that it was maintaining and had so maintained such nuisance. There was also evidence from which they could have found that the plaintiff had suffered damage by reason of a depreciation of the market and rental value of her property, and from the annoyance and discomfort sustained in the occupancy of her house, since the filing of the former suit. On the other hand, there was evidence from which they could have found that no special damage had been sustained by her, either by reason of a depreciation in the market or rental value of the property, or by the rendering of the same substantially uncomfortable for occupancy by her as a dwelling. While the verdict and judgment in the former action adjudicated that at the time of its commencement the defendant had maintained and was maintaining a nuisance, it is obvious that it could not be thereby adjudicated that the defendant would continue to maintain the same in the future. It is undoubtedly true, however, that the verdict and judgment rendered in the former suit included all damages which accrued to the plaintiff prior to the bringing of that suit, growing out of the nuisance for which the suit was brought, and that for such damages there could be no recovery in the present action. While damages cannot be awarded on the assumption that the nuisance is to be continued permanently (*Uline v. Railroad Co.*, 101 N. Y. 98, 4 N. E. 536), yet, in actions for nuisances, as in actions for torts, the measure of dam-

ages is compensation to the plaintiff for the actual injury inflicted. 5 Am. & Eng. Enc. Law, p. 88. Therefore, while a recovery may not be had for prospective damages which might be inflicted were the nuisance continued, yet, where the damages inflicted by the nuisance while in existence are of a permanent character, and go to the entire value of the estate affected by the nuisance, a recovery may be had of the entire damages in one action. Wood, Nuis. § 856, and authorities cited; 3 Sedg. Meas. Dam. § 947, and authorities cited. Where the injury goes either to the market or rental value of the premises, the difference in the market or rental value before the nuisance existed and such value after the nuisance is created is the measure of damage. Peck v. Elder, 3 Sandf. 126; Dana v. Valentine, 5 Metc. (Mass.) 8; McKnight v. Ratcliffe, 44 Pa. St. 150; Thayer v. Brooks, 17 Ohio St. 489; Emery v. City of Lowell, 109 Mass. 197; O'Mara v. Railroad Co., 38 N. Y. 445; Frank v. Railroad Co., 20 La. Ann. 25. Thus, if the plaintiff's premises had sustained permanent damage by reason of the existence of the nuisance prior to the bringing of the first action; if trees, shrubbery, flowers, etc., had been killed or injured; if the well of water had been injured and rendered wholly or partially useless; or if the soil had been rendered wholly or partially unfit to produce vegetation, or its market value diminished, or any other permanent injury done to the plaintiff's lot or premises,—the verdict in the former action must be presumed to have covered such damages, and therefore no second recovery for the same injury could be had. Where the nuisance itself is permanent in its character, and the injury is complete, all damages, both past and prospective, are recoverable, and indeed must be recovered, in one action, as no subsequent action therefor can be maintained. 16 Am. & Eng. Enc. Law, pp. 986, 987, and authorities cited; 2 Wood, Nuis. (3d Ed.) § 865; Powers v. City of Council Bluffs, 45 Iowa, 652. While, therefore, the plaintiff was entitled to recover in the present action for any damages resulting to her, either by reason of depreciation in the market value of her premises or the rental value thereof, or for injury to shade or fruit trees, flowers, shrubbery, vegetation, or fertility of soil, which were caused by the existence of a nuisance maintained by the defendant since the filing of the former suit, as has been said, there was evidence from which the jury might have found that no such damage had been in fact sustained. Analyzed, the verdict of the jury in this case necessarily means that the plaintiff had sustained no special damage, although the defendant had maintained, as against her, a nuisance. The verdict establishes that such nuisance was being maintained at the time of the filing of the petition, or at least had been maintained at some time between the time of the commencement

of the former action and the institution of the latter. The jury therefore properly awarded nominal damages; for, if a nuisance is shown to exist, the law imports damages for an injury to the right, and at least nominal damages may be recovered to protect the right. 2 Wood, Nuis. (3d Ed.) § 866, and authorities cited. It cannot be said, therefore, that the verdict of the jury was contrary to law or to the evidence, nor that it was so small in amount as to be inadequate, or to show bias and prejudice on the part of the jury.

2. The plaintiff in error insists that the court erred in charging the jury as follows: "One who owns a lot has a right to have the air which passes over his or her property to be in a natural state, considering the location, situation, and surroundings of the lot." The plaintiff contends that this part of the charge, taken in connection with the entire charge of the court, tended to confuse the jury and make them believe that other unpleasant surroundings of the property would justify the defendant in creating stenches which would not otherwise be justifiable; that it tended to lead the jury to believe that the gasworks, being near the plaintiff's premises, should be considered, and to some extent justify a state of atmosphere not otherwise natural and pure; that it also tended to make the jury believe that a pollution of the air by other gasworks or other surroundings would justify the defendant in increasing the same, or adding to the pollution, to some extent, and yet not be liable to damages for such contribution. Taken in the abstract, this charge would not be a correct view of the law touching the subject with which it purports to deal. Irrespective of the location, situation, or surroundings of a plaintiff's premises, no one has a right to inflict a nuisance thereupon. Even if such premises were infected with nuisances from other sources, this could be no excuse for the creation or maintenance of a nuisance by the defendant, or of any act which in a substantial way contributed to a nuisance created by the joint acts of others. Wood, Nuis. §§ 477, 480, 689, 698. When, however, the extract from the charge quoted is read in connection with the entire instructions of the court on this particular phase of the case, it will readily be seen that the apparent inaccuracy of the charge does not in fact exist. The evidence tended to show the existence of another gas-manufacturing establishment in the vicinity of plaintiff's residence, and also the existence of a sewer just to the rear of the lot, and that gases and odors from these pervaded plaintiff's premises. The charge of the court, while making defendant answerable for the existence of any nuisance created by its works, properly instructed the jury that the plaintiff would only have a right, as against this defendant, to have the air in a state in which it would otherwise be if the defendant allowed no foul or deleterious gases to es-

cape from its works and go upon the premises. In view of the evidence tending to show that other nuisances existed, it was proper to thus guard the charge; for, while the defendant was answerable for any nuisance which it might create, it was not called upon to insure the plaintiff against the existence of nuisances from other sources. It was not required to purify the air which passed over her premises, but was forbidden to foul it.

3. Another ground of the motion for a new trial is that the court erred in the charge, taken as a whole, in that it failed to point out to the jury what the former recovery embraced, and left them in doubt as to whether the plaintiff had recovered in the former suit all damages which would accrue in the future, etc. A reference to the entire charge, however, shows that the jury were fully instructed that the plaintiff could not recover for any permanent damage sustained by the property prior to the bringing of the first action, but that she could recover for any and all damage sustained during the interval between the commencement of the first action and the filing of the present petition.

4. It is alleged that the verdict of the jury was contrary to the charge of the court, in that it found only nominal damages, when there was no charge by the court authorizing the finding of merely nominal damages, and no reference to nominal damages in the court's charge. This is equivalent to an exception that the verdict is contrary to law. As has been heretofore shown, if the jury found that a nuisance existed, and that no special damage had been sustained, a verdict for nominal damages was proper.

5. During the progress of the trial the presiding judge, in open court, and in the presence of the jury, made the following announcement: "Counsel have introduced in evidence the record of a former suit in this case, including the brief of evidence, the charge of the presiding judge on the trial of that case; and having invoked from the judge a ruling for their guidance in the future progress of this case, and as a means of saving time and of avoiding continued rulings as points might arise, it has been contended by counsel for plaintiff that she is entitled to recover for the diminution of the rental value of the property since the last verdict, and also for any trees killed, or similar injury, since the filing of the former action. They further contend that diminution of the salable value of the property is an element for the consideration of the jury in estimating their damages. Counsel for the defendant contends that all damage for permanent injury to the freehold was included in the former action and recovery, and cannot be recovered again, and that the injury to the occupancy, or the value of the occupancy, of the place since the former suit was filed is the limit of the recovery. I

hold that the former recovery included all injury for which suit was brought, and which was done or caused by the action of defendant up to the time of the filing of that suit, except what had been barred by the statute of limitations. I hold that in that suit was included diminution of the market value; that it also included all the acts or conduct of the defendant up to that time which resulted in the killing of the shade trees, or the like, and all diminution of the rental value up to that date. I therefore hold, and shall so charge the jury, that there cannot be in this action a recovery for the diminution in the market value, because it was covered by the former suit, and, if it were not so covered, it would not be an element for recovery in successive suits for a continuing nuisance. I further hold that there can be no recovery in this case for trees killed, or sterility of soil, or permanent diminution in value of the real estate caused by the conduct of the defendant prior to the bringing of the former suit. I think there can be recovered damages for the killing of trees, shrubs, and the like, if it be shown that this destruction resulted, not from what had occurred prior to the bringing of the former suit, but from the projection of noxious gases, foul waters, or the like, upon or over the property of the plaintiff since the former action was filed. I shall charge the jury that the burden of proof rests upon the plaintiff in this case. I further think, and so hold, that any diminution in the rental value which may have arisen from the conduct of the defendant since the bringing of the former suit is a proper element in estimating the damages. If it appears that the occupants of the premises have been made sick, or an injury to health or discomfort in the occupancy of the premises has arisen, from the continuation of the nuisance since the former action was brought, I think this also a proper element or circumstance for the consideration of the jury in determining the damages, including under the term "occupancy of the plaintiff" the entire occupancy of the plaintiff or her family as a place of abode or residence. These are the elements of recovery of damages which may be recovered if sustained by the evidence. This, I think, so far as now presented to me by counsel, covers all the points of contest touching the damages, except on the question of punitive damages; counsel for plaintiff announcing that they expect to contend for punitive damages, and counsel [for defendant] stating they will resist such damages, I will pass on that in my charge." Counsel for plaintiff in error contend that the judge erred in making this announcement in the presence of the jury, because he announced that the plaintiff had recovered in the former suit permanent damages to the realty, and had recovered for diminution in the market value thereof, when in truth the charge of the court in the former suit positively lim-

ited the recovery to four years as to all causes, and did not allow such recovery. They contend that the announcement had a tendency to and did prejudice the jury against the plaintiff, and led them to believe that the plaintiff had sued for and recovered in the former suit permanent damages to this property; that the announcement led the jury to believe that the plaintiff had already recovered enough of the defendant, and kept them from passing on the issue as to what the plaintiff had been damaged by the continuance of the nuisance for the time sued for; that it did not set forth correctly the issues which had been decided in the former suit, but assumed as a whole that the plaintiff had recovered more than the charge in the former suit had allowed the jury to give plaintiff. Even if, for any of the reasons contended by counsel for plaintiff in error, this announcement contained error, it will be seen from the following explanatory note of the court that the jury could not have been misled or affected thereby. This explanatory note says: "In the course of a discussion arising on the offer in evidence of the petition, charge, and brief of evidence in the former trial, counsel on both sides asked the court to make an announcement indicating his views, and the admissibility of the evidence was involved; and at their instance he did so, as set out in the announcement made. This was not a charge to the jury, but was said to counsel in response to their request. The jury were present, but neither side objected, nor asked that they retire. When the court came to charge the jury, he warned them that they had nothing to do with the admissibility of evidence or the colloquies on the subject of the admissibility of evidence, but should try the case under the law as given them in charge, and the opinion they entertained of the evidence admitted (all of which will appear in the general charge)." It must be clear that there was no error in this announcement. *Clafin v. Jersey Works*, 85 Ga. 28, 11 S. E. 721. There certainly could be no recovery for permanent physical injuries sustained by the property by reason of the existence of the nuisance prior to the filing of the present action, nor could there be a recovery for diminution in the market value of the premises which occurred prior to that time. There is a distinction between permanent physical injuries to property and a diminution in the market value thereof. The mere existence of a nuisance might never inflict a physical injury upon property, and yet materially depreciate its market value. It might never affect the water, the soil, trees, shrubbery, or other vegetation, and yet, by reason of detracting from the comfortable occupancy of the premises, the market or rental value thereof might be greatly diminished. The jury could not give damages for a shrub or tree that might be killed or a well of water that might be ruined if the nuisance contin-

ued, nor for the loss of rents which might occur in that event, but they could readily and legitimately calculate that the market value of the premises without the nuisance is so much, and its market value with the nuisance so much, and accord damages accordingly, without reference to whether the nuisance should continue or not. If it should continue, the plaintiff has recovered the difference between its market value without the nuisance and its market value with the nuisance, and therefore is not hurt in that respect by a continuance of the nuisance. The measure is not for the time the nuisance will continue, but the difference between its value without and with the nuisance. See authorities cited above.

6. Lastly, the plaintiff in error contends that the court, in instructing the jury with reference to the right of the plaintiff to have an injunction, erred in charging them as follows: "But the plaintiff must show you that the defendant is not only maintaining a nuisance, but that it will continue to do so in the future, and that it is necessary for the protection of the plaintiff's rights in the future to enjoin the defendant." The plaintiff also contends that the whole charge of the court as to the question of injunction had a tendency to lead the jury to believe that the court did not think an injunction should issue, and presented the reasons why it should not issue more forcibly than the ones why it should, and required too much proof of the plaintiff in order to allow the jury to grant an injunction. The extract from the charge of the court quoted above does not seem to be a correct view of the law touching the subject with which it deals. Our Code declares that "where the consequences of a nuisance about to be erected or commenced will be irreparable in damages, and such consequences are not merely possible, but to a reasonable degree certain, a court of equity may interfere to arrest a nuisance before it is completed." Civ. Code, § 3863. In order to obtain an injunction, it must be shown that the injury complained of as present or impending is such as by reason of its gravity or its permanent character, or both, cannot be adequately compensated for in damages. The injury must be either irreparable or continuing. 16 Am. & Eng. Enc. Law, p. 959. The injury must be such as is not susceptible of adequate pecuniary compensation in damages, or one the continuance of which would cause a constantly recurring grievance. 1 High, Inj. latter part of section 739; *New York v. Mapes*, 6 Johns. Ch. 46; *Railroad Co. v. Archer*, 6 Paige 83; *Dana v. Valentine*, 5 Metc. (Mass.) 8. A court of equity exercises its jurisdiction to prevent a nuisance. Therefore, where the wrong has been committed, it will not exercise its jurisdiction, unless to prevent its repetition, or where the nuisance itself is continuing. 10 Am. & Eng. Enc. Law, p. 832, par. d, and authorities cited in footnote 2. The interfer-

ence of courts of equity by way of injunction is undoubtedly founded upon the ground of restraining irreparable mischief, or of suppressing oppressive and interminable litigation, or of preventing multiplicity of suits. There must be such an injury as from its nature is not susceptible of being adequately compensated at law, or such as from its continuance or permanent mischief must occasion a constantly recurring grievance, which cannot be otherwise prevented but by an injunction. 2 Story, Eq. Jur. § 925, and authorities cited. It is a well-settled doctrine that equity will restrain a private nuisance at the suit of the injured party. This remedy will not, however, be granted in every instance of alleged nuisance. The present or threatened injury must be real, not trifling, transient, or temporary. It must be one for which, either on account of its essentially irreparable nature, or its repetition or continuance, the legal remedy of damages is inadequate. The equitable jurisdiction is based upon the notion of restraining irreparable mischief, or of preventing vexatious litigation or a multiplicity of suits. 3 Pom. Eq. Jur. § 1350, and authorities cited; Wood, Nuis. § 769. By "irreparable injury" is not meant such injury as is beyond the possibility of repair or beyond possible compensation in damages, or necessarily great injury or great damages, but that species of injury, whether great or small, that ought not to be submitted to on the one hand, or inflicted on the other, and which, because it is so large on the one hand, or so small on the other, is of such constant and frequent recurrence that no fair or reasonable redress can be had therefor in a court of law. Wood, Nuis. § 770. By "continuing nuisance and constantly recurring grievance or permanent injury" is not meant a constant and unceasing nuisance or injury, but a nuisance which occurs so often, and is so necessarily an incident of the use of property complained of, that it can fairly be said to be continuing, although not constant or unceasing. Id. § 772. The true test would seem to be, therefore, not whether the defendant intends in future to maintain the nuisance, but whether the nuisance so maintained by it is in fact of such a character as calls for the issuance of the writ. What the defendant intends to do could not be an issuable fact. Under the facts of this case, however, it does not seem that this error in the charge should work a reversal of the judgment. By their verdict the jury found that the property of the plaintiff had sustained no special damage. The plaintiff introduced no evidence tending to show that she or her family had been sick as a result of the nuisance, and the jury found that she was only nominally affected in her comfortable occupancy of the home. There was evidence tending to show that the defendant had, since the commencement of the suit, torn down and removed its machinery from the plant, ceased entirely manufacturing gas

there, and only used the reservoir for the storage and distribution of gas manufactured at a distant point, and conveyed there through pipes. There was evidence from which they could have found that this was an abatement of the nuisance, and that there was no danger of a recurrence thereof at this point. If this were true, the injunction should not be granted. 2 Wood, Nuis. (3d Ed.) § 800. The case falls under that class of cases where an interference by the writ of injunction is refused on the ground that the damage sustained is merely nominal and trifling in amount. 16 Am. & Eng. Enc. Law, p. 959; Wood, Nuis. § 771; 1 High, Inj. § 740. It appears that the jury viewed the premises, and, as has been said, that they found no special damage, that the plaintiff's health was not involved, and that she was only nominally affected in the use and occupancy of her home. The damage to the plaintiff being merely trifling, as shown by the verdict of the jury, and there being uncontroverted evidence that the defendant had since the filing of the suit, but before the trial, torn down and removed all of its machinery, and ceased manufacturing gas on the premises, and there being also ample evidence authorizing a finding by the jury that in so doing the defendant had practically abated the nuisance, this court is unable to say that an injunction should be granted in any view of the case, and at least does not feel authorized, under the facts of this case, as they are presented in the record, to overrule the discretion of the presiding judge in refusing to grant a new trial because of the inaccuracy of the charge above quoted. Judgment affirmed.

(104 Ga. 856)

HENSON v. DERRICK et al.

(Supreme Court of Georgia. July 27, 1898.)

BILL OF EXCEPTIONS.

If, in preparing a bill of exceptions whereby it is sought to have this court review a judgment denying an injunction, no regard whatever is paid to the law prescribing how, in such cases, the evidence shall be brought up, and there is no question in the case which can be properly considered without reference to the evidence, the writ of error will be dismissed.

(Syllabus by the Court.)

Error from superior court, Rabun county; J. J. Kinsey, Judge.

Action between Mrs. D. A. Henson and J. E. Derrick and others. From the judgment, defendants bring error. Dismissed.

Crane & McMillan, for plaintiffs in error.
W. S. Parla, for defendant in error.

LUMPKIN, P. J. The present bill of exceptions complains of alleged error in denying an injunction. The evidence which was before the judge at the hearing was brought up to this court by attaching to the bill of exceptions as exhibits the papers introduced before him, including a number of deeds.

So it appears not only that there was no attempt to make a brief of evidence, but that counsel for the plaintiff in error attempted to get the evidence before this court by sending up original papers. These contain much matter that is irrelevant, redundant, and unnecessary to an understanding of the errors complained of, so that, even if the originals had been copied, there would have been a total failure to comply with the law prescribing the manner in which, in cases of this kind, evidence must be brought to this court. This being so, and the bill of exceptions presenting no question which can properly be passed upon without taking into consideration the evidence upon which the trial judge acted, the writ of error must be dismissed. See *Moss v. Birch* (Ga.) 28 S. E. 623.

It is proper to add that we cannot sanction the practice of bringing to this court original papers introduced in evidence below. In this very case it became necessary to pass an order granting counsel for the defendant in error leave to detach from the bill of exceptions a deed belonging to a person not interested in this litigation, and to whom the defendant in error was required to give a bond for its safe return before he could obtain possession of it for use as evidence at the hearing below. Writ of error dismissed. All the justices concurring.

(105 Ga. 420)

**MILITARY INTERSTATE ASS'N OF
SAVANNAH v. SAVANNAH,
T. & I. OF H. RY.**

(Supreme Court of Georgia. July 27, 1898.)

**RAILWAY CORPORATION — VALIDITY OF CONTRACT
— SUBSCRIPTION.**

There was no error in dismissing on demurrer an action brought against a railway company of this state, chartered under the general law, upon a contract of subscription for shares of stock in another incorporated company, when the plaintiff's petition alleged nothing showing how or why it was, for any legitimate use or purpose, either necessary or proper for the defendant to own and hold such stock.

(Syllabus by the Court.)

Error from city court of Savannah; T. M. Norwood, Judge.

Action by the Military Interstate Association of Savannah against the Savannah, Thunderbolt & Isle of Hope Railway. From the judgment sustaining a demurrer to the petition, plaintiff brings error. Affirmed.

Alexander & Hitch, for plaintiff in error.
Barrow & Osborne, for defendant in error.

LUMPKIN, P. J. The Military Interstate Association of Savannah is a corporation authorized, by its charter, "to give an annual celebration each spring, and offer suitable money prizes for competitive drills, rifle contests, shotgun tournaments, and band contests, with fireworks and other amusements, the object being to attract people to and advertise Savannah." The Savannah, Thunder-

bolt & Isle of Hope Railway, which was chartered under the general law for the incorporation of railroad companies embraced in section 2159 et seq. of the Civil Code, by its agent, Harriman, signed a contract whereby it undertook to subscribe for a certain number of shares of the capital stock of the corporation first named. Upon a refusal by the railway company to pay this subscription, the Military Interstate Association brought its action to recover the same. The petition was dismissed on demurrer, and the plaintiff excepted.

We have no doubt at all of the correctness of the judgment rendered by the trial court. If, under any circumstances, a railway company, chartered as stated, has authority to subscribe for stock in such an association as the plaintiff, it certainly does not appear from anything contained in the petition now under review that the defendant railway company could do so in this instance without committing an act *ultra vires*. The petition alleges absolutely nothing which shows that it was either necessary or proper for this railway company to hold stock in the plaintiff association for any use or purpose legitimate to the object for which the railway company was incorporated. It is true that the contract of subscription does recite, in general terms, that carrying out the objects for which the association was formed would be "to the mutual and reciprocal advantage" of the subscribers for the stock; but the plaintiff does not undertake to allege how, in a single particular, the railway company, by signing or carrying out its contract of subscription, could in any possible manner be benefited. We are not disposed to hamper railway companies in engaging in any legitimate enterprise connected with the purposes for which they are organized and operated, but we must draw the line somewhere, and accordingly we agree with the trial judge in holding that, under the facts alleged, the attempted subscription of the defendant to the capital stock of the plaintiff association was an act *ultra vires*, and therefore void, although it is conceivable that, because of the "competitive drills, rifle contests, shotgun tournaments, and band contests, with fireworks and other amusements," the business of the railway company might be incidentally increased, if it affirmatively appeared that its line ran to the grounds upon which these fascinating and diverting performances were to take place. Judgment affirmed. All the justices concurring.

(104 Ga. 725)

**PAULK v. MAYOR, ETC., OF TOWN OF
SYCAMORE.**

(Supreme Court of Georgia. July 18, 1898.)

**INTOXICATING LIQUORS — ILLEGAL POSSESSION — CITY
ORDINANCE.**

Possession of intoxicating liquors for the purpose of selling them contrary to law is not a

crime punishable under the laws of this state; and therefore it is competent for the authorities of a municipal corporation, when authorized by its charter, to adopt an ordinance declaring such possession to be an offense against the city, and to provide that the offender shall be punished for the same. What is known as the "general welfare clause" in municipal charters confers the power to pass such an ordinance. This power may be exercised by municipalities wherein the sale of liquor is lawful under license, as well as those within the limits of which the sale is entirely prohibited. Possession of liquors for the purpose of selling them contrary to license laws is as much within the domain of legislation by municipal corporations as possession for the purpose of sale contrary to prohibition laws.

(Syllabus by the Court.)

Error from superior court, Irwin county; C. C. Smith, Judge.

J. E. Paulk was convicted of the violation of an ordinance, and his writ of certiorari was overruled, and he brings error. Affirmed.

W. A. Hawkin and Thomson & Whipple, for plaintiff in error. J. H. Martin, W. T. Williams, and Tom Eason, Sol. Gen., for defendants in error.

COBB, J. J. E. Paulk was arraigned in the municipal court of the town of Sycamore, charged with a violation of an ordinance which prohibited the keeping on hand, for sale, of spirituous, malt, or intoxicating liquors. The accused admitted the facts involved in the charge, but maintained that the corporate authorities had no power to enact the ordinance. His contention was overruled, and he presented a petition for certiorari, in which he set forth that the ordinance under which he was convicted had been repealed, and that, if not repealed, the same was illegal and void, because of a want of power in the city authorities to pass it. In answer to the writ of certiorari the mayor stated that the ordinance had not been repealed, but had been amended, and was still of force, and, further, that no point was made before him at the trial in relation to the ordinance, other than that the same was void for want of power in the city authorities to enact it. The certiorari was overruled, and the accused excepted.

The ordinance under which the accused was convicted was as follows: "It shall be unlawful for any person to keep or have in his possession within the limits of Sycamore any brandy, whisky, lager beer, or any intoxicating viands of any sort, for the purpose of selling, bartering, or dealing in same within the corporate limits of the city of Sycamore." There has been much legislation in reference to the sale of liquors within the limits of this town. We will briefly refer to the several acts relating to the subject. By an act approved February 24, 1877, it was declared to be unlawful for any person within the 432d district, G. M., of Irwin county, which embraced the territory afterwards incorporated as the town of Sycamore,

to sell any intoxicating or ardent spirits within the limits of such district without the consent or approval of two-thirds of all the legal voters therein. A violation of this act was declared to be a misdemeanor, and punishable as such. Acts 1877, p. 837. By an act approved February 27, 1877, it was provided that it was lawful for the manufacturers of domestic wines in this state to sell the same by wholesale, or in quantities not less than one quart, and it was declared therein that nothing in the license laws of this state should be held to apply to such sales. Acts 1877, p. 38. By an act approved September 28, 1879, the sale of all spirituous or intoxicating liquors was prohibited within the limits of Irwin county, and the sale of such liquors declared to be a misdemeanor, and punishable as such. Acts 1878-79, p. 388. The town of Sycamore, in the county of Irwin, was incorporated by an act approved September 29, 1891 (Acts 1890-91, vol. 2, p. 817). This act provides that sections 774-797, inclusive, of the Code of 1882 (Pol. Code, §§ 684-710), so far as not in conflict with anything in the act incorporating the town, are embodied in, and made a part of, its charter. One of the sections thus made a part of the town charter declared that the municipal authorities should have "power to license and regulate the management of bar-rooms, saloons," etc. Pol. Code, § 702. It was further provided in the act of 1891, chartering the town, that "no intoxicating, spirituous, or malt liquors shall ever be sold in said town." It will be seen at a glance that the question as to whether the sale of intoxicating liquors is lawful or unlawful in the town of Sycamore is one involving no little difficulty, when we look alone at the statutes dealing with the subject. When we consider the decisions of this court relating to some of the acts embraced in the above enumeration, the difficulty in determining this question is decidedly increased. The act of 1879, which prohibited the sale of all spirituous or intoxicating liquors in Irwin county, has been held to be unconstitutional because broad enough in its terms to prohibit the sale of domestic wines. So construed, it became a special law relating to a subject for which provision was made by an existing general law; that is, the act of 1877, protecting the sale of such wines. See *Papworth v. State*, 81 S. E. 402. According to the principle ruled in the case of *Bagley v. State* (Ga.) 29 S. E. 123, that provision in the charter of the town of Sycamore prohibiting the sale of liquors is unconstitutional, because it is a special law dealing with a subject which has already been provided for by the general local option liquor law. Pol. Code, § 1541 et seq. That portion of the charter of the town of Sycamore being eliminated by the effect of this decision, it would seem that the power of the municipal authorities to deal with the subject of the sale of liquors was to be de-

terminated by that section of the Code above cited, relating to barrooms and saloons, unless the act of 1877, in relation to the sale of liquors within the militia district which embraces the town of Sycamore, is still of force and unrepealed. If this act was not repealed by the act creating a charter for the town of Sycamore, no person has authority to sell liquor within the limits of the town without complying with the provision of that act requiring the consent of two-thirds of the legal voters of the district, as well as complying with the general law of the state in reference to the registry of persons engaged in the sale of liquors (Pol. Code, § 791), and also any ordinances which may be passed by the municipal authorities of the town of Sycamore in the exercise of the power given them to license and regulate barrooms and saloons. If this law was repealed by the act creating the charter, then no person has a right to sell liquor within the town of Sycamore until he complies with the law in regard to registering as a liquor dealer, and also obtains a license from the authorities of the town. We have stated the foregoing simply to call attention to the difficulties which surround a determination of the question as to what is the law relating to the sale of liquor in the town of Sycamore. For the purposes of this decision, we do not deem it necessary to decide this question; and what has been said is merely a suggestion as to questions which may arise, and nothing said is to be construed as a decision on the right and power of the municipal authorities to deal with the subject of licensing the sale of liquors. The sale of liquors in the town of Sycamore is either absolutely unlawful, or lawful only when a license has been obtained from the proper authorities. It has been held by this court that the municipal authorities of a town situated in a county in which the sale of liquors is entirely prohibited had power, in the exercise of their authority, "to protect the health, property, and persons of the citizens of the town, and to preserve peace and good order therein," and "to make and pass all needful orders, by-laws, ordinances, resolutions, rules, and regulations, not contrary to the constitution and laws of this state, and to prescribe, impose, and enact reasonable fines and penalties," etc., to pass and enforce an ordinance prohibiting the keeping for sale, barter, or exchange of vinous, spirituous, or malt liquors within the corporate limits of the town. *Bagwell v. Town of Lawrenceville*, 94 Ga. 654, 21 S. E. 903. See, also, *Mayson v. City of Atlanta*, 77 Ga. 662. The general law of the state punishes a person who sells liquors in violation of the law prohibiting such sales. Possession of such liquors for the purpose of selling them in violation of law, while a component part of the offense against the state, is not, in itself, punishable by the laws of the state, and is therefore within the province of municipal

legislation. But it may be said that in the cases cited the sale of liquor was entirely prohibited in the counties in which the municipal corporation which passed the ordinance was situated. There seems to us to be no distinction between cases of this character and where the sale of liquor is authorized under a condition, such as the granting of a license, or the like. The sale of liquor without a license in a place where a license is required is just as unlawful as would be the sale in territory where no license was obtainable, although the offenses would be punishable under different statutes. If a person may have liquors in his possession for the purpose of unlawful sale in a county in which no sale can be lawfully had, certainly a person may have liquors in his possession for the purpose of sale contrary to the license laws where the sale is lawful only under license. That such is a daily occurrence is a matter of common knowledge. The records of this court show that there are violators of license laws as well as violators of prohibition laws. If the municipal authorities can punish a person who is in possession of liquors for the purpose of sale contrary to the terms of a prohibition law, there is no sound reason why a municipal corporation should not punish a person who is in possession of liquors for the purpose of sale in violation of the license laws of the town. The ordinance passed by the authorities of the town of Sycamore appears to be almost identical in language and scope with the ordinance passed by the town of Lawrenceville, in *Bagwell's Case*, *supra*. The charter of the town of Sycamore authorizes its council "to protect the property and person of the citizens of such town or village, and to preserve peace and good order therein, and for this purpose to appoint, when necessary, a police force to assist the marshal in the discharge of his duties"; and, to carry into effect the powers conferred in its charter, they have authority "to make and pass all needful orders, by-laws, ordinances, resolutions, rules and regulations, not contrary to the constitution and laws of this state, and to prescribe, impose, and enact reasonable fines, penalties, and imprisonments," etc. Pol. Code, § 696. It seems clear, therefore, that the city authorities had the power to pass the ordinance in question. It may be that, in cities where the sale of liquor is lawful under license, it would not be so easy to convict a person charged with a violation of an ordinance prohibiting the possession of liquors for the purpose of unlawful sale as it would be in a town or city where the sale of liquors was entirely prohibited. When the sale of liquor is entirely prohibited, its possession in such quantities or at such places as would be necessarily inconsistent with the idea of its being on hand for private consumption only would be a strong circumstance tending to show that the possession was for the purpose of sale.

A large quantity of liquor in a man's place of business in a city where the sale of liquor was unauthorized would be indicative of an intention to sell, though this fact alone might not be sufficient to convict. In a city where the sale of liquor would be lawful under license, the possession of any quantity in any place consistent with the license would not be even a circumstance to be considered by the court trying a person for having liquor in his possession for the purpose of sale contrary to the license laws. To illustrate: If, in a town where the sale of liquors was entirely prohibited, it was shown that the keeper of a drug store was accustomed to have on hand in the store large quantities of liquors, and that persons were accustomed to assemble therein, and were known to come from such place in an intoxicated condition, a violation of an ordinance against keeping liquors for unlawful sale would be established; but if in a town where the sale of liquor by license was authorized, and the keeper of a drug store has such license, the possession of any quantity of liquor consistent with the license would never be a circumstance to his prejudice. If, however, during the days or hours at which he was not allowed by law to sell under the license it was shown that a sale had taken place, then a violation of the ordinance would be made out, because it would be manifest that, at least so far as that particular quantity which was sold was concerned, he had that in his possession for the purpose of violating the license laws.

When the accused in the present case was brought into court, he admitted that he had in his possession, for the purpose of sale, liquors of the character named in the ordinance. It was not pretended that he had a license from any competent authority to sell such liquors. His possession was solely for the purpose of selling contrary to law. If the sale of liquor is entirely prohibited by law in the town of Sycamore, his possession was unlawful for that reason; if the sale of liquor is only lawful there when a person has a license from the proper authorities, and unlawful otherwise, then his possession of this liquor for the purpose of selling it was likewise unlawful; and it is immaterial to a proper solution of this case what is the real truth of the matter, because, under any view of it, the accused is a violator of the law. If he had pleaded a license from the proper authorities authorizing him to sell within the town of Sycamore, then it would have been incumbent upon us to decide what is the status of this town in regard to the sale of liquors. The accused admitted having the liquors in his possession for the purpose of selling them. The town had authority to pass the ordinance. The admission of the accused was, in effect, a plea of guilty, and the judge was therefore right in overruling the certiorari. Judgment affirmed. All the justices concurring.

(104 Ga. 767)

DOOLEY v. GORMAN.

(Supreme Court of Georgia. July 20, 1898.)

PLEA OF RECOURPMENT—ACTION ON NOTE—EVIDENCE—DIRECTING VERDICT.

1. It appearing that the claim for damages set up by the plea of recoupment in this case did not grow out of any breach of the contract sued upon, there was no error in sustaining the demurrer thereto.

2. The allegations in the defendant's pleas were sufficient to admit testimony tending to establish the parol contract set forth in the pleas, and therefore the court erred in excluding such testimony.

3. There being some evidence in the case tending to establish the defenses set up by the defendant's pleas, the court erred in directing a verdict for the plaintiff.

(Syllabus by the Court.)

Error from city court of Atlanta; H. M. Reid, Judge.

Action by J. A. Gorman against S. O. Dooley. Judgment for plaintiff. Defendant brings error. Reversed.

Hamilton Douglas, for plaintiff in error.
Fraser & Hynds, for defendant in error.

COBB, J. Gorman sued Mrs. Dooley upon a promissory note dated September 10, 1895, and reciting that it was in full for all services rendered her to September 11, 1895. The defendant pleaded that the consideration of the note had totally failed, for reasons which will appear from the following: About June 1, 1895, defendant entered into a contract with the plaintiff, whereby he was to work for her for one month, during which time he was to go to California, to secure California exhibits in the California Building at the Cotton States and International Exposition, and was to be paid \$250 for his services during the month, the defendant having a contract with the exposition company for the erection of the California Building. Plaintiff went with her to California for the purpose stated, and represented from day to day that he was securing exhibitors, and that contracts for space would be soon signed and turned over to defendant. In the early part of July, defendant left California, and returned to Atlanta. No distinct understanding was had with the plaintiff as to his work after July 1st, it being mutually understood, however, that he was to continue in the same work at the same compensation, finish it in a few days, and return to Atlanta with contracts covering all space in the building. She advanced him his expenses during the trip, which were large, and made him advances at different times on account of the services. He returned to Atlanta about August 5th, and represented that exhibitors had been practically secured to fill the building, and that his services were necessary to consummate negotiations pending with some of them. He guaranteed that, in consideration of being employed by her to complete these negotiations, the building would be filled with bona fide California exhibitors; and, in con-

sideration of such guaranty and the representations made, it was verbally agreed that he should continue to serve her for an indefinite period, not to extend later than the opening of the exposition, in September, 1895. Incidentally, he was to give her the benefit of his experience in putting up the California Building. He continually represented that he was in constant communication with exhibitors in California, and that there were great numbers of his personal friends, fruit growers, wine makers, etc., who would occupy the building when the exposition opened. She repeatedly requested the plaintiff to furnish her with a list of the exhibitors secured, and also any correspondence or memoranda that would give her information on the subject. He failed to give any definite information, but from time to time quieted her apprehensions with promises which were false. Having no way to ascertain their falsity, and being afraid to interfere with his plans, she relied on these representations, and did not dismiss him from her employment. Her verbal contract with defendant ended September 11th, up to which time he had been supposed to be working for her; and, if the services had been actually rendered, there would have been due him the amount of the note sued on. The note was given because defendant was led to believe that the services had been rendered. It became apparent when the exposition opened that the exhibitors had not been obtained by plaintiff, and that his representations that they had were false, and that he never had performed the services he was employed to perform. The note was given upon the representations made by plaintiff that the services had been rendered, when, in truth, they had not been rendered. The defendant further pleaded that she obtained bids from responsible parties for the erection of the California Building, one being for the sum of \$2,850. She was about to accept same, said building to be built by day labor under the supervision of plaintiff, he representing himself as a thoroughly practical builder, that he had built many buildings, knew the cost of material, etc., and that the building could be erected at a much less sum than the sum mentioned in the bid above referred to. He agreed that he would secure a reliable foreman, and erect the building, guarantying to do the work at less than the sum mentioned. He undertook the work, and the building cost \$3,600. He added to the cost of the building by making additions thereto which were not authorized, and which ruined the symmetry of the building. The additions cost \$350, and were entirely useless. She alleges that, on account of this conduct of the plaintiff, he had become liable to her in the sum of \$750, for which amount she asks judgment. The second plea above referred to was stricken on demurrer, and the case proceeded to trial upon the petition and the plea first above mentioned. The plaintiff introduced in evi-

dence the note sued on, and closed. The defendant introduced the written contract signed by herself and plaintiff, dated June 1, 1895, which was as follows: "Georgia, Fulton County. This agreement, between Mrs. S. C. Dooley, of said county and state, and J. Anthony Gorman, of San Francisco, California, shows that said Mrs. S. C. Dooley has employed said Gorman for one month, beginning with June 1, 1895, to go with her to the state of California, and render such assistance as she may direct, looking towards the securing of exhibitors for the California State Building at the Cotton States and International Exposition to be held in Atlanta during the fall of 1895. Said Mrs. S. C. Dooley, for said service, is to pay two hundred and fifty dollars per month, and all railroad traveling and hotel expenses. Said money is to be paid at the expiration of said time of service, and is to be in full for all services rendered up to date. It being impossible to specify in detail what these services shall consist of, it is mutually agreed that said Gorman will render every assistance in his power to secure such exhibitors, together with an exhibit from the State Board of Trade of California." The defendant testified to facts which she claims tended to establish the truth of her pleas. The court thereupon directed a verdict for the plaintiff, and, a motion for a new trial filed by the defendant being overruled, she excepted.

1. Upon an analysis of the plea which was stricken on demurrer, it is clear that the intention of the pleader was to file a plea of recoupment. It was, no doubt, so treated on the trial of the case in the court below, and counsel for plaintiff in error, in his brief, deals with it as a plea of this character. As such, it was insufficient, and was properly stricken. "Recoupment is a right of the defendant to have a deduction from the amount of the plaintiff's damages, for the reason that the plaintiff has not complied with the cross obligations or independent covenants arising under the same contract." Civ. Code, § 3756. Recoupment is confined to the contract on which the plaintiff sues. Id. § 3757. The damages claimed in the plea grew out of the false representations made by the plaintiff in regard to the sum for which he could construct the building therein referred to. If the plaintiff be liable at all to the defendant on account of this matter, it grows out of transactions entirely separate and distinct from the note which is sued on, or the contract out of which it grew. Treating the plea as being a plea of recoupment, which was the only way in which it was dealt with in the trial court, and there having been no effort to sustain it otherwise, we see no error in the judgment of the court striking the same.

2. It appears from the above statement of facts that there was a written contract between the plaintiff and the defendant in relation to the services to be rendered by the

former to the latter during the month of June, 1895. It was distinctly alleged in the plea upon which the trial was had that there was a verbal contract at a later day for services to be rendered subsequent to the month of June. The court refused to admit testimony which would tend to establish this parol contract. In this we think that he erred. The allegations were that the note sued on grew out of the parol contract, and that the defendant was not liable on the note on account of the plaintiff's failure to comply with the obligation undertaken by him in the parol contract.

3. The plea alleged that, at the time the note sued on was signed, the services for which the note was given had not been performed, and that the note was delivered upon the false and fraudulent representations of the plaintiff that he had rendered the services, when he knew that he had not; that the defendant was ignorant of the fact that the services had not been rendered, and relied upon the statements of the plaintiff. If these allegations be proven, there would be such a fraud shown to have been perpetrated upon the defendant as to relieve her from any liability on the note. If the services had not been performed, and the note was given upon the false representations of the plaintiff that they had been rendered, the defendant would be let into the defense pleaded in this case, notwithstanding the fact that the note recited that the services had been rendered in accordance with the contract between the parties. There was some evidence which the jury would be authorized to consider tending to establish the truth of the defendant's pleas, and to show that the note was procured by false and fraudulent representations; and we think that the case should have been submitted to the jury on this issue. It was therefore error for the court to direct a verdict in favor of the plaintiff. Judgment reversed.

(105 Ga. 339)

COHEN et al. v. PARISH.

(Supreme Court of Georgia. July 27, 1896.)

APPEAL—REVIEW—GIFT TO CHILD—FRAUDULENT CONVEYANCE—RIGHTS OF TRUSTEE—EVIDENCE.

1. When the controlling question in a case is one of fact, and the jury, having been properly charged, determine that question, and there is evidence in the record which supports their finding, the verdict, when complained of as being contrary to law and to the evidence, will not be set aside after its approval by the trial judge.

2. When a father purchases land with his own funds, and causes the title to be made by the vendor to himself as trustee for a minor daughter, this, in the absence of any valuable consideration as between these two, is equivalent to a gift of the land by the father to the daughter; and the fact that he may have supposed the daughter had a valid, legal claim against him, and may have intended to thus settle it, when in fact there was no such claim, does not invalidate the trust deed. Its validity, when attacked by his creditors, depends upon his solvency at the time of the conveyance, and the absence of any intention on his part

to hinder, delay, or defraud his creditors; and although the conveyance gives to the trustee a general power of sale, without order of court, such power does not carry with it the right to sell and convey the property in consideration of the payment of an individual debt of the trustee.

3. In the trial of a case involving the validity of such a deed, where it is alleged that at the time of the gift the father was insolvent, and his object in causing such conveyance to be made was to hinder, delay, or defraud his creditors, the issues to be determined are those of solvency and of good faith; and declarations on the part of the father, made at the time of the conveyance, as to his reasons for having the conveyance so made, may be submitted to the jury for their consideration on the question of intention, and so may any documentary evidence tending to show the good or bad faith of the transaction, though such declarations or such documents may not be evidence of the truth of the matters recited or contained therein.

(Syllabus by the Court.)

Error from superior court, Fulton county; J. H. Lumpkin, Judge.

Action by Minnie L. Parish, by her next friend, against L. Cohen & Co. Judgment for plaintiff. Defendants bring error. Affirmed.

The following is the official report:

On February 12, 1895, Minnie Laura Parish, a minor, brought suit by her next friend against L. Cohen & Co., a firm composed of L. Cohen, E. Steinheimer, and Jacob Menko, and against L. Cohen individually and John T. Parish, alleging in brief: In April, 1886, Samuel T. Bryan, by a deed recorded May 7, 1886, conveyed to the plaintiff, through her father, John T. Parish, as trustee for her, a certain lot of land in the city of Atlanta. The deed contained a clause as follows: "This conveyance made with power to said John T. Parish, trustee as aforesaid, to sell and convey said property at public or private sale, without any order of court for that purpose." On September 18th of the same year the sheriff, under a fi. fa. in favor of L. Cohen & Co. against John T. Parish, assumed or pretended to sell the property, and L. Cohen bid it in; the alleged consideration being \$100. The sheriff's deed to him is void, because John T. Parish had no leviable interest in the property; the property belonging exclusively to the present plaintiff. On August 21st of that year, John T. Parish, having become indebted to L. Cohen & Co. and L. Cohen for whisky, agreed to execute, as trustee, a deed conveying said realty to L. Cohen in payment of the whisky account, and for similar goods to be thereafter supplied. This indebtedness was exclusively that of the plaintiff's father, and she had no interest in it, and the deed is void. The alleged consideration, \$500, is less than half the value of the property. The trustee had no power to execute such a deed, and the grantee knew this, and knew that the plaintiff had no interest in, and derived no benefit from, the transaction, and wrongfully and fraudulently induced Parish to execute the deed. Cohen

took possession of the property on or about the date of the deed, and continued wrongfully in possession until March, 1893, when he sold to one Spier. (Originally the plaintiff's petition attacked the title of Spier, but it is now conceded that Spier was an innocent purchaser, and obtained a good title.) The plaintiff prayed for a judgment against L. Cohen & Co., and against L. Cohen individually, for \$1,250, which she alleged was the value of the property on August 21, 1896, together with interest, and for general relief. L. Cohen & Co. and L. Cohen, in their answer, denied the allegations as to fraud, and alleged that they bought the property from Parish in good faith, believing it was subject to their debt. They contended that the sale by the sheriff was valid, and the sheriff's deed conveyed a good title; that the deed to John T. Parish, purporting to create a trust for the benefit of the plaintiff, was void as against his creditors, because the consideration of the deed was a lot belonging to Parish, which Bryan received from him in exchange for the one conveyed, and the conveyance was therefore in the nature of a gift to the plaintiff from Parish, who was then insolvent, and because it was made for the purpose of hindering, delaying, and defrauding his creditors. Further, the deed executed to Cohen by Parish was made in consideration of \$500, and created a good title.

On the first trial of the case there was a verdict in favor of the plaintiff, and the case was brought to this court, and a new trial granted. 100 Ga. 335, 28 S. E. 122. On the last trial (April 23, 1897) there was a verdict for the plaintiff for \$700 principal and \$519.94 interest. The defendants made a motion for a new trial, upon grounds hereafter stated, which the court overruled, provided the plaintiff would within a stated time write off from the verdict \$204.40, with interest thereon at 7 per cent. from August 21, 1896; the court stating that the principal sum stated was the amount which counsel for the defendant claimed was paid on that date. The plaintiff wrote off this amount, with interest, as directed, and to the overruling of the motion Cohen & Co. excepted. The motion was upon the grounds that the verdict was contrary to law and the evidence, and excessive, and against all of the defendants jointly, although the proof showed that the deeds made by the sheriff and John T. Parish were to L. Cohen, and not to Steinhelmer and Menko, and there was no evidence to sustain any verdict against Steinhelmer and Menko. Also, that the court erred as follows:

(4) In admitting in evidence, over the objections of defendants L. Cohen & Co., "the homestead proceedings" (an application by Eva Parish and John T. Parish to the superior court to allow them to sell the lot described in the petition), and the proceedings and order of court, found in Book Q, pp. 45-48,—the petition to sell this homestead property; the appointment of a guardian ad li-

tem for the two minor children of Eva and John T. Parish; his consent, as guardian, that it should be sold; and the order of the judge of the superior court authorizing its sale, and stating certain terms of the reinvestment of the fund arising from the sale. (It appeared from this evidence that on April 17, 1876, Eva Parish, wife of John T. Parish, and mother of the plaintiff, filed her claim of exemption under section 2040 of the Code of 1873, including in the schedule land subsequently exchanged by John T. Parish for the property conveyed to him by the trust deed in question, and that the exemption was allowed.) Defendants objected to the introduction of the evidence on the grounds: (a) There was no evidence that Eva and John T. Parish had any such property. (b) There was no evidence that they had a homestead on the property, except as stated in the petition, and the homestead would be the highest evidence of that fact. (c) It should first be shown that Cohen & Co. had no notice of this homestead fund. (d) It makes no difference whether Parish had any homestead funds or not, for, if he did have any, it did not create a debt from him to his daughter. She had no interest in the homestead estate, nor was she interested in the proceeds of it,—certainly not to the extent of justifying him in giving her his property. The court held that the evidence offered was not admissible to show the truth of the recitals in the petition, as against Cohen & Co., but that he would admit it as against Parish. The movants contend that it was not admissible even as against Parish, and its only effect would be to cloud and prejudice the minds of the jury, to the injury of defendants Cohen & Co., and that it was not admissible because of the objections stated at the time it was offered.

Note by the court: "On the trial it was contended on behalf of defendants that the trust deed was [void], among other reasons, on two grounds: (1) Because it was a deed without valuable consideration, made pending insolvency; and (2) because it was made for the purpose of hindering, delaying, and defrauding creditors. The court admitted the evidence of the grant of a homestead or exemption, the proceeding to sell it, in which Parish participated, the receipt of money by him in connection with this exemption, and what he said in taking the trust deed (part of the *res gestæ*), solely as evidence of the circumstances surrounding him, and as bearing on the state of his mind and intention, as to the question of fraud. The court charged the jury that this furnished no valuable consideration for the deed, nor was proof of the facts alleged, and why it was admitted, and on what question it might be considered."

(5) In permitting the plaintiff to introduce a copy of the exemption sued out by Eva Parish on April 17, 1876, and copied in the brief of the evidence, over the objection of the defendants; the defendants objecting to

the introduction of the homestead papers because: (a) The loss of the original homestead was not properly accounted for, and the proof of the loss was not sufficient to admit secondary evidence. (b) The homestead does not show out of whose property the same was set apart; the same having been sued out by a married woman, and it not appearing upon the face of the proceedings out of whose property it was sought to be set apart. (c) There was nothing in the pleadings that justified the introduction of the homestead proceedings. (d) There was no allegation in the pleadings that this property was paid for with funds arising from the sale of the homestead property, or that the plaintiff was a beneficiary under the homestead estate, or that the plaintiff had any interest in any of the property alleged to have been set apart as a homestead. (e) It does not appear that notice was given to the defendants of the homestead estate. Movants allege that the court erred in admitting the homestead proceedings, for the reasons above stated. It could not affect the rights of the defendants, and even if there was a homestead, and it was sold, and the proceeds invested in the property in question, this would not be a sufficient consideration for a conveyance from Parish to his daughter, to the exclusion of his creditors.

Note by the court: "See note to preceding ground. It was not admitted to show a valid homestead or a valuable consideration, but on the question of fraud, or intent to hinder or defraud creditors."

(6) In admitting in evidence, over the objection of defendants, a copy of the petition and order and other proceedings for the sale of the homestead property, copied in the brief of evidence: this evidence being offered at this time, and admitted by the court, not only as against Parish, but also as evidence against L. Cohen & Co. It is alleged that this was error, for the reasons mentioned in the fourth ground of the motion, and for the further reason that no proof was offered of any sale of the homestead property under said order, and therefore the evidence was irrelevant and inadmissible. (In a note to this ground, the court refers to the note to preceding ground.)

(7) In allowing S. T. Bryan to testify, over the objection of defendants, that John T. Parish, at the time he traded lands with the witness, and took the deed from him to the property in question to himself as trustee for his daughter, stated to the witness that he had some money belonging to his daughter, and he would take the property the witness proposed to trade to him in part pay for his place. This evidence was offered for the purpose of showing good faith on the part of Parish in the transaction; that he really thought he owed his daughter some money, and had a right to convey this property to her in payment of the debt. Defendants contended before the court that the state-

ment of Parish at the time of this trade to Bryan was not admissible as against Cohen & Co., and that, even though Parish thought he owed his daughter, he did not owe her anything of the homestead estate, and had no right to make the conveyance to her, as against Cohen & Co., and the plaintiff had no right to put in evidence the fact that Parish thought he was paying a debt to his daughter, for the purpose of showing good faith, and supporting a deed of gift to his daughter. (In a note to this ground the court refers to the note to ground 6, and states that the evidence was not offered or admitted to show a valuable consideration, but as bearing on the question of intent or fraud.)

(8) In permitting John T. Parish to testify, over the objection of defendants: "My intention in having the deed of April 30th made to my daughter was to pay money that I owed my daughter, and set it aside for her, so it would school her;" the witness referring to the homestead money. Defendants objected to the introduction of this evidence because it made no difference what the intentions of Parish were; they would not bind the defendants. It being shown that no consideration actually passed from the daughter to the father, the plaintiff had no right to have a good motive shown in an attempt to make a conveyance for a valuable consideration. She could not show that her father intended to convey her the property for a valuable consideration, and when it turned out that the consideration which he thought was a valuable consideration was no consideration at all, sustain it as a voluntary conveyance by showing his good faith.

Note by the court: "See note to ground 6. The court held and charged that the matter of homestead, etc., did not make a valuable consideration, but submitted the evidence on the question of bona fides or fraud, or whether the conveyance was procured by Parish to defeat creditors, even if he was solvent when it was made."

(9) In allowing John T. Parish to testify, over the objection of defendants, that, after the order of the court authorizing him to sell the homestead property had been granted him, he vacated the property, and afterwards Henson went into possession of it, and Henson paid him a consideration of \$500 for letting him go into it. Movants say that the intention of this was to prove indirectly a sale of the property to Henson, and a receipt of \$500 for it on the part of Parish. They objected to this proof without the introduction of the conveyance from Parish to Henson; the deed being the highest evidence of what property was conveyed, and what consideration was received, if any. They further objected to the introduction of any proof of a sale of the property, upon the ground that even though there had been a sale, and Parish had received the \$500 claimed, it was not a sufficient consideration for the conveyance from Parish to his daughter. Further,

If there was a conveyance of the homestead property from Parish to Henson, this would be no consideration for the conveyance from Parish to his daughter.

Notes by the court: "See note to grounds 6 and 9[?]. The evidence was not admitted to show a conveyance of the homestead, or the passage of title to it, but that he (Parish) received money from the property called the 'homestead,' coupled with his sayings in having the trust deed made, as a circumstance in considering whether his intention was to hinder, delay, or defraud creditors, even if solvent."

(10) In refusing, upon motion of defendants' counsel, to rule out the homestead proceedings, the homestead and order for the sale of the homestead property, upon the same grounds urged when they were offered in evidence, and upon the additional ground that it had not been proven that any conveyance of the property was made by John T. Parish or his wife in pursuance of the order of the court for the sale of the homestead property. This motion was made after the plaintiff had closed her case, and no evidence had been offered, nor was any ever offered, showing a sale of the homestead property.

Note by the court: "Whether there was any evidence of a sale of the homestead will appear from the brief, but the court held, as already stated, it was not a question of a valid homestead and valid sale; but on that ground of attack based on fraud the surroundings of Parish and his intent were relevant."

(11) In overruling the defendants' motion for a nonsuit, which was made upon the ground that it had not been shown that the consideration of the conveyance from Parish to his daughter was a sufficient consideration, that there was no evidence of a gift, and that the plaintiff could not prove a conveyance upon a valuable consideration, and afterwards hold the conveyance good for a voluntary conveyance, when there was no proof that it was intended to be made as a voluntary conveyance, or a good consideration in contradistinction to a valuable consideration; and, further, because it had not been shown that it was not the intention of Parish, in making this voluntary conveyance, to hinder, delay, or defraud his creditors, and especially the defendants, while on the contrary the plaintiff had shown by her father that he did not pay Cohen & Co. out of the money he had on hand at the time he made the conveyance to Bryan, and received the deed from Bryan to himself as trustee for his daughter, and did not pay them out of the money he received from Bryan or the stock of goods. Therefore the prima facie case of fraudulent conveyance was not rebutted or removed by the evidence on the part of the plaintiff.

(12) In charging: "Certain evidence was introduced before you touching whether a homestead or exemption had been granted

on certain property, whether Mr. Parish received certain money growing out of or under an order of court with respect to that property, and what he did and what he said at the time of making the transaction by which the deed was put in him as trustee. This evidence was offered and admitted to be considered by you, along with the other evidence in the case, on the subject of intention, or bona fides (that is, good faith) or mala fides (that is, bad faith); but it is conceded, and the court so charges you, that such evidence did not operate as proving the truth of what Mr. Parish may have said; that his declarations are not evidence of the fact of what he states; that they were offered and admitted for your consideration on the subject of his intention, and not as proof of the actual fact which he may have stated or recited, further than the question of intent on his part. And, as I stated to you, it is further conceded by counsel in open court that the evidence touching the homestead, and the transaction resulting with regard to it, do not show a valuable consideration for the taking of the deed by Parish in his name as trustee for his daughter. You may therefore act on the statement that there is no proof of a valuable consideration, and that the taking of title in his name as trustee was therefore a voluntary conveyance, or amounted to a voluntary conveyance, between him and his daughter." It is contended that the court ought to have charged the jury that they should have disregarded the conveyance, instead of charging them that the "evidence offered and admitted to be considered by them, along with the other evidence in the case, on the subject of intention, or bona fides (that is, good faith) or mala fides (that is, bad faith)." It is alleged that the question of faith should have played no part in this investigation, because, under the law, there was no consideration. Under the plaintiff's evidence (there being no allegations in the pleadings with reference to the consideration), there was no proof of any valuable consideration, and no effort or intention on the part of Parish to make a deed of gift to his daughter; he having testified that his object was to pay her a debt which he considered he owed her. If he did not owe her anything, then there was no consideration for the deed; and the court could neither admit evidence to show, nor permit the jury to presume, that there was a good consideration, when the parties did not intend that the deed should be based on a good consideration instead of a valuable consideration.

(13) In charging: "If he [meaning Parish] was solvent, however, he could make a voluntary deed or conveyance, and it would not ipso facto be void; that is to say, if a man is solvent, the mere fact that he makes a voluntary conveyance does not render the conveyance void as against his creditors. If a man has sufficient means to pay his debts, if he is solvent, and he makes a voluntary con-

veyance which does not leave him sufficient to pay his debts, the transaction would be void as against his creditors; but if he is solvent, and makes a voluntary conveyance which does not leave him unable to pay his debts out of his assets in hand, the conveyance would not be void merely because it may have been voluntary." It is contended that this charge is erroneous because it is based upon an hypothesis that a deed made by a party intending to make it for a valuable consideration, when in fact there was no valuable consideration, could be upheld as a voluntary conveyance. There was no evidence in the record that this deed was intended as a voluntary conveyance or a deed of gift, and therefore the court had no right to charge upon a theory that a deed intended to be made for a valuable consideration, which really had no consideration, could be supported as a voluntary conveyance.

Note: "Counsel for movant contended that there was no evidence of any intention to make a voluntary conveyance. Counsel for plaintiff contended that it showed that Parish felt a moral obligation or sense of duty towards his daughter, and not a purpose to defraud creditors."

(14) In charging: "You will perceive that the plaintiff claims to recover on the ground that the trust property has been diverted. Therefore, if she is entitled to recover, she would be entitled to recover to the extent to which she has been injured by reason of such diversion, if it existed; that is, to the extent of the value of the trust property misappropriated or diverted, with interest on it from the date of such diversion. It appears in the evidence that, in addition to the indebtedness of Messrs. Cohen & Co., there was some amount in cash given to Parish, the trustee. In order for this to be set off as against the recovery of the plaintiff (if she be entitled to recover), it must appear from the evidence that this went to her benefit, and was actually used for her benefit or the trust estate. If it does not so appear, it would be a matter of credit." It is alleged that this was error, because, under the evidence, Cohen was seeking to get his money out of the property which he believed was liable for the payment of his debt, and was acting, so far as the evidence shows, in good faith,—at least, he so contended. The property at the time the debt was contracted really belonged to Parish (that is, the property he gave for this particular property), and Cohen had a right to expect his money from this property. Parish was the trustee, with power to sell and convey, without order of court, either at public or private sale, and therefore he had a right to sell this property for money; and he alone would be liable to the cestui que trust, if any one would, for the proceeds of such sale. If he received only a part in money, he alone would be liable to the cestui que trust for that part thus received.

(15) In charging: "If the trust deed in Parish, trustee, was valid, and Cohen took a conveyance from him with a knowledge of this trust, and knowing that it was made to pay an individual debt of Parish, this would be a diversion, and Cohen could not set up prescriptive title under that deed as against the beneficiary. One who takes property from a trustee, knowing it to be diverted, takes subject to the trust. Therefore, as to the conveyance from the trustee to Cohen & Co., if it amounted to a diversion, it would not form a basis of a prescription by Cohen as against the beneficiary of the trust." The assignment of error as to this portion of the charge is in the following language: "Defendants say that said instructions were error, because, if Cohen, although he bought the property from the trustee in good faith, and believed at the time that he had a right to have the property appropriated to the payment of his debt, knowing at the time that Parish, while indebted to him, had converted the only visible property he had, which was in his name, into the property now in question, and caused the title to be made to him as trustee for his daughter, and Cohen believed that the transfer was for the purpose of defeating his claim, and was seeking to subject the property to the payment of his debt, and honestly believed that he had a right to do so, and that Parish conceded that fact, and he made a deed to the property in payment of his debt, then defendants insist that a prescriptive title depends upon the good faith in the purchaser, and a title that purports to convey the property, although it might be defective, still, if the purchaser holds possession of the property for seven years in good faith, he is protected from all persons *sui juris*; and if the trustee held the legal title, as in this case, then he would be barred. The *cestui que trust* would also be barred. Defendant says the court did not submit this question to the jury, but practically took it from the jury, and therefore the charge was error."

Simmons & Corrigan, for plaintiffs in error. C. T. Ladson and Van Epps & Leftwich, for defendant in error.

LITTLE, J. The preceding official report furnishes all the information necessary to a clear understanding of the facts of the case, and sets out the grounds on which it is sought to have the judgment of the court below reversed.

1. Exception was taken to several distinct parts of the charge of the court. The instructions contained in these extracts from the charge, on which error is assigned, we construe to be in harmony with the principles of law applicable to the case, and which are hereafter discussed. It is our opinion, as hereafter shown, that the court committed no error in admitting evidence. The final determination of the case on its merits depend-

ed upon the facts whether at the time of the conveyance from Bryan to John T. Parish, as trustee, Parish was solvent or insolvent, and whether he caused such deed to be made in good faith, or with the intent to hinder, delay, or defraud his creditors. Much evidence was introduced to sustain the respective contentions of the parties. The jury (having been, as we think, properly instructed by the court), by their verdict, solved these questions of fact in favor of the petitioner, and we are not at liberty to reject their finding, inasmuch as there was sufficient evidence introduced on the trial on which such a verdict could be rendered; and it will not therefore be set aside, as contrary either to law or to the evidence, after its approval by the trial judge.

2. This is the second time the case has been before this court. On the first trial a verdict was rendered for the petitioner, and on the refusal of the trial judge to set aside the verdict and judgment rendered thereon the defendants assigned error, and this court reversed that judgment. 100 Ga. 335, 28 S. E. 122. The second trial resulted in a verdict for the plaintiff, which, as it appears here, was made satisfactory to the presiding judge in the court below, who refused to grant a new trial on motion of the defendants, and the judgment so refusing has been brought here, and is sought to be reversed on the grounds appearing in the official report. The issue upon which the case turns is whether the deed of trust under which the petitioner claims was void, as against the defendants, either by reason of having been made at a time when John T. Parish was insolvent, or rendered insolvent by such transaction, or having been made at the instance of John T. Parish to hinder, delay, or defraud his creditors. The plaintiffs in error contend further that this deed of trust was made without a consideration to support it, and also that they have acquired by prescription a good title as against the petitioner. On the former trial it was claimed by the petitioner that the deed of trust which was made by Bryan to John T. Parish as trustee for petitioner was made by the direction of said Parish for the purpose of paying to the cestui que trust a debt which Parish owed to her by reason of having misappropriated the proceeds of a homestead estate of which she was the sole beneficiary. On the present trial, however, petitioner rested the validity of the deed of trust, not upon a valuable consideration, but upon a good consideration,—that of blood,—and claimed that it was made at a time when the said John T. Parish had a right so to have it made, he being solvent, and that he acted in good faith, and without any intent to hinder, delay, or defraud his creditors. In determining, therefore, the relative rights of the parties to this action, the deed of trust must be treated and regarded as a voluntary conveyance, so far as the creditors of John T. Parish are concerned.

By section 3569 of the Civil Code it is declared that "an insolvent person cannot make a valid gift to the injury of his existing creditors," etc.; and paragraph 3 of section 2695 of that Code, which defines what acts shall be void as against creditors, includes within such acts "every voluntary deed or conveyance, not for a valuable consideration, made by a debtor insolvent at the time of such conveyance," while paragraph 2 of that section embraces within such acts "every conveyance of real or personal estate, by writing or otherwise, and every bond, suit, judgment and execution, or contract of any description, had or made with intention to delay or defraud creditors, and such intention known to the party taking," etc. While, therefore, this rule of law that every voluntary conveyance, not for a valuable consideration, made by a debtor insolvent at the time of its execution, shall be void as against creditors, and that every conveyance made by a debtor, whether solvent or insolvent, with intention to delay or defraud creditors, and such intention known to the party taking, shall likewise be void, is mandatory and admits of no exception (King v. Poole, 61 Ga. 374), yet it is well settled that a person may, though in debt at the time, make a voluntary conveyance under such circumstances as that it will be valid and binding even as against existing creditors. In the case of Clayton v. Brown, 17 Ga. 220, the court, referring to this question, said: "Far be it from us to controvert the rule that a gift or conveyance founded merely upon a good consideration, such as blood or affection, may not be set aside by creditors, if it appear that the grantor was in embarrassed circumstances when he made it; for it has been well said that a man must be just before he is generous, and that he is bound, both legally and morally, to pay his debts before giving away his property. Still we do maintain that the mere fact that a man is indebted at the time will not render his gift, ipso facto, void,"—in support of which many authorities are cited. In the case of Weed v. Davis, 25 Ga. 684, the rule is laid down that: "A person, though in debt, may in good faith make a voluntary conveyance of a part of his property, if the part which he retains is amply sufficient to pay his debts." So, in the case of Brown v. Spivey, 53 Ga. 155, it was held that a voluntary conveyance made by a husband, solvent at the time, to his wife and children, was binding as against creditors. The same principle was recognized in the case of Trounstone v. Irving, 91 Ga. 92, 16 S. E. 310, and many other of our reported cases.

The plaintiff at the last trial having conceded that the trust deed under which she claimed was not supported by a valuable consideration, such deed was, as to creditors, as was ruled by this court on its former review of the case, *prima facie* fraudulent; and the plaintiff carried the burden of proving that it was valid, by showing, not only the solvency of the

father, but also that the deed was bona fide, and not made with the intention to hinder, delay, or defraud creditors. On the trial there was evidence for the plaintiff tending to show that, at the time the father directed the land to be conveyed to him as trustee for her, he had, in addition, cash in hand which considerably exceeded his entire indebtedness in amount. There was also evidence for the plaintiff tending to show that her father honestly believed that he was indebted to her for the proceeds of the homestead, which had been misappropriated by him, and that he, in good faith, and without any intention of hindering, delaying, or defrauding his creditors, directed the deed to be executed to himself as trustee for his daughter, in order to make reparation for the misappropriated proceeds of the homestead estate. Under the ruling of this court in the case when before here for review, if it is true that the father at the time of the conveyance had in hand more than sufficient money to pay all of his debts, he was not, within the meaning of section 2695, par. 3, of the Civil Code, insolvent. There was sufficient evidence introduced at the trial to warrant the jury in finding that the father had a sufficient amount of money to pay all of his indebtedness at the time of the execution of the trust deed, and also sufficient evidence to warrant the jury in finding that, in directing the trust deed made, the father acted in good faith, and without any intention to hinder, delay, or defraud creditors. It must therefore follow that the jury, passing on this evidence, found that the conveyance was not void as to the defendants for any of the reasons stated. As we have said, the validity of the deed from Bryan to Parish as trustee for petitioner in no way depended on the question as to whether, at the time of its execution, Parish was moved to have the deed executed because of his belief that he was indebted to his daughter. If in fact he was so indebted, then the consideration between the trustee and the cestui que trust would be a valuable one. If, on the contrary, he was not so indebted, the relation of parent and child was sufficient to afford a good consideration. It suffices to say that he caused the deed to be executed, and if, on any account, the reasons which caused such execution on his part were unfounded, the trust deed nevertheless vested the beneficial interest in the cestui que trust, which could not be recovered by the action of any creditor on account of the voluntary character of the deed, but would be subject to be set aside at the instance of Parish alone, if in fact equitable grounds existed therefor; and, without any effort on his part to bring this about, it would be held to be a gift by the father to the daughter.

The jury having determined that the deed of trust was valid, it remains to inquire whether the sheriff's deed, and that executed to the defendant by John T. Parish as trustee for the plaintiff, passed title to the grantees, as against the cestui que trust. In addition to the sher-

iff's deed, Cohen claimed under a deed executed by John T. Parish, trustee for his daughter, Minnie Laura Parish. The consideration of this deed was shown, at least in part, to be the settlement of a debt which Parish individually owed to Cohen. Claiming under a deed executed by Parish as trustee, Cohen was charged with notice of the trust estate. *Bazemore v. Davis*, 55 Ga. 505. It is undoubtedly true that, under the terms of the deed creating the trust, Parish had a right, at his own volition, and without an order of court, to sell and convey this trust property. The proceeds of such sale, however, if any should be made, would belong to the cestui que trust, and must, in the hands of the trustee, be held for her benefit. The trustee had no right, under the power of sale given to him, to sell the trust property and convey the title in payment of his individual debt. Such a conveyance would be a direct misappropriation of the trust property, and would carry no title to the grantee whose debt was so paid. Cohen recognized the existence, if not the validity, of the trust, and the fact that title was held for the benefit of the petitioner, by accepting the conveyance as that of a trust estate, the validity of which depended on the right of the trustee to convey. He took the property, in part at least, in satisfaction, not of a debt due to him by the trust estate, but of a debt due to him by Parish individually. This was a diversion of trust property, if the trust in fact existed, to which Cohen was a party, with knowledge; and, assuming the existence of the trust, as the jury have found, his rights are to be governed by the provisions of section 3200 of the Civil Code, which declares, "All persons aiding and assisting trustees of any character, with a knowledge of their misconduct, in misapplying assets, are directly accountable to the persons injured." The principle thus announced in the Code is applied in the case of *Maynard v. Cleveland*, 76 Ga. 52, where it was held that a payment of a note due a trust estate, by allowing a credit on the trustee's individual indebtedness to the payor, is not valid against the trust estate. So that, if there was in law a valid trust,—that is to say, if in this case the father caused the deed of trust to be made at a time when he was solvent, and was not rendered insolvent by such transaction, and this action on his part was not had for the purpose of hindering, delaying, or defrauding his creditors, both of which facts the jury must have determined in setting up the trust,—neither the sale of the land by the sheriff under execution issued against John T. Parish individually, and with which the cestui que trust had no connection, nor the deed of conveyance made by Parish to Cohen in consideration of the payment of the individual debt of Parish, were, as a matter of law, valid, and the grantee took nothing by either one of such conveyances.

8. As we have before said, the issues to be tried under the pleadings in this case being the solvency or insolvency of Parish,

and whether he caused the conveyance to be made to hinder, delay, or defraud his creditors, it was competent, as bearing in some degree on the question of intention, to admit in evidence the declarations made by Parish at the time of the execution of the conveyance as to his reasons for having the conveyance so made. The plaintiff introduced Bryan, who testified that at the time he closed with Parish, and conveyed the land to him as trustee for his daughter, Parish stated to him that he had some money belonging to his daughter, and would take the property of the witness in part pay for his place. For the plaintiff, Parish also was allowed to testify that his intention in having the deed made to his daughter was to pay money which he owed her, and to set it aside for her, so that it would school her. A copy of the exemption set aside on the application of Eva Parish in 1876, and also a copy of the proceedings under which the homestead property was sold, including the petition and order of the court, were allowed in evidence over the objection of defendants. Concerning the homestead property, Parish was also allowed to testify that after its sale he vacated the property, and received the sum of \$500 from Henson, who went into possession. We think this evidence was properly admitted, not as proof of the facts stated, but solely as evidence of the circumstances surrounding Parish at the time, and as to some extent, at least, bearing on the question of what was his intention in having the deed so made, and as tending to show the absence of fraud. This seems to have been the view of the presiding judge, who, in his charge to the jury, instructed them that this evidence was not sufficient to show that there was a valuable consideration moving from the daughter to the father, nor should the evidence be considered as proof going to establish any other facts than that of intention and the absence of fraud. Whether Parish was acting in good faith, or whether he was contriving to defraud his creditors, were questions of fact to be determined. It was therefore proper to admit this evidence as showing the acts and words of Parish done and spoken at the time, in order to ascertain his motive. Section 5179 of the Civil Code provides that "declarations accompanying an act, or so nearly connected therewith in time as to be free from all suspicion of device or afterthought, are admissible in evidence as part of the *res gestæ*." Section 5176 of the Civil Code declares that "when, in a legal investigation, information, conversations, letters and replies and similar evidence are facts to explain conduct and ascertain motives, they are admitted in evidence, not as hearsay, but as original evidence." In the case of *Carter v. Buchanan*, 3 Ga. 513, the court says, "*Res gestæ* are the circumstances, acts, and declarations which grow out of the main fact, are contemporaneous with it, and serve to illustrate

its character." And in the case of *Clayton v. Tucker*, 20 Ga. 452, the court held, "Declarations which accompany an act, and which are such as may well explain the act and be a part of it, are admissible as evidence along with the act." Thus, in the case of *King v. King*, 45 Ga. 644, the court ruled that, "Where the fact that complainant went to Rome to receive the Confederate money was proven, her reasons stated at the time for her act should have been received as part of the *res gestæ*." And in the case of *McLean v. Clark*, 47 Ga. 24, the court ruled, "Declarations of a vendor of property as to his motives for the sale, made at the time and during the progress of the sale, and even so soon thereafter as to be free from all suspicion of afterthought, are admissible evidence on a trial as to the validity of the sale." It is also held that: "A party may testify to his intention. It is evidence to be considered, but the facts—all the facts—are to be considered, to arrive at the truth respecting his real motive." There can be no question that the evidence objected to was admissible as part of the *res gestæ* of the transaction resulting in the execution of the trust deed, and as throwing light upon the issue as to the real intention and motive of the father in directing the trust deed to be made. Although the documents and declarations may not have been competent evidence as to the truth of what they contained or recited, they were admissible as bearing upon and tending to illustrate the motives actuating the father at the time of the execution of the trust deed. Judgment affirmed. All the justices concurring.

(33 S. C. 303.)

JOHNSON v. SOUTHERN RY. CO.

(Supreme Court of South Carolina. Sept. 28, 1898.)

CARRIERS—INJURY TO PASSENGER'S ESCORT—NEGLECT—PLEADING.

1. To give a passenger necessary assistance in boarding a train,—none being afforded by the carrier,—her husband is entitled to enter the train, and to have a reasonable time to leave it before it is started.

2. Though a conductor did not, till after the starting of the train, know of the desire to get off the train of one who had given his wife, a passenger, needed assistance in boarding the train, he should, instead of telling him to jump, have stopped the train for him; the stop at the station not having been long enough to allow him to alight, and he being an old man.

3. In the absence of a motion to make more specific, the allegation of the complaint that defendant "negligently and carelessly started the train" allows of evidence of negligence in starting the train with a jolt or jerk.

Appeal from common pleas circuit court of Saluda county; J. O. Klugh, Judge.

Action by George Johnson against the Southern Railway Company. Judgment for plaintiff. Defendant appeals. Affirmed.

B. L. Abney and John P. Thomas, Jr., for appellant. Tompkins & Wells and S. McG. Simkins, for respondent.

McIVER, C. J. This was an action to recover damages for injuries sustained by plaintiff in alighting from defendant's train,—caused, as alleged, by the negligence of the defendant company. The case, in brief, was this: The plaintiff bought a ticket for his wife from defendant's agent at Monetta, a station on defendant's line, which entitled her to be carried as a passenger from that station to Augusta, Ga. The train was behind time in reaching Monetta, and the plaintiff's wife, who was incumbered with heavy baggage,—a valise,—needed assistance in boarding the train, which not being afforded by any of the railroad employes, her husband, the plaintiff, undertook to carry her valise on the train for her, and, in leaving the train while it was in motion, fell or was thrown to the ground, thereby sustaining the injuries complained of. At the close of the testimony on the part of the plaintiff, the defendant moved for a nonsuit upon the ground that there was no testimony tending to show any negligence on the part of the defendant company. The motion was refused by his honor, Judge Klugh, saying: "The testimony is that the plaintiff made known his wish to the conductor (that is, his wish to get off the train); that the conductor, the agent of the railroad, told him to get off. That tends to show—I don't say it shows—negligence; but it is a question which must go to the jury, whether that was negligence of the company or not." The defendant then introduced its testimony, and after the charge of the circuit judge, which, it seems to us, was entirely correct, and eminently fair to both parties, the case was submitted to the jury, who returned a verdict in favor of the plaintiff for \$600, and judgment was entered thereon. From this judgment the defendant gave notice of appeal, basing the same upon four exceptions; but as two of them—the second and third—were abandoned, and very properly abandoned, at the hearing, it is only necessary to state and consider the first and fourth exceptions.

The first exception imputes error to the circuit judge in refusing the motion for a nonsuit. This turns upon the question whether there was any evidence tending to show negligence on the part of the defendant company from which the injuries complained of resulted. While it is true that the evidence did not tend to show that the plaintiff was a passenger, and hence that the defendant company owed plaintiff no duty as such, yet it is equally true that the evidence did tend to show that plaintiff went to the train for the purpose of assisting his wife, who was incumbered with heavy baggage, to board the train as a passenger; that the wife needed assistance in boarding the train, and, none being offered or rendered by any

of the railroad officials, it became necessary for the plaintiff, her husband, to render the assistance necessary; that for this purpose he took his wife's heavy valise, and went up the steps of the second-class car, for which his wife had a ticket; that as soon as he reached the platform he felt the train moving, and called to his wife to take the valise, so as to let him get off the train; that she took the valise, and the plaintiff went down the steps as quick as he could, saying to the conductor, who was standing on the front steps of the first-class car, that he wanted to get off, when the conductor told him to get off while the train was in motion; and that in doing so he fell or was thrown to the ground, whereby he sustained the injuries complained of. It is not, and cannot be, denied that such was the purport of the testimony on the part of the plaintiff, which was, of course, the only testimony before the court when the motion for a nonsuit was made. The question, then, is, did this testimony tend to show negligence on the part of the defendant. This depends upon the inquiry whether the defendant company owed the plaintiff any duty, and, if so, what, under the circumstances. There can be no doubt that a female holding a ticket entitling her to transportation as a passenger on a railroad train, if feeble, or incumbered with heavy baggage or other impediments, is entitled to have assistance in boarding the train; and, if the same is not afforded by the railroad officials or servants, her husband or other escort may render her the necessary assistance, and for this purpose is entitled to enter the train, and is entitled to a reasonable time to leave the train before it is put in motion. Both reason and authority unite in sustaining this proposition, and indeed we do not understand that it is denied in this case, if accompanied with the proviso that the defendant or its agents have notice of the purpose for which such person enters the train. Accepting the proposition with this proviso, we think it clear that there was some testimony—whether sufficient or not is not the question under a motion for a nonsuit—tending to show that defendant neglected to perform its duty to the plaintiff, in not allowing him a reasonable time to leave the train, which he had started to enter for the purpose of assisting his wife; for the evidence on the part of the plaintiff tends to show that the conductor was standing on the front steps of the first-class car, near enough probably to hear the wife tell her husband to bring in her baggage, as she was going up the steps of the second-class car, and that plaintiff, as soon as he discovered that the train was in motion, informed the conductor that he wanted to get off, and was told by him to get off, although the train was then in motion. This testimony, if true,—and that was a question for the jury,—certainly tended to show negligence in the performance of the duty which

defendant owed plaintiff under the circumstances stated.

It is contended, however, for the appellant, that according to this testimony the conductor had no notice of plaintiff's wish to get off the train until after it had started. Even if this view of the testimony should be accepted, we do not think it would relieve the defendant from the charge of negligence; for the evidence was that the train, being behind time, stopped for a very short time,—about half a minute, as one of plaintiff's witnesses estimated,—and if the conductor had started his train after such a very short time, and was then notified that the plaintiff desired to get off the train, he could and should have stopped his train to enable this old man, 65 years of age, to get off the train, especially as the testimony tended to show that the train had not stopped long enough to allow the plaintiff time to get off before it started. Besides, if the conductor was standing near where the wife of the plaintiff got on the train,—and that was a question of fact for the jury,—the jury might have inferred from the testimony that he was near enough to see and hear what passed between plaintiff and his wife as she was getting on the train; and, if so, that was sufficient to give him notice that the plaintiff merely got on the platform of the second-class car to assist his wife with her baggage, and wanted to get off before the train started. We do not think, therefore, that there was any error in refusing the motion for a nonsuit.

The only other exception is the fourth, which reads as follows: "Because the presiding judge erred, as matter of law, in charging that 'a railroad company is liable for injuries to persons lawfully in its cars, caused by a certain jolting or jerking of the same, if such jolting or jerking was due to the negligence and carelessness of the defendant, its servants and agents, and the injured party was not contributorily negligent,' because it was not alleged in the complaint that the negligence of defendant was caused by any 'jolting or jerking,' and there was no proof that such jerking or jolting was due to any negligence on the part of the defendant, and said charge was not applicable to the case at bar." It will be observed that the correctness of the legal proposition contained in the charge is not impugned, but the error is alleged to lie in the fact that there was no allegation in the complaint "that the negligence of defendant was caused by any jolting or jerking, and there was no proof that such jerking or jolting was due to any negligence on the part of the defendant," and hence said charge was inapplicable to the case. In the seventh paragraph of the complaint there is a general allega-

tion that the defendant "negligently and carelessly started the train"; and if the defendant desired any more specific allegation of negligence in starting the train,—as, for example, in starting the train with a jolt or jerk,—the defendant had a right to move the court to make the complaint more specific in its allegations, and, not having done so, it is too late now to avail itself of such an exception. As was well said by Mr. Justice Gary in delivering the opinion of the court in *Spires v. Railroad Co.*, 47 S. C., at page 30, 24 S. E. 993: "When a complaint is general in its allegations of negligence, and the defendant desires to know upon what particular acts of negligence the plaintiff relies to sustain his action, it is the duty of the defendant to make a motion to have the complaint made more definite and certain; and when this is not done the plaintiff has the right to introduce any competent evidence tending to show negligence on the part of the defendant." Accordingly in this case the plaintiff was allowed to testify, without objection, that, as he was about to get off, "the train either ran over a joint, or made a jerk, and I fell." So that the charge was applicable to the pleadings and the evidence. The other branch of the exception—that "there was no proof that such jerking or jolting was due to any negligence on the part of the defendant"—is fully disposed of by the terms of the charge, in which the circuit judge was careful to say "if such jolting or jerking was due to the negligence and carelessness of the defendants, its servants and agents"; so that, if there was no evidence of any negligence, the defendant could not possibly be injured by such a charge. Counsel for appellant, in his argument, has urged another objection to this charge, which is not indicated in the exception, and is not, therefore, properly before us. But, even if it were, it could not avail the defendant. It is contended that the vice in the charge was the failure of his honor to distinguish "between the case of a person in the car, in a position of safety, and the case of the plaintiff, who at the time of the alleged jerk was in a position of danger, on the bottom step of the car, and in the act of trying to get off a moving train,"—it should be added, getting off by the direction of the conductor, as the plaintiff testified. In the first place, it does not appear that any such distinction was brought to the attention of the circuit judge, either by request to charge or otherwise; and, in the second place, the matter was brought to the attention of the jury by the concluding words, "and the injured party was not contributorily negligent." The fourth exception is overruled. The judgment of this court is that the judgment of the circuit court be affirmed.

(104 Ga. 318)

HOLLIS v. COVENANT BUILDING & LOAN ASS'N.

(Supreme Court of Georgia. May 25, 1898.)

CONTRACTS — BY WHAT LAW GOVERNED — EJECTMENT — PLEA — DEED UNDER USURIOUS CONTRACT.

1. Where a lender is a resident of one state and the borrower is a resident of another, and the evidence of debt, and the deed given to secure the payment of the same, as well as all other papers connected with the transaction, are executed in the state of the borrower's residence, and there is nothing in the papers to indicate that it was the intention of the parties that the contract should be controlled by the law of the state of the lender's residence, the contract, as to its validity, form, and effect, will be controlled by the law of the state where the contract was executed.

2. In the trial of an action for the recovery of real property it was error to strike a plea filed by the defendant, in which it was alleged that the deed upon which the plaintiff relied was given to secure a debt which was a part of a usurious contract. In such a case usury need not be pleaded with the same particularity as in a suit to recover it back, or in a plea attempting to set it off against the plaintiff's demand.

3. If in the trial of such a case it should appear that the contract of which the deed was a part was one made with a building and loan association, pure and simple, and that the apparent usury was simply the result of the plan and scope of such association, the plea of usury would not be available to the defendant.

(Syllabus by the Court.)

Error from superior court, Bibb county; W. H. Felton, Jr., Judge.

Action by the Covenant Building & Loan Association against Jere Hollis. Judgment for plaintiff, and defendant brings error. Reversed.

Chambers & Jordan, Preston & Ayer, and Estes & Jones, for plaintiff in error. Hope, Polhill, Hardeman, Davis & Turner, for defendant in error.

COBB, J. 1. The first question to be determined in the present case is whether or not the contract between the plaintiff and the defendant is to be governed by the laws of Tennessee or those of Georgia. All of the different transactions which make up the contract must be looked to in order to properly determine this question. The plaintiff resides in Tennessee and the defendant resides in Georgia; so residence can have no material bearing on the question. There appears in the record a deed given to the plaintiff to secure the payment of the loan, a bond for the faithful performance of the contract, and a written transfer to the plaintiff of 25 shares of stock owned by the defendant in the plaintiff association. These instruments were all executed on the same day, in Bibb county, in this state. The bond recites that the plaintiff and his wife procured the loan on the day on which it and the other instruments were executed. There is nothing in the record to show where the loan was in fact made, or where the money was to be repaid, or what was the intention

of the parties in this regard. The circumstances above recited would afford a strong presumption that the contract was, in fact, consummated in this state. The recital in the bond would seem to indicate that the money was paid here, and all the papers which appear in the record as constituting the contract between the parties appear on their face to have been executed here. So far as the record is concerned, it is as reasonable to assume that the loan was to be repaid in Georgia to an agent of the plaintiff, as that it was to be sent to the office of the plaintiff in Tennessee. Where a person in one state borrows money from a person in another state, and the instrument given to secure the loan is executed in the borrower's state, and the money is to be repaid there, the contract will be governed by the laws of that state, notwithstanding the money may have been actually advanced in the state where the person making the loan resided. See Story, Conf. Laws, p. 392, § 287a; De Wolf v. Johnson, 10 Wheat. 367; Cope v. Alden, 53 Barb. 350; Hosford v. Nichols, 1 Paige, 220; Klinck v. Price, 4 W. Va. 4; Cubbedge v. Napier, 62 Ala. 518. According to the authorities just above cited, the interest allowed by the laws of the place where the contract is made, in the absence of any special stipulation in the contract to the contrary, is presumed to be the interest agreed upon. See, also, Martin v. Johnson, 84 Ga. 481, 10 S. E. 1092; Odom v. Security Co., 91 Ga. 505, 18 S. E. 131. If it should appear at the trial of this case, therefore, that the loan was in fact made and was to be repaid in the state of Tennessee, then the legal rate of interest allowed by the laws of that state would be looked to to determine whether or not the contract is usurious. But, it being presumed from the record that the contract was executed in Georgia, was to be performed here, and hence is governed by the laws of this state, it was unnecessary for the defendant to allege in his pleas what rate of interest was allowed by the laws of Tennessee. The chief reason why the *lex loci contractus* governs is that the parties are supposed to have in mind the law of the country where the contract is made. It should be determined, therefore, from the nature of the transaction and the situation and objects of the parties, what law they had in contemplation when the contract was executed. Van Schaick v. Edwards, 2 Johns. 355.

2. But it is contended that, even if the contract is to be governed by the laws of this state, the plea attempting to set up usury was properly stricken, for the reason that usury was not pleaded with sufficient minuteness. In the case of Carswell v. Hartidge, 55 Ga. 412, it was held that "in pleading usury for the purpose of avoiding a deed it is unnecessary to set it out with all the particularity required in pleas of usury to actions for money. In such actions amounts

are material, but in attacking a deed the bare fact of usury is enough to decide the issue of title." The defendant's plea, under the ruling made in the case above cited, alleged usury with sufficient particularity, and hence was improperly stricken.

3. The defendant alleges that the contract entered into between himself and the plaintiff was a scheme to evade the usury laws. Whether or not this would be true would depend upon whether the plaintiff association was formed for the purpose of lending money to its members; in other words, whether it was a building and loan association pure and simple, or whether it was a composite institution, formed for various other purposes as well. If at the trial it should be made to appear to the jury that the contract was in fact made with a building and loan association, pure and simple, and that the apparent usury was simply the result of the plan and scope of the association, then the plea of usury would not be available to the defendant. If, on the other hand, it should appear that it was a mere device to hide a real intent to exact usury, then the plea would be good, and the deed given to secure the payment of the loan would be void. See *Parker v. Association*, 46 Ga. 166; *Butler v. Investment Co.*, 94 Ga. 562, 20 S. E. 101. Judgment reversed. All the justices concurring, except SIMMONS, C. J., disqualified.

(101 Ga. 691)

HEARD et al. v. PHILLIPS et al.

(Supreme Court of Georgia. July 9, 1897.)

ACTION — FILING PLEADING — COMPUTATION OF TIME — COMPETENCY OF WITNESS — ADVERSE POSSESSION.

1. In computing the number of days preceding the term of court in which a petition must be filed to make it returnable to that term, the Sundays intervening between the date of filing and the commencement of the term are to be counted; and this is true even if the twentieth or last day before the commencement of the term falls on Sunday.

2. Where a transferee of a bond for titles has taken a deed from the obligor of the bond, and brings a suit to recover the possession of the premises so conveyed to him from one who acquired possession under the original obligee, he being dead at the time of the trial, the defendant does not fall within any of the classes of persons excluded as witnesses by the terms of paragraph 1 of section 5269 of the Civil Code.

3. The possession of one who has been admitted under a bond for titles to land is not adverse to the obligor of the bond, or the representatives upon his estate, in the sense that such possession may be the foundation of a prescription; but where, in pursuance of such a bond, the obligee has been admitted into possession, and the obligor dies, the possession so obtained is adverse in the sense that a sale of such property by the administrator upon the latter's estate pending such possession is void, and one who takes a conveyance at such sale cannot in his own name, by force of such conveyance, maintain an action against the person so holding possession.

4. So far as the assignments of error upon rulings made in the court below are properly

presented for consideration, there was no error of law committed, except upon the questions dealt with in the second and third headnotes.

(Syllabus by the Court.)

Error from superior court, Fulton county: J. H. Lumpkin, Judge.

Action by W. R. Phillips, Jr., & Co. against Charity Heard and others. Judgment for plaintiffs. Defendants bring error. Reversed.

Robert L. Rodgers, for plaintiffs in error. Arnold & Broyles, for defendants in error.

LITTLE, J. 1. The present suit was filed on August 14, 1894, and made returnable to the September term of Fulton superior court, which by law met on the first Monday in September, which Monday was the 3d day of that month. The cause coming on for a hearing, defendants' counsel moved to dismiss the same, on the ground that the suit had not been filed for the length of time required by law—that is, 20 days—before the sitting of the court for the September term. This motion was overruled, and is made a ground of exception in the motion for a new trial. The contention is that the Sunday preceding the sitting of the court on Monday cannot legally be counted in computing the number of days intervening between the filing of the petition and the commencement of the term of the court. This court has heretofore made a ruling directly on this point, which is adverse to the contention of the defendants' counsel. See the case of *Merritt v. Bank*, 100 Ga. 147, 27 S. E. 979, wherein it was ruled that: "Under an act providing that all cases brought in a designated city court should be returnable to and triable at the term next ensuing after twenty days have elapsed from the filing, a case in that court, the declaration in which was filed on the 12th day of June, 1894, was ripe for trial at the ensuing July term, which began on the first Monday of that month. This is true although the last of the twenty days prescribed by the statute in this instance fell upon the Sabbath day." The effect of this ruling is that the Sundays intervening between the date of filing and the commencement of the term are to be counted.

2. Phillips brought an equitable petition involving a complaint in the nature of an action of ejectment against the defendants to recover possession of a house and lot in the city of Atlanta, and prayed, also, therein for other relief. Both plaintiff and defendants claimed title under O. T. Swift and H. J. Lamar, Jr. Phillips claimed under a bond for titles, executed by the last-named parties to one John Wright, conditioned to make title to him upon the payment of an aggregate sum in monthly installments of given amounts. Upon this bond appears a transfer and assignment of the same by Wright to James M. Jones, who in turn transferred and assigned the same and all his rights thereunder to the plaintiff. He also relied

for recovery on a deed from Burkhart, as administrator of C. T. Swift, to Mrs. Lena B. Swift, under an order from the court of ordinary, conveying to her a half undivided interest in the land in dispute; and a deed from Mrs. Lena B. Swift and H. J. Lamar, Jr., conveying the land in question to himself. The defendants founded their claim upon the contention that during the lifetime of James Jones his wife, Emma, a daughter of Allen Holland, was the owner of another lot, and with the same, or its proceeds, traded with John Wright for the lot in controversy, and the bond for titles ought to have been transferred by Wright to her, as her money paid for it; that, after the death of James Jones, his wife, Emma, remained in possession of the lot in controversy until her death, she having in the meantime married defendant Woodley; and that after her death the land was administered upon as her estate, and regularly sold at administrator's sale to Allen Holland, under whom Charity Heard was in possession when the suit was brought. It was further contended that the transfer of the bond for title by James Jones to plaintiff was made only as security for a loan of \$18, or some such sum of money. It appears that John Wright, the original obligee in, and James Jones, the intermediate transferee of, the bond for titles introduced in evidence by the plaintiff, were both dead at the time of the trial. During the progress of the trial Charity Heard and Allen Holland, defendants, were introduced as witnesses, and, among other things, undertook to testify, respectively, as to certain transactions occurring between them and James Jones and John Wright during their lifetime, whereupon plaintiff's counsel objected to their testifying to anything that transpired between them and the deceased parties, for the reason, as urged, that plaintiff was claiming under said deceased parties, and Charity Heard and Allen Holland were parties to the suit, and therefore incompetent to testify concerning such transactions, under the provisions of the evidence act of 1889, as amended by subsequent acts; the provisions of all of which acts will be found codified in section 5269 of the Civil Code. The court below sustained the objection as made, and, we presume, rested his judgment upon the provisions of paragraph 1 of said section, the full text of which is as follows: "Where any suit is instituted or defended by a person insane at time of trial, or by an endorsee, assignee, transferee, or by the personal representative of a deceased person, the opposite party shall not be admitted to testify in his own favor against the insane or deceased person, as to transactions or communications with such insane or deceased person." It will be noted that the plaintiff presented the bond for titles which had been transferred to him to Mrs. Lena B. Swift and H. J. Lamar, Jr., and upon payment by plaintiff of \$225 as the balance due

upon the purchase price to Swift and Lamar they executed to plaintiff a deed conveying the land in dispute, and it was this deed which formed the foundation of the present action. Phillips was claiming under and suing upon this deed. True enough, the bond for titles constituted a link in the chain of title exhibited to the court, and upon which Phillips' claim rested. It served, however, merely to show the channel through which the plaintiff derived the title upon which his claim was finally based. His suit was not founded upon the transfer or assignment of the bond for titles, nor was he suing as an assignee or transferee thereof, within the meaning of the statute. Although the bond and transfers were needful in showing his chain of title, and were, with respect to the gravamen of the action, collaterally involved, yet the suit was directly upon the deed from Swift and Lamar to the plaintiff. We think the provisions of the statute apply only in cases where the action is instituted or defended directly by an indorsee, assignee, or transferee; that is to say, where the indorsement, assignment, or transfer is directly sued upon or defended. We conclude, therefore, that the court erred in sustaining the objection to the competency of the witnesses heretofore referred to.

8. John Wright made a contract of purchase of the property in dispute from C. T. Swift and H. J. Lamar, Jr., taking their bond for titles, conditioned to make a conveyance of the property to him upon payment of the purchase price. Under this contract of purchase and bond for titles he was admitted by Swift and Lamar into possession of the premises. Wright afterwards transferred and assigned the bond to Jones, who in turn transferred and assigned the same to the plaintiff. Pending the outstanding of this bond for titles, and before its conditions had been complied with and title made, C. T. Swift, one of the joint obligors, died. Administration was regularly taken on his estate by one Burkhart, and, it appearing that his intestate and H. J. Lamar, Jr., were tenants in common of the property in controversy, Burkhart, as administrator, under an order of the court of ordinary, conveyed a half undivided interest in the land in dispute to Mrs. Lena B. Swift, who then, as has been shown, joined Lamar in a deed to the plaintiff in pursuance of the terms and conditions of the bond for titles previously executed by C. T. Swift and H. J. Lamar, Jr., and held by plaintiff in the manner heretofore pointed out. It does not appear that the administrator made any effort whatever to recover possession of this property from the obligee in the outstanding bond before making administrator's deed to Mrs. Lena B. Swift. Our Civil Code (section 3457) provides that "an administrator cannot sell property held adversely to the estate by a third person; he must first recover possession." It has several times been ruled by this court

that the possession of one holding under a bond for titles to land is not adverse to the obligor of the bond, or the representatives upon his estate, in the sense that such possession may be the foundation of a prescription as against such obligor or his estate. *Hines v. Rutherford*, 67 Ga. 606; *Allen v. Napier*, 75 Ga. 275; *Hawkins v. Dearing*, 93 Ga. 108, 19 S. E. 717. Indeed, a vendee under a bond or contract for conveyance, though placed in possession by the vendor, does not hold adversely to the latter. By the very fact of taking under a bond or contract for a deed to be thereafter executed by the vendor, a purchaser recognizes the title of his vendor, and acknowledges himself as holding in subordination, and not in antagonism, to it. 1 Warv. Vend. 201. It must be understood, however, that the obligor or his personal representative is not at liberty to treat the obligee as holding in subordination to the title of the obligor for all purposes. The doctrine is well settled, and has been announced in strong terms by the federal courts, that, while the vendor without deed is a trustee of the vendee for the conveyance of the title, and the vendee in turn a trustee for the payment of the purchase money, yet that the vendee is in no sense a trustee of the vendor as to the possession of the property sold; that the vendee claims and holds it in his own right, for his own benefit, subject to no right of the vendor save the terms which the contract imposes; and that his possession is, therefore, adverse as to the property, but friendly as to the performance of the conditions of the purchase. *Id.* 202; *Hobart v. Drohan*, 10 Pet. 108. We are clearly of the opinion, therefore, that while the obligee in the bond from Swift and Lamar had, as to the latter, no such adverse possession of the premises as would enable him to acquire a prescriptive title thereunder, yet such possession was, within the meaning of our statute, adverse in the sense that a sale of any portion of the property by the administrator upon the estate of one of the obligors, pending such possession, and without first having recovered the possession as required by the statute, was void. It follows, therefore, so far as this record shows, that the legal title to an undivided half interest in the premises in dispute still remains in the estate of C. T. Swift, the administrator's deed to Mrs. Lena B. Swift being void, and consequently ineffectual to pass the title out of said estate. It being incumbent upon the plaintiff to recover upon the strength of his own title, and he having failed to exhibit title covering the undivided interest in the property belonging to the estate of C. T. Swift, the court erred in directing a verdict for the plaintiff covering the entire premises.

4. In addition to the questions above considered, the motion for new trial contains several assignments of error upon rulings made in the court below; but, in so far as these assignments of error are properly pre-

sented for consideration, there was no error of law committed except as herein pointed out. Judgment reversed.

(123 N. C. 695)

STATE v. HORTON et al.

(Supreme Court of North Carolina. Oct. 10, 1898.)

BAIL—DISCHARGE OF RECOGNIZANCE—TERMS OF COURT.

Under Code, § 926, authorizing the sheriff to adjourn a regular term to the next regular term if the judge be absent, a recognizance to appear at a term which is so adjourned is not discharged by an appearance thereat, but defendant is bound to appear at the next regular term, or at an intervening special term, under section 919, requiring persons summoned to appear at a regular term to appear at an intervening special term.

Appeal from superior court, Pasquotank county; Norwood, Judge.

Scire facias by the state against John Horton and others on a recognizance. There was a judgment for defendants, and plaintiff appeals. Error.

The Attorney General for the State. G. W. Ward, for appellees.

CLARK, J. The defendant gave recognizance for his appearance "at the next term of the superior court, on the 3d Monday in September." At that term, the judge, being ill, did not appear, and the court was "adjourned until next term." Code, § 926. It would be a grave miscarriage of justice if on such facts all recognizances are discharged when no officer is present authorized to take renewals. In *Askew v. Stevenson*, 61 N. C. 288, it was held that the cause was continued "certainly for one term," and probably "from term to term, until the attendance of a judge to hold the court," by virtue of Rev. Code, c. 31, § 24. That section was brought forward in the Code (section 919), with the words stricken out which formerly restricted its application to civil cases. Certainly this section applies in the present case, as a special term was held in January following, of which "due notice was given by publication in the newspapers and otherwise"; and section 919 provides that all persons "bound to attend the next regular term of the court shall attend at the special term, under the same rules," etc. The recognizance to appear at the September term was not to "depart the same without leave." There being no judge present, no leave was given beyond the adjournment, "till next term." The Code (section 926), by operation of law, carried all matters over to "the next regular term" in the same plight and condition (*Walker v. State*, 6 Ala. 350), and this was transferred to the intervening special term by virtue of Code, § 919. No hardship can accrue from any bona fide mistake in such matters, as the judge has discretion to remit or lessen forfeitures in all cases (Code, § 1205), but in re-

fusing judgment on the scire facias there was error. *State v. Houston*, 74 N. C. 174, has no application, for there, after the bond was given, a new regular term was established by law, to be held before the term at which the defendant was bound over to appear. Error.

(122 N. C. 710)

STATE v. WOODARD.

(Supreme Court of North Carolina. Oct. 10, 1898.)

FISH—PUBLIC WATERS—NETS—CONSTITUTIONAL LAW—CRIMINAL LAW—VENUE.

1. Acts 1897, c. 51, prohibiting fishing with gill nets more than 20 yards long in Albemarle Sound, is not unconstitutional, as interfering with the natural right of a citizen of North Carolina to fish in the navigable waters of the state.

2. Said act is violated by fishing with a gill net exceeding that length, but cut in sections of 20 yards each, and tied together, with 6 inches of space between the different sections.

3. The objection that a prosecution is not brought in the proper county must be taken by plea in abatement.

Appeal from superior court, Bertie county; Brown, Judge.

J. A. Woodard was convicted of fishing in Albemarle Sound with a gill net exceeding 20 yards in length, and he appeals. Affirmed.

W. M. Bond, for appellant. Francis D. Winston, R. B. Peebles, and the Attorney General, for the State.

FURCHES, J. This is an indictment under chapter 51 of the Acts of 1897, for unlawfully fishing in the waters of Albemarle Sound. The statute is singularly drawn, and its policy is not apparent to us. It is contended on behalf of the state that its object is to protect its citizens from the depredation of persons from other states, while it is contended by the defendant that its object is to destroy the small fisheries in the interest of the large beach seine fisheries. And it seems rather singular that a gill net 80 yards long is permitted to be used in Roanoke river, one-fourth of a mile wide, while one not more than 20 yards long is allowed to be used in Albemarle Sound, which is from 6 to 12 miles wide. But we have nothing to do with these matters of policy further than they may assist us in putting a proper construction upon the act of the legislature under which the defendant is indicted; and, as neither the evil to be remedied nor the benefit to be attained by this statute is apparent, we are furnished no aid from this source.

The defendant contends that this act is unconstitutional, as it interferes with the natural right of a citizen of the state to fish in its navigable waters. But this question seems to have been decided against the contention of the defendant. *Rae v. Hampton*, 101 N. C. 51, 7 S. E. 649.

The defendant also objects to the venue, in Bertie, and says that it should have been in

Chowan, county. But this is a matter under the control of the legislature, and, upon an examination of the act, it is found that Bertie is included in the counties where the indictment may be had. Besides, if there was ground for this objection it should have been taken by plea in abatement.

This brings us down to the question as to whether the matters found in the special verdict were a criminal violation of the act under which the defendant is indicted, and we are of the opinion that they were; that under this act he could only fish with nets 20 yards long. The defendant, for some reason, and, we must suppose, for the purpose of evading the penalty of this act, cut his nets up into sections of 20 yards in length, then tied a half dozen of them together, leaving only 6 inches between them, and put them out. This, to our minds, was rather a stupid device to evade the penalty of the statute. It is like the case where the defendant, to evade the penalty of the law for retailing liquor by the small measure, would sell his customer a cob for a dime, and then give him a drink for buying one of his cobs. The court said this would not do. Another liquor dealer would leave a bottle of liquor on a table, with a slot in the table, where his customers would find it, trusting to their honor to drop a nickle in the slot every time they took a drink. But the court said this would not do; that these were efforts to evade the law by means of these stupid devices, which the law would not allow. And so it was with the defendant in this case. Such attempts to evade the law cannot be allowed to succeed. The judgment is affirmed.

(123 N. C. 705)

STATE v. ANDERSON.

(Supreme Court of North Carolina. Oct. 10, 1898.)

STATUTES—IMPLIED REPEAL—REVIVAL.

Acts 1885, c. 106, making it a misdemeanor to allow stock to run at large in the county of Edgecombe, was not repealed by Acts 1897, c. 301, which amended the former act by adding after the word "Edgecombe" the words "between March the 1st and December the 31st." Hence Code, § 2799, requiring a planter to keep a fence about his farm, which was repealed by the act of 1885 as to Edgecombe county, is not in force there, as having been revived by the act of 1897.

Appeal from superior court, Edgecombe county; Brown, Judge.

Thomas Anderson was found guilty in the circuit court on a special verdict on an indictment charging him with not having a fence about his premises, and he appealed to the circuit court, which reversed the judgment of conviction, from which judgment the state appeals. Affirmed.

The indictment is as follows, viz.: "The jurors for the state," etc., "present that Thomas Anderson," etc., "on the 20th day of January, 1898, with force and arms," etc., "un-

lawfully did take up and impound a certain hog, running at large, the property of one J. M. Pittman, the said hog being allowed to run at large in the county aforesaid between December 31st and March 1st of each year, against form of the statute," etc. "And the jurors aforesaid," etc., "do further present that the said Anderson, * * * on the day and year aforesaid, with force and arms," etc., "did unlawfully and willfully fail, omit, and neglect to have and make a sufficient fence about the cleared ground of him, the said Thomas Anderson, under cultivation, at least five feet high, there being no navigable stream and no deep water course instead of such fence, and there being at the time aforesaid no stock law in force within the limits of said county of Edgecombe within which said land is situated, against the form of the statute," etc. "And thereupon the following jurors [naming them] being chosen," etc., "upon their oath say that the defendant owned and was in the possession of a farm situated in said county of Edgecombe, whereon he cultivated and grew various crops during the year 1897; that he had winter crops growing thereon at the time of the commission of the misdemeanor wherewith he is charged; that said farm is situated within the stock-law territory of said county, and has been so situated since March, 1885; that during the month of January, 1898, one J. M. Pittman owned a certain hog, which he permitted to run at large within said territory; that said hog came upon the farm of the defendant, and did damage in the cultivated fields of the defendant, and that while said hog was so at large upon the farm of the defendant, doing damage, the said defendant took up said hog, and impounded same, during the month of January, as aforesaid; that while said hog was impounded the defendant fed same; that the defendant refused to surrender the hog to Pittman, the owner, until defendant had been paid for the damage done by said hog, and the food furnished to it by the defendant; that there is no fence of any kind inclosing the farm of said defendant and his cultivated fields, nor has there been any inclosure since 1885; that defendant does not permit his stock to run at large; that defendant impounded said hog because he thought he had a right so to do. But whether defendant be guilty of the misdemeanor as charged in said indictment against him, the jurors are altogether ignorant, and pray the advice of the court thereupon. And if, upon the whole matter," etc., "it shall appear to the court that he is guilty in law, * * * then they find him guilty. If upon the whole matter it shall appear to the court that he is not guilty," etc., "then the jurors find * * * that the defendant is not guilty." "Upon considering the foregoing the court is of opinion that the defendant is guilty, and directs that a verdict of guilty be entered, and that defendant be fined one penny and costs." The defendant appealed to the superior court.

The judgment of the superior court was as follows, viz.: "This cause coming on to be heard upon appeal from the judgment of the circuit court, the court is of opinion that the act of 1885 (chapter 106) by implication repealed section 2799 of the Code, relating to fences, as to Edgecombe county; that the amendment of March 8, 1897 (chapter 301), does not have the effect to re-enact that section; that Edgecombe county, being in stock-law territory generally by virtue of act 1885 (chapter 106), the said section of the Code does not apply to it; that no indictable offense is stated in the bill, being an offense when committed in said county; that upon the special verdict the defendant is not guilty. Judgment of circuit court reversed. Let the proceedings be quashed, and defendant go without day," etc. "[Signed] Brown, J." From the foregoing the state appealed to the supreme court.

A. B. Andrews, Jr., and The Attorney General, for the State. John L. Bridgers, for appellee.

FAIRCLOTH, C. J. The act of 1885 (chapter 106) makes it a misdemeanor for any person to permit his or her live stock to run at large in the county of Edgecombe, and the act of 1897 (chapter 301) amends the said act of 1885 by adding after the word "Edgecombe" the words "between March the 1st and December the 31st." The first act, called the "Stock Law Act," relieved every planter from keeping a lawful fence around his farm, as required by the Code (section 2799). The defendant is indicted for failing to have such fence around his farm on the 20th of January, 1898. The case hinges upon the effect of the amending act of 1897 (chapter 301). The contention of the state is that the amendment repealed the act of 1885 and put the Code (section 2799) in operation, on the principle that the repeal of the statute, repealing a former statute, leaves the latter in force. We cannot adopt that view in this case. The amending act does not profess to or in effect repeal the first statute. We think the amendment must be taken as if it had been inserted in the original act, uncovering or excepting the period from December 31st to March 1st. In England the common law did not permit stock to run at large. In this country the conditions were so different, owing to the vast forests, and the small number of acres under cultivation, that the rule was practically changed, and by common consent the custom obtained of allowing stock to run at large. It was rather the necessity of the situation than a rule of law, and this custom still continues, when not changed by statute. Our court has frequently recognized this custom in the various instances in which the question arose in different forms. *Laws v. Railroad Co.*, 52 N. C. 468; *Morrison v. Cornelius*, 63 N. C. 351; *Burgwyn v. Whitfield*, 81 N. C. 263. Our conclusion therefore

is that the judgment of the superior court upon the special verdict was not erroneous. Affirmed.

(128 N. C. 697)

STATE v. GODWIN et al.

(Supreme Court of North Carolina. Oct. 10, 1898.)

TAXATION — EQUATION BETWEEN POLL AND PROPERTY TAXES—STATUTES—PARTIAL INVALIDITY—OFFICERS—CRIMINAL LIABILITY—CONSTITUTIONAL LAW.

1. Pub. Laws 1897, c. 514, providing for the working of roads in Hertford county, and levying a tax for that purpose on property therein, fails to observe the constitutional equation between the tax on the poll and the tax on property.

2. Where the enforcement of an act depends entirely on a tax provided by one section of it, and that section is void because of the illegality of the tax, the entire act falls. Pub. Laws 1897, c. 514.

3. Where a law which enjoins performance of a duty on a public officer, and makes its neglect criminal, is attempted to be repealed by a statute which is unconstitutional, and the officer, believing in good faith that the repealing act is constitutional, neglects performance of such duty, he is not criminally liable.

Appeal from superior court, Hertford county; Norwood, Judge.

H. D. Godwin and others were indicted for refusal to perform an official duty, and found not guilty, and the solicitor for the state appeals. Affirmed.

The jury returned a special verdict, as follows: "We find that on the 7th day of March, 1897, the general assembly passed an act to provide for working the roads of Hertford county, as the same appears in chapter 514 of the Public Laws of North Carolina (Sess. 1897), and which said act is made a part of this finding. That on the first Monday in June, 1897, the county commissioners of Hertford county met in regular session, and, after consultation with counsel and upon advice, they decided that the said act was inoperative and void and unconstitutional, because the act did not observe the constitutional equation of taxation; and at the said meeting the county commissioners refused and declined to levy said road tax, or to elect the officers named in the act, or in any way to put in operation the provision of the said act; and this official decision and conduct of the said commissioners was known to each of the defendants named in the bill of indictment in this cause. That the commissioners at said meeting levied the full constitutional limit of taxation for the ordinary and necessary expenses of Hertford county, and this was known to the defendants. That on the 1st day of June, 1897, and since that time, they have all been acting justices of the peace in St. John's township, in Hertford county. That on the first Thursday in August, 1897, the said defendants, after taking the advice of counsel, and being of opinion that the provisions of the general law relating to public roads in Hert-

ford county had been repealed by said act, and that the said act was in force, declined and refused to hold the meeting required by sections 2015 and 2016 of the Code, and also made no report to this court at the fall term of the condition of the roads in said township. That the failure of the said defendants to hold said meeting and to make the said report was owing to the fact that they were advised and believed that their duties in regard to the public roads of Hertford county had been taken from them by the said act, and vested in the officers named in said act; and, being ignorant of the law, the jury say that if, upon the facts as above stated, the court is of opinion that under the law these defendants are guilty, the jury find them all guilty as charged; and if the court is of opinion that under the law the defendants are not guilty, then the jury find that all the defendants are not guilty." The judgment of the court was that the defendants were not guilty. The solicitor for the state appealed.

B. B. Winborne and the Attorney General, for the State. Francis D. Winston, for appellees.

MONTGOMERY, J. The defendants were justices of the peace, and by virtue of their office (Code, § 2014) were a board of supervisors, and were required to look after the public roads in their townships. They were required also (Id. § 2015) to hold stated meetings for the purpose of consulting on the condition of the roads, and, by section 2024 of the Code, to make to the superior court, at term time, an annual report of the condition of the roads. The general assembly of 1897, in chapter 514, undertook to repeal the provisions of the Code, above referred to, as to Hertford county, and to impose upon others the duties required of the defendants. The defendants, after the enactment of the act of 1897, failed and refused to discharge the duties enjoined upon them under the provisions of the former law (the Code), and they were indicted on account of such failure and refusal. The act of 1897, in its entirety, is contrary to the provisions of our state constitution, and is therefore void. In the act a tax for making, repairing, and keeping up the public roads of Hertford county, a necessary county expense, was authorized to be levied upon property solely. The constitutional equation between the tax on the poll and that on property was not observed. It was contended here by the counsel of defendants that a part of the act was in conformity with the constitution, and that such part should be upheld; but, upon a careful reading of each of its provisions, it is manifest that they are all interdependent. The county commissioners had refused from the beginning to act under the law of 1897, and hence the question of the appointment of the officers prescribed by that act, in place of the defendants, and the consequent effect of such appointment, does not arise. The

whole act appears on its face to be one common plan for working the public roads of Hertford county, and the enforcement of its provisions depends entirely upon the tax provided for in the first section, and, that section being void because it disregards the equation of taxation between property and the poll, the whole act falls.

The question for decision, then, is, is one who is a public officer under a former provision of law compelled, under pain of indictment and punishment, to perform the duties of the office during the time when there was on the statute books a subsequent act unconstitutional in all of its provisions? The matter is an important one, both to the public and to the individual. With us, public office is a public trust, and public officers are merely the agents of the people. This fundamental principle of republican government may not always be recognized by the officer, but it is nevertheless the true theory. When the people, through their representatives, create a public office, and prescribe the duties of the officer, the people act for the common good, and the incumbent of the office is the mere instrument used for the general welfare. His gain or profit is not in contemplation of the lawmakers. The public interest is the chief consideration. What an anomalous state of things would we have, then, if a person believing himself to be a public officer, because of the discharge of the duties which he thought he owed to the public, should afterwards be indicted and punished because the courts had held the act which created the office and prescribed its duties to be against the provisions of the constitution and void! Such a proposition would be equivalent to declaring that the individual officeholder must be wiser than the whole people, represented in their general assembly. Such a proposition, to us, seems opposed to every idea of justice. It could not be true. The criminal law cannot be invoked to punish one who acts as a public officer,—as an agent of the people,—and who in the discharge of a public duty had obeyed an act of the lawmaking power, even though the law be unconstitutional, unless the act itself had required the committal of a crime,—a thought which could not be entertained for a moment. And it makes no difference that in the case before the court the defendants are indicted for a refusal to perform certain duties under a former law attempted to be repealed by a subsequent unconstitutional statute, and not for doing positive acts under an unconstitutional law. The principle is the same in both cases. The defendants here cannot be punished under the criminal law for falling and refusing to perform the duties of an office, which office, and the duties pertaining to it, had been sought to be repealed by a subsequent act of the legislature, afterwards declared by the courts to be unconstitutional. Until the subsequent statute was declared to be unconstitutional by competent authority, the defendants, under

every idea of justice and under our theory of government, had a right to presume that the lawmaking power had acted within the bounds of the constitution, and their highest duty was to obey.

It is not necessary, to a proper determination of this case, to go into the realm of the effect of contracts, executed or executory, made by a person claiming to be a public officer, but where there is no lawfully created office. The counsel for the prosecution cited to the court, in support of his position, the case of *Norton v. Shelby Co.*, 118 U. S. 425, 6 Sup. Ct. 1121, and especially to that portion of the opinion wherein it was declared by the court that "an unconstitutional act is not a law; it confers no rights; it imposes no duties; it affords no protection; it creates no office; it is, in legal contemplation, as inoperative as though it had never passed." The opinion in that case was rendered upon the effect of an executory contract made by one who claimed to be a public officer, the office having been created without authority of law. For the reasons given in this opinion, the case of *Norton v. Shelby Co.*, supra, does not apply to the facts in this case. Upon the special verdict the judgment of the court below was that the defendants were not guilty, and the judgment is affirmed. Affirmed.

(53 S. C. 198)

RIDDLE v. REESE.

(Supreme Court of South Carolina. Sept. 28, 1898.)

COURTS—JURISDICTION—RESIDENCE.

1. Act Feb. 25, 1897 (22 St. at Large, p. 588), establishing C. county, and declaring that "all suits pending in * * * counties, in which the defendants reside in the portions of said counties now established as the county of C., * * * shall be transferred to the calendars of the courts of the county of C.," and declaring that the act shall take effect "from and after its passage," deprives a court of one of the old counties of jurisdiction of such an action, though the defendant consents to trial by it.

2. Change of residence so as to affect jurisdiction is not shown by the mere fact of defendant's arrest, imprisonment, and escape.

Appeal from common pleas circuit court of York county; O. W. Buchanan, Judge.

Action by James H. Riddle, administrator of Charles T. Williams, deceased, against Marion R. Reese. Judgment for plaintiff. Defendant appeals. Reversed.

Hart & Hart and Thos. F. McDow, for appellant. Finley & Brice and Wm. B. McCaw, for respondent.

McIVER, C. J. This action was brought by plaintiff, as administrator of Charles T. Williams, suing for the benefit of the wife and child of his intestate, to recover damages, from the defendant, proportioned to the injury resulting from the death of his intestate, alleged to have been caused by the wrongful act of the defendant. The action was commenced on the 6th of March, 1898, and

was tried before his honor, Judge Buchanan, and a jury, at the April term of the court of common pleas for York county, in the year 1897, and resulted in a verdict for the plaintiff, upon which judgment was entered on the 14th of April, 1897. From this judgment the defendant gave notice of appeal, based upon sundry exceptions set out in the record.

Inasmuch as the question of jurisdiction has been raised, it will be necessary first to determine that question before we can look into the merits; for, if it shall be determined that the court which undertook to render the judgment appealed from had no jurisdiction to try the case, then it would be neither necessary nor proper for us to inquire whether there were any errors committed in the progress of the trial.

It is claimed by the appellant that the court of common pleas for York county, in which the case was tried, had no jurisdiction to try the case, because by the act to establish Cherokee county, approved 25th of February, 1897 (22 St. at Large, p. 588), it was expressly declared, in the tenth section of said act, "that all suits pending in Spartanburg, Union and York counties, in which the defendants reside, in the portions of said counties now established as the county of Cherokee, * * * shall be transferred to the calendars of the courts of the county of Cherokee," etc., and that the defendant being a resident of the town of Blacksburg (which is conceded to be in that portion of the county of York which is now embraced within the boundaries of Cherokee county), as well at the time of the passage of said act as at the time of the trial of this case, such trial could not be had in York county, but must be had in Cherokee county. If it be true that the defendant was, in the eye of the law, a resident of Blacksburg, in the county of Cherokee, at the time of the trial of this case, which was confessedly pending at the time of the passage of the act of 1897, above referred to, and which it was declared should take effect "from and after its passage," then the court of common pleas for York county had no jurisdiction of the case, and any judgment it might undertake to render would be a nullity, for want of jurisdiction. *Ware v. Henderson*, 25 S. C. 385, where the court used the following language: "It will be observed that the language used in those sections in regard to the place of trial is of an imperative character,— 'must be tried' in sections 144 and 145, and 'shall be tried' in section 146,—and we do not see by what authority a court can disregard such an imperative mandate from the lawmaking power. This language clearly implies that a case cannot be tried elsewhere than in the place appointed for the purpose, unless the place of trial be changed under section 147 of the Code; and therefore, if tried in the wrong county, the trial and the judgment entered therein are nullities for want of jurisdiction." Here the act of 1897

contains equally imperative terms,— "shall be transferred,"—and we do not see by what authority this court can undertake to disregard this imperative mandate of the lawmaking power.

It is contended, however, that the defendant was not a resident of Blacksburg, in the county of Cherokee, either at the time of the passage of the act of 1897 (25th of February, 1897), or at the time of the trial (7th of April, 1897), because it appears from the testimony of E. A. Crawford, ex sheriff, and John R. Logan, the present sheriff, of York county, that the defendant was in jail in York county from some time in November, 1896, until the 13th of February, 1897, when he escaped from jail; and the contention is that the defendant had thereby lost his residence in Blacksburg (now and at the time of the trial in Cherokee county), which it is admitted was previously defendant's place of residence. This, it seems to us, is a very extraordinary proposition. The idea that a person can be said to have changed his place of residence by being arrested by the officers of the law, and confined in a jail, and there kept by the authority of the law until he succeeds in making his escape, is a view which we cannot accept. In the eye of the law, the place of a person's residence is to be determined by his own act and consent, and not by a force which he has neither the right nor the power to resist. The question of a person's place of residence is to be determined by his own intention, accompanied by his own voluntary act. Under this view, we have not deemed it necessary to consider the question of the competency of the testimony of either Crawford or Logan, presented by one of the exceptions; for conceding its competency, for the purposes of this inquiry, it is very clear that it cannot have the effect claimed for it. The fact being conceded by the pleadings that the defendant was at the time of the killing of Williams a resident of the town of Blacksburg, then in the county of York, but now and at the time of the trial in the county of Cherokee, and there being no evidence that the defendant ever changed his place of residence, Blacksburg must still be regarded as his place of residence. This is undoubtedly the rule where the question is as to domicile. *Bradley v. Lowry, Speer, Eq.*, at page 14, where *Johnston, Ch.*, in delivering the opinion of the court, uses this language: "Nor is there any doubt that a man's abandonment of his domicile, however deliberate, is no destruction of it, unless he shall have acquired a new one. From the necessity of the case, the last residence, although intentionally and permanently forsaken, must still be regarded as his domicile." While it is true that this language was used in reference to the question of domicile, and while it may possibly be true that more strictness is required in determining a question of domicile than in determining a mere question of residence,

yet the reason of the rule above stated—"the necessity of the case"—applies with equal force to the latter as well as to the former. Accordingly, we find a case cited in the notes to page 123 of 21 Am. & Eng. Enc. Law, holding that "the residence of a person having been shown to be in a particular place is presumed to continue there until the contrary is proved." *Chaine v. Wilson*, 1 Bosw. 673.

Again, it is contended that inasmuch as the court of common pleas for York county had jurisdiction of the case when the action was commenced, on the 6th of March, 1896 (prior to the passage of the act of 1897, establishing Cherokee county, and transferring this case to that county for trial), such jurisdiction cannot be directed by any subsequent event. This may be so far as the subsequent event depends upon or arises out of the acts or omissions of the parties; but it is not true that a subsequent event, arising out of the acts of the law, cannot change the jurisdiction. On the contrary, the lawmaking power may at any time make such changes in the jurisdiction of its several courts as may be deemed best, provided the constitutional limitations are not transgressed, of which there is no pretense here. See *Ex parte De Hay*, 3 S. C. 564, and *Grant v. Grant*, 12 S. C. 29. All the cases cited by respondent, except one, are cases in which it was claimed that the jurisdiction once vested had been divested by the acts or omissions of the parties, and not by the act of the lawmaking power. The exception is the case of *U. S. v. Dawson*, 15 How. 467, and in that case it was held, not that the act of congress could not divest the circuit court of jurisdiction which it had previously acquired, but that the act simply empowered the district court therein established for the Western district of Arkansas to try such a case as that in question, without undertaking to divest the jurisdiction of the circuit court.

Finally, it is contended that the defendant, by appearing and answering and announcing himself as ready to go to trial, has waived this question of jurisdiction. As we understand it, jurisdiction cannot be conferred even by actual consent, and cannot be waived by any act or omission of the parties. On the contrary, the question may be and has been raised for the first time, even in this court. *State v. Penny*, 19 S. C. 218; *Ware v. Henderson*, supra. Indeed, it may be raised by this court, without any motion from either of the parties. *Lowry v. Thompson*, 25 S. C. 416. It is true that jurisdiction of the person may be waived; but this is not a case of that character. Inasmuch, therefore, as the court of common pleas for York county had been deprived of jurisdiction to try this case by an act of the legislature transferring the case to the court of common pleas for Cherokee county before the trial was commenced, it follows that all the proceedings leading up to the judgment and the judgment itself are

mere nullities, for want of jurisdiction, and must be so declared. This being our view, it is not only unnecessary, but would be improper, for us to consider the various questions presented by the exceptions as to alleged errors in the rulings and judgment of the court. The judgment of this court is that the judgment of the court of common pleas for York county in this case be set aside, for want of jurisdiction, without prejudice as to the merits, with leave to either party, if so advised, to have the case transferred to the proper court for trial.

(53 S. C. 210)

GILLMAN v. FLORIDA CENT. & P. R. CO.
(Supreme Court of South Carolina. Sept. 28, 1898.)

CARRIERS—EXEMPLARY DAMAGES—EVIDENCE—HARMLESS ERRORS—REVIEW.

1. Exemplary damages can be recovered against a railroad where the conductor of its passenger train, on being told by the station agent that he had checked plaintiff's baggage, but had not had time to get him a ticket, and that plaintiff would pay him on the train, told the agent to sell plaintiff a ticket, and he would hold the train, and then, when they were in the station getting the ticket, wantonly and willfully caused the train to leave.

2. Error, if any, in allowing plaintiff, in an action against a railroad for punitive damages for leaving him at station from which he wanted to take a train home, to testify as to what he did after he got home, is harmless.

3. Allowing plaintiff to answer the question, "How can you estimate your feelings in damages?" is not error, he not having undertaken to say how much he estimated his damages at, but said, "No reasonable amount could have bought my privilege of being at home in such a case."

4. The conductor of a train, who was alleged to have willfully left plaintiff at a station from which he wished to take the train, having testified as to what he said and did, there was no error in refusing to allow him to testify what he thought or supposed.

5. Refusal of new trial by the circuit judge on the ground of want of evidence to support the verdict, or excessive damages, cannot be reviewed.

Appeal from common pleas circuit court of Lexington county; D. A. Townsend, Judge.

Action by R. E. Gillman against the Florida Central & Peninsular Railroad Company. Judgment for plaintiff. Defendant appeals. Affirmed.

Paragraphs 2 to 7, inclusive, of the complaint, are as follows:

"(2) That at Denmark, a station on the line of said railroad, now in Bamberg county, but then in Barnwell county, in the state aforesaid, at 8 o'clock on the morning of the 23d day of October, 1897, the plaintiff, on reaching the said station at Denmark, applied to the station agent of the defendant for a ticket to Richmond, Va., whereupon the said station agent informed the plaintiff that the train going to Columbia, S. C., was then approaching the station from Savannah, Ga.; that he would not have time to deliver him the ticket, but would check his baggage to Columbia;

that he could pay the conductor of said train his fare to Columbia, S. C., at which place he could procure a ticket to Richmond, Va.

"(3) That plaintiff then and there informed said station agent of the defendant that his sister was lying dead in the city of Richmond, Va., and that it was of the utmost importance for him to go on the train of the defendant, which was then approaching said station at Denmark.

"(4) That immediately upon the arrival of said train at said station the plaintiff boarded it, and deposited his sample case and grip sack in the first-class car of said train, and the said station agent, who had checked plaintiff's baggage, came to the platform of one of the cars of said train on which the conductor of said train of cars was standing, and informed said conductor, who was the agent and servant of the defendant, and acting within the scope of his authority as such agent and servant, that he had been unable to give the plaintiff a ticket, but had checked his baggage to Columbia, and that plaintiff would pay said conductor his fare to Columbia; and being informed that plaintiff was on his way to Richmond, Va., and how important it was for plaintiff to go on said train of cars in order to reach Richmond at the earliest possible moment, the said conductor then and there directed the said station agent to sell plaintiff a ticket to Richmond, saying that said train was on time, that he was in charge of it, and would hold it there until plaintiff could go with said station agent to the office, get the ticket, and get on said train.

"(5) That under the direction and instruction of said conductor, who was in charge of said train of cars as agent and servant as aforesaid, this plaintiff got off of said cars, and went to the office of said station agent, and procured a ticket to Richmond, Va., paying said station agent the sum of \$13.45 for the same, and immediately returned to the place where the train was standing when he left it.

"(6) That, before the plaintiff could procure said ticket and return to the place where he left said train of cars, the said conductor of said train of cars, being the agent and servant of the defendant, and acting within the scope of his authority as such agent and servant, wrongfully, wantonly, and willfully caused said train of cars to leave said station for Columbia, S. C., at a rapid rate, carrying away plaintiff's baggage, sample case, and grip sack, and left plaintiff at said station, without any provocation whatsoever.

"(7) That by reason of the wanton and willful conduct of the agent and servant of the defendant, as is hereinbefore set forth, and in getting this plaintiff off said train and leaving him as aforesaid, this plaintiff was delayed, greatly inconvenienced, and humiliated, was insulted, and his feelings injured, was subjected to further expense in trying to reach Richmond, and was otherwise injured, to his damage nineteen hundred dollars."

C. J. C. Hutson and Wm. H. Lyles, for appellant. George Tillman Graham and Patrick Henry Nelson, for respondent.

McIVER, C. J. Inasmuch as the first question raised by this appeal is whether there was error in overruling the demurrer interposed upon the ground that the facts stated in the complaint are not sufficient to constitute a cause of action, it will be necessary for the reporter to set forth in his report a copy of so much of the complaint as states facts of the case, to wit, paragraphs 2, 3, 4, 5, 6, and 7. If the facts there alleged be true,—and they must be taken to be so, in considering the sufficiency of the demurrer,—it seems to us that the case of *Samuels v. Railroad Co.*, 35 S. C. 493, 14 S. E. 943, conclusively shows that the facts there alleged are quite sufficient to sustain the plaintiff's cause of action for exemplary damages; and it seems that both parties, as well as the trial judge, treated the case as an action for the recovery of exemplary damages only. There can be no doubt that when a railroad company receives a charter from this state, or even when it has been chartered by another state, and allowed to exercise its corporate franchises within the limits of this state, it assumes certain duties to the public, accompanied with correlative rights on the part of the public, which duties it is legally bound to perform on the one hand, and to recognize those rights on the other. When such a corporation assumes the position of a carrier of passengers within this state, as the defendant corporation is conceded to have done, it assumes, among other duties, the obligation to receive and carry safely and promptly all persons offering themselves for transportation to and from the various stations along the line of its road; and when the plaintiff offered himself as a passenger from Denmark, one of defendant's stations, to be carried to Columbia, the terminus of defendant's road, and thence to Richmond, Va., by connecting lines, he had a right to be received as a passenger, and afforded every necessary and proper facility for reaching his destination comfortably, safely, and promptly, provided he complied with the reasonable regulations of the company for that purpose; and he also had a right to ask for and obtain from the officers and agents of the defendant company all necessary information to enable him to accomplish his purpose. If, therefore, the plaintiff was deprived of, or hindered in obtaining, the enjoyment of his legal right by the willful default of the officers or agents of the company intrusted with the performance of the duties resting upon the company, or by their wanton or reckless disregard of the rights of the plaintiff, he certainly would have a cause of action against the company, not only to recover damages for any pecuniary loss he might thereby sustain, but also for exemplary damages, as a punishment for such willful and wanton disregard of plaintiff's legal

rights. Inasmuch as plaintiff is not suing for any consequential or special damages, the absence of any allegation in the complaint of any such damages cannot affect the question; the claim being for exemplary damages which arose immediately out of the alleged misconduct of defendant's officers and agents.

The demurrer having been overruled,—properly, as we have seen,—testimony was introduced by both parties, no motion for a nonsuit having been made, and the case was submitted to the jury under the charge of the circuit, and a verdict was rendered in favor of plaintiff for the sum of \$1,500. Thereupon the defendant moved, on the minutes, for a new trial (1) because there was no evidence which would justify the jury in rendering a verdict for punitive damages; (2) because the damages awarded by the jury were excessive. This motion having been refused, and judgment entered upon the verdict, the defendant appeals upon the several grounds set out in the record.

The first two grounds, imputing error to the circuit judge in overruling the demurrer, having already been disposed of, need not be further considered.

The third ground complains of error in allowing the plaintiff to testify as to what he did after he got back to Richmond. This, it seems to us, was harmless error, if error at all. At most, its only effect would be to aggravate, not the damages which plaintiff sustained, but the damages which defendant would pay by reason of the misconduct of its servants, as a punishment for their willful or wanton default, and in that view it would be competent.

The fourth ground imputes error to the circuit judge in allowing plaintiff to say, in answer to the question, "How can you estimate your feelings in damages?" "No reasonable amount could have bought my privilege of being at home in such a case." We do not see any error in this. He did not undertake to say how much he estimated his damages at. Indeed, his answer showed that he could not make any estimate of the amount.

The fifth and sixth grounds impute error in not allowing the witness Brock, who seems to have been the conductor of the train which plaintiff desired to take, to say what he thought or supposed. There was, clearly, no error in this. The witness was allowed to say what he said and did, and certainly what was in his own mind, and not communicated to any one, was not competent testimony.

The seventh, eighth, ninth, and tenth grounds complain of error on the part of the circuit judge in what he said to the jury in regard to exemplary damages. These grounds are, practically, based upon the same theory upon which the demurrer was rested, and what he said to the jury was, in fact, nothing more than the legitimate consequence of his ruling as to the demurrer, and, as we have concurred in that ruling, these grounds must be overruled.

The eleventh and twelfth grounds complain of error in refusing the motion for a new trial. Ever since the case of *Steele v. Railroad Co.*, 11 S. C. 589, and the case of *State v. Cardoza*, Id. 195, we think it should be regarded as settled, in this state, that this court has no jurisdiction to review the action of a circuit judge in refusing a motion for a new trial, either upon the ground of want of evidence to sustain the verdict or for excessive damages. The judgment of this court is that the judgment of the circuit court be affirmed.

(53 S. C. 222)

McDANIEL v. ADDISON et al.
(Supreme Court of South Carolina. Sept. 28, 1898.)

TIME TO ANSWER—RELIEF FROM DEFAULT—DISCRETION.

Refusal to allow answer after the time limited therefor cannot be said to be an abuse of the court's discretion, under Code Civ. Proc. § 195, to so allow it, though a meritorious defense be shown, where defendant says that he did not understand he was required to answer, and was unfamiliar with law practice, but called within 20 days to see a lawyer, who was away, and immediately went to see him again on receipt of letter from a person whom he had asked to inform him of return of the lawyer; the affidavit of plaintiff's attorney being that defendant had had considerable experience in business and law matters, and that a person had told him that before time to answer he had informed defendant he must answer within 20 days, though such person made affidavit that he had not so told defendant or plaintiff's attorney.

Pope, J., dissenting.

Appeal from common pleas circuit court of Greenwood county; James Aldrich, Judge.

Action by Lucius McDaniel against E. S. Addison and others. From an order denying motion of defendant E. S. Addison to be allowed to answer after default, he appeals. Affirmed.

Sheppards & Grier, for appellant. Giles & Magill, for respondent.

McIVER, C. J. This is an appeal from an order of his honor, Judge Aldrich, refusing a motion on behalf of the appellant (the other defendants not participating therein) for leave to answer after the expiration of the 20 days allowed for that purpose. The conceded facts are that appellant was served with a copy of the summons, which was in the usual form, together with the complaint, on the 6th day of July, 1897, and that appellant served no answer within 20 days from that date. Within a short time after the expiration of the 20 days, the appellant, through his attorneys, applied to the attorney for plaintiff, to consent to the filing of his answer, which was refused. On the 1st of September, 1897, appellant, through his attorneys, gave notice of a motion, to be made at the next ensuing term of the court, for leave to serve the answer, stating in the notice that the motion would be made on the affidavit of the appellant, his proposed answer, together

with the affidavit of W. P. Greene and W. G. Chafee, Esqs., attorneys at law, copies of which were served with the notice of the motion. This motion was heard by Judge Aldrich, on the 30th of November, 1897, upon the paper above stated, and upon the affidavit of E. S. F. Giles, Esq., attorney for plaintiff, submitted on behalf of the plaintiff. At the hearing, his honor granted an order refusing the motion. On the 2d of December, 1897, appellant applied for, and obtained, a rehearing of the motion, at which rehearing the motion was heard on the same papers above mentioned, and three additional affidavits submitted on behalf of appellant. The motion was again refused by an order bearing date 2d of December, 1897; and from this order the present appeal is taken, upon the several grounds set out in the record, which need not be stated here, as they substantially raise the single question whether there was an abuse of discretion in refusing the motion.

The motion is based upon section 195 of the Code of Civil Procedure, which provides, among other things, that the court may, "in its discretion, and upon such terms as may be just, allow an answer or reply to be made, or other act to be done, after the time limited by this Code of Procedure, or, by an order, enlarge such time." It is manifest, therefore, from the express terms of the statute, that a motion of this character is addressed to the discretion of the circuit court, and is not, therefore, ordinarily applicable; for as was said by the late Chief Justice Simpson, in *Truett v. Rains*, 17 S. C. 451, and quoted with approval in the very recent case of *Michalson v. Rountree* (S. C.) 29 S. E., at page 67: "As a general rule, where a court or judge is invested with power to be exercised at discretion, such power is absolute, and, when exercised, it is final. From the very meaning of the term and the nature of the power, discretion is unlimited. It is bounded by no rule except the good sense and integrity of the party empowered to exercise it, and, in the absence of an express right to appeal, it necessarily follows that its exercise is unappealable." While this is, undoubtedly, the general rule, our cases, some of which have been cited in the argument of counsel, recognize, at least, one exception, and that is where there has been an abuse of discretion. Of course, this court would not assume that any circuit judge has been guilty of abuse of discretion confided to him by law; and hence, whenever an appeal has been taken upon this ground, the burden rests upon the appellant to show that there has been abuse of discretion.

In the light of these principles, we will proceed to examine the papers upon which the circuit judge acted in this case, all of which are set out in the "case," and have been carefully examined. The pleadings used at the hearing do not, it seems to us, throw any light upon the question which we are called upon to determine; for, where a party makes

an earnest effort to repair his default in answering, we would be disposed to assume that the defendant had, or, at least, supposed he had, a good defense to the action brought against him; but the question before the circuit judge was whether he had made such a showing as would justify him, in the exercise of his discretion, in allowing defendant to repair an admitted default in making his defense at the time and in the manner plainly and distinctly prescribed by law; and the question before this court is whether the circuit judge has abused the discretion confided to him. With this view we will proceed to examine the showing made by appellant. In the first affidavit of the appellant he says that, when the summons and complaint were served upon him, "he read the same, but did not understand that it was required of him to interpose an answer thereto, but was honestly of the belief that nothing by him was to be done until the fall term of the court, when he expected to have his attorneys take charge of the same for him; that the deponent has spent most of his life far removed from any court-house town, where such matters are generally discussed, and is entirely unfamiliar with such matters, and did not know that an answer had to be filed in order that he might make his defense to plaintiff's alleged cause of action." He then goes on to reiterate that he did not know it was necessary to file an answer, and, if he had known or even suspected as much, he would not have allowed the time to pass, but would immediately have taken the papers to his attorneys, to be by them attended to, and denies that his default was due to any carelessness or neglect, but solely to his lack of knowledge and proper understanding of the papers served upon him. He also avers that he has a good defense to the action, as set forth in his proposed answer. The only other affidavit submitted on behalf of appellant at the first hearing is that of Messrs. Greene and Chafee, in which they say they are practicing attorneys at the Greenwood bar, and that, after reading the appellant's proposed answer, they are of opinion that a good defense is stated therein. On the other hand, the affidavit of E. S. F. Giles, Esq., was submitted on behalf of plaintiff, in which, among other things, he says that, soon after the time for answering had expired, he had a conversation with the defendant F. V. Cooper, who expressed great surprise that Addison had failed to answer, adding "that the said Addison, soon after the summons and complaint were served upon him, tried to persuade him, the said F. V. Cooper, to assist him in the employment of counsel to answer said complaint; that the defendant F. V. Cooper told E. S. Addison that he was bomb proof and independent of execution, that nothing could be made out of him on a judgment; and he advised the defendant Addison to answer the said complaint within twenty days, and told him that he did not ex-

pect to bother about it, and that he would pay no part of any attorney's fee." Mr. Giles further states that he is informed and believes that Addison "is a man of considerable education, of large experience in business matters, and superior advantages for a man not engaged in the practice of law; that he was raised at Edgefield Court House, where he resided for a long time, and intermarried with a daughter of the late John L. Addison, Esq., one of the most distinguished members of the Edgefield bar; that the said E. S. Addison afterwards lived for a long time at Greenville Court House; that the said E. S. Addison has had considerable experience in legal proceedings"; and naming among other cases in which he was concerned, the recent case of Addison v. Sugette (S. C.) 28 S. E. 948. Upon this showing it was not surprising that Judge Aldrich refused the motion when it was first heard, for the only ground upon which it rested was the mere assertion that he did not know that it was necessary for him to answer within 20 days, when the summons, which, it is admitted, was in the usual form, so plainly and explicitly informed him that it was necessary for him to answer within 20 days that it is impossible to conceive how a person of the most ordinary intelligence could fail to understand so plain a requirement, much less a person of Mr. Addison's intelligence and business experience in legal matters. Besides, according to the affidavit of Mr. Giles, he was expressly told by Cooper that he had to answer within 20 days; and it may be that the circuit judge inferred from the statements made in the affidavit of Mr. Giles that the real reason why Addison delayed answering was for the purpose of getting some one of the defendants to assist him in employing counsel to defend the case. If so, that was an inference from the testimony which this court has no power to review.

But it seems that the circuit judge, upon a simple motion, without any showing for that purpose, so far as appears, granted the appellant a rehearing of his motion. This, certainly, not only does not indicate any disposition on the part of the circuit judge to abuse his discretion, but, on the contrary, shows a desire to allow the appellant every possible opportunity to relieve himself from the effect of his admitted default. Accordingly, the motion was again heard on the same papers used at the former hearing, together with three additional affidavits submitted on behalf of the appellant. These three additional affidavits must therefore be considered. The first is that of F. V. Cooper, in which he controverts the statement made in the affidavit of Mr. Giles hereinabove set forth, in so far as it represents the conversation between Cooper and Addison; saying that, while he did have a conversation with Mr. Giles, "he made no reference to Mr. Addison, and, if Mr. Giles so understood deponent, he is mistaken." He then goes on

to say that he recalls the fact that Mr. Addison stated to deponent that he did not believe he was required to answer the complaint until court, but stated that he was on his way to see his attorneys, and have them take charge of the case; and that this conversation took place before the 20 days had expired. How the circuit judge undertook to reconcile these conflicting statements of Giles and Cooper, or whose version of the matter he accepted, we have no means of knowing. At all events, that was a question exclusively for the circuit judge, and not for us. We will only say that it is difficult to conceive how Mr. Giles could have been mistaken. His version must have been either true or manufactured out of whole cloth, and the mild contradiction of Cooper does not seem well calculated to overthrow the testimony of Giles, which, if accepted by the circuit judge, would go far towards justifying his conclusion. Next comes the affidavit of Maner L. Rice, in which he says that some time in the month of July, 1897 (whether before or after the 20 days had expired he does not say), he met Addison, who told him that he wanted to see Mr. Grier, and, when told that Mr. Grier was out of town, said that he wanted to see him about this suit, and after saying that he did not feel that he had done plaintiff any wrong, etc., had some talk with deponent as to what was the proper time to look after the matter. Deponent very properly advised him to see his lawyers, and do what they said. Thereupon appellant asked deponent to see Mr. Grier as soon as he returned, and to let him know what was necessary to be done. This deponent does not say that he saw Mr. Grier, as requested, or that he let appellant know what was necessary to be done. He does not even say that he agreed to do so. The only other additional affidavit is that of appellant, in which, after reiterating the statements made in his first affidavit as to his lack of knowledge as to the requirements of the summons, adds that, some time before the time of answering had expired, he came to Greenwood, for the purpose of consulting his attorneys as to this case, but learning that Mr. Grier, the attorney whom he desired to consult, was out of town, he was unable to do so; "that, a few days after this, deponent received a letter from M. L. Rice, who, at the request of deponent, had consulted with deponent's attorneys, to the effect that he must answer the said complaint within 20 days; that, immediately upon the receipt of this letter, deponent, at great personal inconvenience, went to the office of his attorneys, in the town of Greenwood, and handed them the summons and complaint herein, and had them to attend to the same." Whether this was before or after the expiration of the 20 days is not stated. If before, the answer should have been then served, and no reason is stated why it was not. If after, then that fact should have been stated. It is true that this

affiant goes on to state that, though he did not know it was necessary for him to answer until court, yet, if his attorney had not been absent, the answer would have been served in time, as he went to his office for the express purpose of having him to attend to this matter, and but for his absence it would have been attended to. This, manifestly, refers to the appellant's first visit to Greenwood, when Mr. Grier was absent, and not to his second visit, when Mr. Grier was not absent; for affiant says he "went to the office of his attorneys in the town of Greenwood, and handed them the summons and complaint herein." It will be observed that in this second affidavit the appellant does not deny the statements made in the affidavit of Mr. Giles, as to his education, large experience in business matters, and superior advantages, and his experience in legal proceedings, together with his long residence at Edgfield and Greenville Court Houses, which, according to the statements made in appellant's first affidavit, are places where legal proceedings are generally discussed, all of which tends to rebut the idea intended to be conveyed in his first affidavit that he was entirely unfamiliar with legal proceedings, to such an extent that he did not even know that it was necessary to answer a complaint within 20 days, although the summons, which he says he read, explicitly informed him of that fact. If he did read it, he must have read it in the most careless manner. Legal process and other papers are served upon parties for the express purpose of informing them what is required of them; and, if they pay no attention to the contents of such papers, they must take the consequences of their own folly or carelessness. It seems to us, therefore, after a careful examination of this case, that the appellant has utterly failed to show any abuse of discretion on the part of the circuit judge; and hence his appeal must be dismissed.

It has been most earnestly contended by the zealous counsel for appellant that the question whether there has been abuse of discretion in a case of this kind should be resolved by the inquiry whether the refusal of such a motion will result in manifest injustice. We cannot recognize any such test. The law has, in the plainest terms, prescribed certain requirements, one of which is that a failure to answer the complaint within 20 days entitles the plaintiff to a judgment by default; and, if a defendant fails to comply with this plain and simple requirement, he must take the consequences, even though they may result in what some persons would call manifest injustice. It might be said that whenever a defendant is sued upon an unjust or unfounded claim, and he fails to comply with the requirements of the law, without such an excuse as would be recognized as sufficient by the court, whereby judgment by default goes

against him, he suffers great injustice, and, if that were the test of statutory requirements, would become entirely futile, and the statute would be practically repealed. This case, in one of its features, is very much like the case of *White v. Coleman*, 38 S. C. 556, 17 S. E. 21, where a married woman, having failed to answer to an action brought against her, applied to the court for leave to answer after the time had expired, upon the ground "that she was ignorant of the requirements of the law, and very much occupied with her domestic duties, and so neglected to employ an attorney in time." But her application was refused by the circuit judge, and upon appeal this court held that there was no abuse of discretion, and the appeal was dismissed. So also, it is not unlike the case of *Sullivan v. Shell*, 36 S. C. 578, 15 S. E. 722, in another of its features, where the defendant relied upon a friend to deliver the summons with which he had been served to his attorney with instructions to appear and plead payment, which his friend failed to do in time, and it was held that deponent was not entitled to relief, under section 195 of the Code, as no excusable neglect was shown. This is a stronger case against the appellant than that just cited, for here the defendant did not leave the summons and complaint with Mr. Rice, with the request that he deliver the same to Mr. Grier as soon as he returned, but simply requested Mr. Rice to see the attorney, and write him what it was necessary for him to do. The present case differs materially from the case of *Varn v. Green* (S. C.) 27 S. E. 862, in which the circuit judge refused a motion for continuance where both of the counsel were sick and unable to conduct the case, upon the ground that it was his custom—"which custom had not the sanction of law"—to require clients to employ other counsel where the counsel engaged were too sick to conduct the case. Held, that it was error of law on the part of the circuit judge to allow his discretion to be controlled by such custom. Nothing of the kind appears in this case. Nor do we see the application of the cases of *Latimer v. Latimer*, 42 S. C. 205, 20 S. E. 159, and *Hill v. Hill* (S. C.) 28 S. E. 309, and other cases cited by appellant; for they decide nothing more than the conceded and well-settled rule that a motion addressed to the discretion of the circuit court cannot be reviewed by this court, unless abuse of such discretion appears. In this case nothing of the kind appears. On the contrary, there was testimony before the circuit judge which, if believed by him (and he alone was to judge of that), might well have warranted his conclusion. The judgment of this court is that the order appealed from be affirmed.

POPE, J., dissenting.

(53 S. C. 241)

**SANDALL v. ATLANTA MUT. LIFE
INS. CO.**(Supreme Court of South Carolina. Sept. 28,
1898.)**INSURANCE COMPANIES — STATE REGULATIONS —
PENALTY—COMPLAINT—OBLIGATION
OF CONTRACTS.**

1. Complaint to recover penalty declared by Act March 2, 1897 (22 St. at Large, p. 461), against foreign insurance companies for transacting business in the state without complying with the requirements, is sufficient without the formal statement that the offense was against the form of any statute; the statute being set out, and the fact of defendant's doing business without compliance therewith.

2. The remedy for indefiniteness and uncertainty in allegation of complaint for recovery of penalty, as to the time and place of offense, is not by demurrer, but by motion to make more definite.

3. It is no violation of the contract clause of the United States constitution for a state, after allowing, without condition, a foreign insurance company to do business in the state, to impose conditions on its continuing to do business.

Appeal from common pleas circuit court of Lexington county; J. C. Klugh, Judge.

Action by F. L. Sandall against the Atlanta Mutual Life Insurance Company. Judgment for defendant. Plaintiff appeals. Reversed.

G. T. Graham and P. H. Nelson, for appellant. John T. Sloan, for respondent.

McIVER, C. J. This is an action to recover the penalty imposed upon any insurance company or association transacting any business in this state without complying with the conditions required by the act of 2d of March, 1897 (22 St. at Large, p. 461). The action was commenced on the — day of August, 1897, and was called for trial at September term, 1897, of the court of common pleas for Lexington county. An oral demurrer was interposed, upon the ground that the facts stated in the complaint were not sufficient to constitute a cause of action; and, in conformity to rule 18 of the circuit court, the points wherein the complaint was alleged to be insufficient were stated in writing, as follows: "(1) That the supposed offense is not alleged to have been committed against the form of any statute or statutes of the United States. (2) That it does not state the time and place of the commission of the supposed offense. (3) Because the contract set out in the complaint was entered into prior to the passage of the act of 1897, and is not, therefore, in violation of said act." After argument, his honor, Judge Klugh, granted an order sustaining the demurrer and dismissing the complaint, with costs. After the judge's conclusion was announced, but before the said order was signed, the plaintiff moved for leave to amend his complaint, which was refused. The plaintiff appeals upon the several grounds set out in the record, which, practically, raise but two questions: (1) Whether there was error in sustaining the de-

murrer; (2) whether there was error in refusing the application to amend.

To determine the first question, two inquiries are presented: (1) What facts are alleged in the complaint; (2) whether the facts there alleged are sufficient to constitute a cause of action afforded by the act of 1897. To these inquiries above must we confine our attention; for we cannot, under this appeal, consider any of the points raised by defendant's answer, a copy of which is set out in the "case." *Davis v. McDuffie*, 18 S. C. 495. See, also, *Kennerty v. Phosphate Co.*, 17 S. C. 411.

What, then, are the facts alleged in the complaint: (1) That the defendant is a corporation created by the laws of the state of Georgia, "and doing business in the state of South Carolina." (2) That the defendant is an insurance company, engaged in the business of life and accident insurance, and doing business in the state of South Carolina, "and is not a fraternal order or lodge, nor mutual life or fire insurance company on the assessment plan, incorporated under the laws of the said state of South Carolina." (3) That the defendant is not possessed of \$100,000 of surplus, and has not filed with the comptroller general the certificate of the official of some other state of the United States, under his hand and official seal, that he holds on deposit or in trust, for the benefit of all the policy holders or members of such company or association, securities worth \$100,000, and the said defendant has not deposited with the state treasurer valid securities aggregating \$10,000. (4) That the plaintiff is a citizen of this state, and has a policy of insurance in said defendant company, issued on the 10th day of July, 1894, to wit, policy No. 1,334, which has been kept up by payment of weekly payments or premiums since that date. (5) That the defendant, by its conduct as herein set forth, has violated the provisions of the act approved 2d of March, 1897, entitled "An act," etc., giving the full title of said act, and has thereby violated section 3 of said act, giving the terms of said section, in totidem verbis.

If these allegations be true (and they must be taken to be so in considering this demurrer), then it is clear that the plaintiff has stated in his complaint the facts necessary to constitute a cause of action for the recovery of the penalty imposed by the act of 1897, for a violation of its terms; for the act forbids any insurance company, except fraternal orders or lodges, and mutual life or insurance companies on the assessment plan, incorporated in this state, from doing business in this state without complying with the provisions of the act, designed to secure to the citizens of this state who hold policies in such companies, under a penalty to be recovered by any citizen of this state holding a policy issued by any such company, by an action in any court of competent jurisdiction in this state. And the allegations of the complaint show that the defend-

ant is an insurance company not belonging to any of the classes of companies or associations exempted from the operation of the act; that it is doing business in this state without complying with the requirements of the act, and is therefore liable to the penalty imposed, which the plaintiff, being alleged to be a citizen of this state holding a policy issued by the defendant company, is expressly authorized to recover. What further allegation can be necessary we are unable to perceive. The omission of the purely formal allegation that the offense imputed to the defendant was against the form of any statute of this state is wholly immaterial; for while such technical formality may be necessary in an indictment, or perhaps might formerly have been necessary under the previous system of special pleading, which it was the very object of the Code to abolish, and to substitute therefor a simpler and more concise form, by which it is only necessary for a complaint to contain "a plain and concise statement of the facts constituting a cause of action, without unnecessary repetition," no such technicality is required or even countenanced by the reformed system of procedure.

As to the second specification of deficiency in the allegations of the complaint,—“that it does not state the time and place of the commission of the supposed offense,”—it seems to us that this is another attempt to construe a Code pleading by the technical rules applicable to a criminal pleading. Indeed, the allegations in the complaint may be regarded as indicating both time and place with sufficient accuracy, for it is alleged in the second paragraph that the defendant is doing business within this state, and in the fourth paragraph the allegation is that the policy held by plaintiff has been kept up ever since its date, “by payment of weekly payments or premiums.” But, even if these allegations should be regarded as too indefinite and uncertain, the remedy is, not by demurrer, but by a motion to make the allegation more definite.

The third specification upon which the demurrer rested—to wit, that “the contract set out in the complaint was entered into prior to the passage of the act of 1897, and is not, therefore, in violation of said act”—seems to us to go more to the merits of the case than the alleged deficiency in the complaint. The plaintiff does not complain that the defendant violated the act of 1897 by issuing to him a policy in 1894; and hence we do not perceive the application of this specification to the question which we are called upon to determine. We suppose, however, that the real point which the defendant desired to make by this specification is that the defendant having been permitted by this state to do business within its borders at the time the policy was issued, in 1894, the state could not afterwards, by the act of 1897, impose any new conditions upon its right to do business in this state without violating the contract clause of the constitution of the United

States. We will not decline to consider the question in this aspect, though we might do so under our rules of practice. The defendant, being a foreign corporation, can only exercise its corporate powers within this state by permission, either express or implied. It has no legal right to do so, but its privilege rests only upon comity. Hence this state may either grant or refuse a license to a foreign corporation to do business within its borders; and the grant may be either absolute or conditional, according as the proper authorities may see fit to determine. *Bank v. Earle*, 13 Pet. 519; *Paul v. Virginia*, 8 Wall. 166; *Doyle v. Insurance Co.*, 94 U. S. 535. Hence we see no reason why the state could not require of the defendant company a compliance with the provisions of the act of 1897, designed simply to provide a security for its policy holders, who are citizens of this state, as a condition of its being allowed to continue to do business in this state.

Having reached the conclusion that there was error in sustaining the demurrer to the complaint, the question as to whether there was error in refusing leave to amend does not arise, and need not be considered. The judgment of this court is that the judgment of the circuit court be reversed, and that the case be remanded to that court for a new trial.

(53 S. C. 216)

THOMAS v. DEMPSEY et al.

(Supreme Court of South Carolina. Sept. 28, 1898.)

ADVERSE POSSESSION—EVIDENCE—COMMON SOURCE OF TITLE.

1. Testimony of plaintiff in action for land, commenced June, 1897, that the year after death of T. (1886) she learned that B. & Co., mortgagees, had put the land up for sale, and, being informed by B. that she must pay rent, she did so to keep from being turned out, and that after she moved out, two or three years later, the property was, according to her recollection, vacant for a while; and the testimony of witness, who lived with her, that some time in June or July, 1887, they began to pay rent; and that after death of T. they had had possession by permission of J., heir of T.,—does not show possession by B., or B. & Co., for 10 years, or, if so, that it was adverse or continuous for the whole period.

2. Where plaintiff claimed under T., evidence that defendant took a mortgage from T., and demanded a certain amount in satisfaction thereof, and thereafter returned the property for taxation as “from T.” is, in the absence of more, sufficient to show that they claimed under a common source of title.

Appeal from common pleas circuit court of Kershaw county; J. O. Klugh, Judge.

Action by Margaret Thomas against Paul Dempsey and others. Judgment for defendants. Plaintiff appeals. Reversed.

Thos. J. Kirkland, for appellant. J. T. Hay, for respondents.

McIVER, C. J. This was an action to recover possession of a parcel of land, being a

part of lot No. 1,033, in the city of Camden. The plaintiff, in her complaint, after alleging that she is seised of the land in dispute, and entitled to the possession thereof, alleges that the defendant Paul Dempsey is in possession by his tenant, Thomas J. Boykin, and withholds the possession thereof from plaintiff; and she further alleges the defendants H. Baum and M. Baum, partners as Baum Bros., claim some interest in the land. The defendants join in a general denial, and also set up the plea of the statute of limitations, based upon 10 years' possession in the defendant H. Baum, alleging that Paul Dempsey holds as tenant of H. Baum. At the close of the testimony on the part of the plaintiff, the defendants moved for a nonsuit upon the following grounds: "That plaintiff had failed to trace title to the state, or to show twenty years' possession in those through whom she claimed; that auditor's deed had not been proved, and was null and void, and could not constitute claim of title; that plaintiff's evidence showed she had surrendered possession of the premises to Baum, and recognized him as owner of the premises more than ten years before institution of the action." His honor, Judge Klugh, who heard the case, at September term, 1897, granted the motion, upon the ground "that by plaintiff's own showing the title of Baum, one of the defendants by possession, is apparently better than that of the plaintiff"; adding that the nonsuit was not granted upon any of the grounds submitted, "except the one that H. Baum appeared to have been in possession for ten years." The plaintiff took due exception to the order of nonsuit, upon the ground that his honor erred in holding that H. Baum had been shown to be in possession for 10 years. In accordance with the proper practice, the respondents gave notice that, if this court should be unable to sustain the nonsuit upon the ground stated by the circuit judge, they would ask this court to sustain the nonsuit upon the following grounds: "(1) That the plaintiff failed to trace back a title to a grant from the state; (2) that the plaintiff failed to show a continuous possession of twenty years in herself, or those under whom she claimed, from which a grant might be presumed; (3) that the plaintiff failed to show adverse possession in herself, or under any person under whom she claimed, for ten years; (4) that the alleged deed of Donald McQueen, county auditor, to Josie L. Chaplin, was inadmissible in evidence, in the absence of legal evidence that the land had been forfeited for taxes, and, being so inadmissible, the plaintiff had failed to establish a claim of written title, even so far as she claimed to go."

This appeal thus presenting the question whether there was error in rendering the judgment of nonsuit, it will be necessary to set forth, somewhat in detail, the testimony which appears in the "case," for the purpose of ascertaining—First, whether the plaintiff

had, by her own testimony, shown title out of herself and in the defendant H. Baum, as held by the circuit judge; and, second, if not, whether the plaintiff had failed to introduce any testimony tending to show title in herself, in any of the modes recognized by law.

The "case" shows that the present action was commenced on the 30th of June, 1897, and therefore, in order to determine the first question, the inquiry is whether the testimony introduced by the plaintiff was sufficient to show title out of herself, and in the defendant H. Baum, by adverse possession for the period of 10 years prior to the commencement of this action. The rule is well settled that, where the question is whether a party has acquired title to real estate by adverse possession for a period of 10 years, such possession must be clearly proved and shown. *Holmes v. Rochell*, 2 Bay, 487; *Harrington v. Wilkins*, 2 McCord, 289, where it is said the character of the possession is a question for the jury; *Cantey v. Platt*, Id. 260; *Porter v. Kennedy*, 1 McMul. 354; *Hill v. Saunders*, 6 Rich. Law, 62; *Abel v. Hutto*, 8 Rich. Law, 42. Under this rule, it is clear that there was error in holding that the plaintiff, by her testimony, had shown that the title was in H. Baum by adverse possession. The only testimony to show that Baum ever had been in possession of the lot in question, in any shape or form, is to be found in the following statement made by the plaintiff: "Some time the next year, I think, after Mr. R. D. Thomas' death, I learned that Baum & Co., who had the mortgage, had put up the lot for sale, and Mr. Baum sent us word we must pay rent. We did not know how it was, and to keep from being turned out, as we thought, we paid rent,—five dollars a month. We made it at first by sewing. Then Mrs. Malone's pension money helped, and we rented a part of the lot a while to Tom Lee. The rent was paid in at the store of Baum and Stein to the bookkeeper generally. I think it was paid sometimes to Mr. Stein at the desk. It was some time in the year after Mr. R. D. Thomas died we began to pay rent. I don't remember the time of the year. We stayed on the lot between two and three years after Mr. Thomas died, I believe, and moved out, as the rent was hard for us to keep up. The lot was vacant a while after we left it, according to my recollection,"—and in the following testimony of Mrs. Caroline Outlaw, who was the sister of the plaintiff, and who, with another sister, Mrs. Malone, went to live on the lot just after the death of R. D. Thomas, which occurred in 1886: "That some time in 1887 she and Miss Thomas and Mrs. Malone began to pay rent to Baum & Co. Thinks they began to pay in June or July, 1887. They heard the place had been sold, and feared they would be turned out after the rent was demanded of them. They held the lot after the death of R. D. Thomas by permission of John H. Thomas, who lived in Marlborough county, and was only heir of

R. D. Thomas." It seems to us that this testimony is not only insufficient to show that either Baum or Baum & Co. had such adverse possession for a period of 10 years as would give him title, but does not even tend to show that fact. Even assuming that Baum's possession commenced when the plaintiff and her sisters commenced to pay rent under the apprehension of being ejected, the testimony leaves it altogether uncertain when that occurred; one of the witnesses saying that it was some time in the year after the death of R. D. Thomas, which was the year of 1886, and the other witness saying that she thought they began to pay rent in June or July, 1887. If it was in July, then the 10 years had not expired when this action was commenced. Besides, there was no testimony whatever even tending to show that Baum's possession (if, indeed, he can be said to have any) was either continuous or adverse for the whole period of 10 years, which would be necessary to give him title. On the contrary, the testimony tends, not only to show that the lot was vacant for a while after the plaintiff and her sisters left it, some two or three years after the death of R. D. Thomas, in 1886, but also that the defendant Boykin was in possession of it, and had been for about 18 months, as the tenant of the defendant Paul Dempsey, and there is nothing in the testimony to connect Dempsey with Baum. The judgment appealed from cannot, therefore, be sustained upon the ground upon which the circuit judge rested his conclusion, expressly declining to rest it upon any of the other grounds.

We suppose, however, that the defendants have the right, under the case of *Tutt v. Railway Co.*, 20 S. C. 110, to ask this court to sustain the judgment of nonsuit upon other grounds, provided due notice has been given, as it has been here. We will, therefore, proceed to consider whether the judgment of nonsuit can be sustained upon any of the additional grounds stated in the record and set forth above. In considering these grounds, it must be remembered that a plaintiff in an action to recover possession of real estate may establish his title and right to recover in several different ways: (1) By producing a grant from the state for the land in dispute, and connecting himself with such grant by a regular chain of paper title; (2) by proving such possession in himself, or those under whom he claims, as will authorize the presumption of a grant; (3) by showing that, before the commencement of his action, he had acquired title by adverse possession for the requisite period of time; (4) by showing that both he and the defendant claim under a common source of title, in which case it is not necessary to go beyond such common source of title, and the only question is as to which party can show the superior title from the common source. So that, if plaintiff succeeds in showing his title in either of these modes, he has a right to re-

cover, even though he may fail to show title in either of the other three modes.

The practical inquiry, therefore, in this case, is whether the plaintiff has failed to make such *prima facie* showing of title as would justify the court in granting the nonsuit; or, to put the inquiry in a more precise form, has the plaintiff introduced any competent evidence tending to prove her title in either of the four modes above indicated. Assuming, for the purposes of this inquiry, but not deciding, that the plaintiff has failed to introduce any competent evidence tending to show title in her by any one of the three modes first above stated, yet it seems to us that she did introduce competent evidence tending to show title in her by the fourth mode, and therefore there was error in rendering the judgment of nonsuit. The evidence offered to show that both parties claimed under a common source of title was as follows: The tax return of H. Baum & Co., made by H. Baum, 18th February, 1888, on which the following entry was made: "Lot and house east of Broad street from R. D. Thomas,"—which tended to show that Baum returned this property for taxes as property derived from R. D. Thomas, as there was no evidence tending to show that R. D. Thomas ever owned any other property in Camden than the lot in question, and there was direct evidence that this lot had been conveyed to R. D. Thomas. Next, there was evidence that Baum & Co. took a mortgage on the lot in question, on the 16th February, 1888, to secure the payment of \$150, with power of sale, from R. D. Thomas, and that the plaintiff "offered to pay the mortgage to Mr. Baum, but he demanded \$400." This, in the absence of any evidence whatever tending to show that Baum claimed the title to the lot from any other source, was certainly sufficient to require the case to go to the jury, as was held in *Martin v. Ranlett*, 5 Rich. Law, 541, recognized and followed in *Smythe v. Tolbert*, 22 S. C. 133. The facts of the case of *Martin v. Ranlett*, so far as they affect the question as to a common source of title, are very much like those developed by the testimony in the case now under consideration. In that case *Martin* claimed under a sheriff's deed for the interest of one Marsh, and, to show that the defendant also claimed under Marsh, he offered evidence tending to show that Gary, the lessor of the defendant, *Ranlett*, had taken a mortgage from Marsh, thereby recognizing his title; and the court held that the evidence developed the fact that both parties traced their claim of title to a common source, sufficiently to render it improper to grant a motion for a nonsuit. There can be no doubt that plaintiff claimed title under R. D. Thomas, for she introduced a deed to him from H. O. Flayer, and proved that he died in 1886, leaving as his only heir John H. Thomas, and introduced a deed from John H. Thomas to her covering the lot in dispute, bearing date the 1st of June, 1897.

So, therefore, if the testimony above referred to be sufficient, as we have seen it was, to carry the question to a jury as to whether both parties claimed from a common source of title, then there was error in granting the nonsuit. Under this view of the case, the other questions presented by the additional grounds for a nonsuit do not properly arise, and have not, therefore, been considered. The judgment of this court is that the judgment of the circuit court be reversed, and the case be remanded to that court for a new trial.

(53 S. C. 232)

BOMAR et al. v. MEANS et al.

(Supreme Court of South Carolina. Sept. 28, 1896.)

**FRAUDULENT CONVEYANCES — ADVANCEMENT —
EQUITY JURISDICTION — CONTENTION
ON APPEAL.**

1. An advancement by parent to child does not make the child a debtor to the parent, so as to constitute consideration, as against creditors, for a conveyance by the child to the parent.

2. Equity has jurisdiction of a suit to set aside a conveyance as in fraud of creditors.

3. The parties having by their "case" agreed that the action was commenced in 1891, it cannot on appeal be contended that it was commenced later, when an amended complaint was filed.

4. Whether one, through whom another conveyed property to his children, had sufficient mental strength to participate in the transaction, is immaterial on the question of fraudulent conveyances.

5. Exceptions alleging error of the court as follows: "In ordering N. to hold a reference herein," "In sustaining the allegations of the complaint herein," "In decreeing relief, sua sponte, which transcends the relief sought or set out in the complaint herein,"—are too general.

6. Where M. makes a fraudulent conveyance of his property to B., and B. conveys such property to the children of M., with an honest claim against M., they can prove such claim against the estate of M.

Appeal from common pleas circuit court of Spartanburg county; R. C. Watts, Judge.

Action by Ellisha Bomar and others against Albert Means and others to set aside a conveyance as fraudulent. Decree for plaintiffs. Defendants, except H. F. Means, appeal. Modified.

The 16th, 17th, and 21st exceptions allege error of the court as follows: (16) "In ordering J. D. Norman to hold a reference herein." (17) "In sustaining the allegations of the complaint herein." (21) "In decreeing relief, sua sponte, which transcends the relief sought or set out in the complaint herein."

W. Waddy Thomson, for appellants. Hydrick & Wilson, for respondents.

POPE, J. This appeal is from the decree of his honor, R. C. Watts, presiding judge, at the spring term, 1897, of the court of common pleas for Spartanburg county, in the above-stated action, by which decree it was adjudged that the bill of sale, mortgage, and confession of judgment which were executed by Al-

bert G. Means, the elder, to Robert Beaty, the elder, on the 30th day of December, 1887, were founded on debts for the greater part pretentive, and were executed by said Albert G. Means while he was consciously insolvent, and in order to give an unjust preference, in violation of the statute law of this state, and, further, in order to hinder, delay, defeat, and deprive his creditors, against the statute of Elizabeth, in force in this state. The circuit judge further found that Robert Beaty, the elder, was not fully conscious of these transactions had with him on 30th December, 1887, and yet to a certain extent participated in them. By his decree, Judge Watts directed that the defendant H. G. Means, who had no lot or parcel in any of the transactions of A. G. Means with R. Beaty, the elder, should pay over to William Munro, as receiver, the sum of \$1,575.35, with interest thereon from 2d November, 1892; that the children of the said Albert G. Means, the elder, do deliver up the papers assigned to them by Robert Beaty, the elder, on the 30th day of December, 1887, to be canceled; and, further, that said children do account with and turn over to William Munro, Esq., as receiver, all personal property mentioned in the bill of sale, except such as is described in the judgment in the case of Sarah J. Archer et al. against J. G. Long, as sheriff of Union county; that all of the plantation of Albert G. Means, the elder, lying in Union county, except that part of the tract of land laid off to said Albert G. Means, the elder, as his homestead, be sold by said receiver. We need not set forth fully the pleadings and proceedings in this action, except so much as relate to the exceptions, for they will be found fully described in Bomar v. Means, 37 S. C. 520, 16 S. E. 537, and 47 S. C. 190, 25 S. E. 60.

The defendants, except H. F. Means, appeal from Judge Watts' decree, on 22 exceptions thereto. These exceptions may be grouped as follows: First, error in the circuit judge in deciding from the testimony that the bill of sale, mortgage, and judgment from Albert G. Means, the elder, to Robert Beaty, the elder, were in fraud of the creditors of the former; second, error in the circuit judge in holding that at the date (30th December, 1887) of bill of sale, etc., to Robert Beaty, the elder, the said Beaty did not understand their character or scope, nor their nature, but was deceived and misled with relation thereto; third, that Albert G. Means, the elder, was consciously insolvent on the 30th day of December, 1887, and attempted to include in the instruments executed on that day advancements in money and property of Robert Beaty, the elder, to the wife of Albert G. Means, and to said Means in right of his wife.

We have given all the papers, especially the testimony of the witnesses, a thorough consideration, and we have endeavored to remember the high character of both Mr. Beaty and Mr. Means; but we regret to say that in a moment of weakness, according to the testimony, both parties yielded and lent them-

selves to the perpetration of a wrong. There can be no doubt that Mr. Means was indebted to his father-in-law, Robert Beaty, in the sum of \$2,700, but not in the sum of \$15,000. We look in vain to the testimony to explain the latter indebtedness. The only way it can be done is by including the advancements of Mr. Beaty to his daughters, the wives of Mr. Means, and some of such advances to Mr. Means in right of his wives. Advancements by the parent to the child are gifts by the parent, to be reckoned as a part of the share of such child in case the parent dies intestate, or in the event of testacy under a direct provision in the will therefor. In no case when the child becomes embarrassed by debt after the advancements have been made can such advancements be changed in character so as to become debts, to the injury of creditors. The expressions of the old gentleman, Mr. Robert Beaty, in his last days, are pathetic when he states he did not know they were including the advancements in the papers executed on 30th December, 1887, and also that, if carried to court, he would tell the truth of the matter. So deeply was he moved that he would talk to his family and friends about these matters, even when he was told such expressions of his might lead to trouble. The fact that judgments had been obtained against Mr. Means in Spartanburg county at the very date of those transactions in Union county is not without significance. Indeed, it serves to explain the haste with which all these papers were signed on the 30th day of December, 1887. On the 12th of January, 1888, we find by the testimony that the sheriff of Union county is laying off the homestead of Mr. Means in his Union plantation. To show the haste of the parties on the 30th of December, 1887, to execute the papers, it will only be necessary to call attention to the testimony of Mr. James Means, who was then clerk of the court of common pleas for Union county. He testifies that Mr. Means and his attorney came to his house after night on the 30th of December, 1887, and insisted that he should go to his office and enter papers there; that the assignment of the judgment by Mr. Robert Beaty, the elder, to the children of Mr. Means, had been signed by Mr. Beaty before the confession was made, and that the note upon which the confession was made was taken from the pocket of Mr. Means; that such note failed to correspond with the figures of the confession, and was after that night, without the clerk's knowledge, taken from the judgment roll, and other notes substituted. We agree with the circuit judge on this point. So, too, as to Mr. Beaty's failure to understand the purport of all these papers on the 30th December, 1887. We think the testimony points to him as nearly 87 years of age at that time, quite deaf, and as one so frail at that time as to cause him to depend upon his son Dr. Beaty, or his grandson C. H. Peake, Esq., to look after his business. Under such circumstances, it is not to be wondered at that Mr. Beaty should

execute papers that he did not understand; especially as his act was merely assigning and setting over such papers to others, to wit, his grandchildren. He certainly declared afterwards that he did not understand the papers, and regretted that his son Dr. Beaty was not present to look after such business for him. The expression attributed to Mr. Beaty by one of the witnesses, "Are you sure this is all right?" to which question the attorney replied, "I am sure it is all right, and there is nothing wrong about it,"—would indicate that Mr. Beaty did not comprehend the transactions. As to Mr. Means' insolvency there can be no doubt. His home place in Spartanburg was mortgaged for nearly its value. His little farm in that county was also covered by an incumbrance. His plantation in Union, although large and valuable, and his personal property, could not pay and discharge his debts; especially after the homestead and exemption were allowed. The eighth exception is overruled.

As to the first exception, which alleges error in the circuit judge in trying the case at bar when its facts did not warrant the court on its equity side to take jurisdiction: We cannot understand the appellants. Surely, at this day it cannot be doubted that it is the province of the court of equity to unravel just such cases as the present. Nor is there any doubt that the facts of the case, as developed in the action at its trial, sustain the jurisdiction. We have said as much as we have on this point because of our anxiety to fully cover in our investigations every point suggested in the appeal, whereas in this exception, by reason of its generality, no specific error is alleged, and we might well have excused ourselves from any notice of it.

The second exception complains that the circuit judge erred in failing to sustain the plea of the statute of limitations, although such issue was presented in the argument of appellants' attorney. The statute of limitations is not pleaded by the appellants in their answer. Nor do the facts warrant any such plea. The instruments sought to be set aside were executed on 30th December, 1887. Judgments (some of them) were obtained in 1888. Return of nulla bona by sheriff was made in the year 1888. This action was commenced 23d December, 1891. There was no interval of six years after the right of action accrued. Therefore the technical plea of bar by statute of limitations is unavailing, because unfounded.

The third ground of appeal, which seeks to impute error to the circuit judge because he failed to find that the plaintiffs were not entitled to come into equity, because they had a plain and adequate remedy at law, which they had lost by their own laches: We remark that the appellants, in their answer, raise no such issue. But, independently of this fact, the facts and circumstances of this action, as developed on trial, show that this is peculiarly a case for the court of equity. In our former decision of this case (47 S. C.

202, 25 S. E. 60) we have held that the plaintiffs have not been guilty of laches.

The next error alleged in the circuit judge is in holding that this action was commenced in 1891, instead of July, 1895, when an amended complaint was filed. Our answer to this will be brief: The parties to this case have agreed by their "case" now before us: "This action was commenced in the court of common pleas for Spartanburg county on the 23d day of December, 1891," etc.

The next error alleged is that the circuit judge held, as a matter of fact, that, at various times from the year 1846 until 1887, Robert Beaty advanced to his daughter Elizabeth, and to Mr. Means in her right, various sums of money and items of personal property, such as furniture, stock, and negroes. We do not see how the appellants can claim this as error. One of their witnesses, Mr. Hill, of Mississippi, testified: "I think he made advancements to all of them [children], and to my present wife, about \$2,000 in money and a few slaves." In answer to the eighth interrogatory, which was: "Did not said Robert Beaty, Sr., have a book wherein he kept the account of moneys gotten by his daughters and their husbands, and did he not intend to hold both daughters and son-in-law responsible to the end of a just final division?"—he testified: "He kept a book as inquired of, but do not know for what purpose." Now, the appellants have by their own witness proved that Mr. Beaty kept a book wherein he set down advancements made to his children, and also that he made such advancements in money and negroes. The witnesses for the plaintiff respondents also testified as to this book, and what it contained, to wit, advancements to the children. Mr. Beaty said to witness that he did not want Mr. Means to pay for money and negroes that he had let his daughter have years ago. Smith Wright testified that when Mr. C. H. Peake told his grandfather, Mr. Robert Beaty, Sr., about the papers executed on 30th December, 1887, being put on record: "Robert Beaty said: 'Oh, my! They did not owe me that much. They must have put in the negroes and money I had given them, and I did not want them to put them in.'" This witness said he heard Mr. Beaty tell Mr. Means' attorney, while he was preparing the papers, on the 30th of December, 1887, that he did not want him to put in the money and negroes that he had given them years before. These books were before the circuit judge. He saw the entries and the dates, and upon those entries and the testimony he based his finding of fact. We have not the books before us, but we have the testimony. We are satisfied with the finding of the circuit judge.

The sixth exception, relating to the finding of fact by the circuit judge, that the book contained all the items of money or other property advanced to the children by Mr. Beaty, and, further, that "we do not know only inferentially that Mr. Beaty intended to require A. G.

Means to pay his note for \$2,726.25," is the next objection to the circuit decree. In regard to this exception we fail to discover that it is not supported by the testimony; indeed, it has abundant support there. As to the note for \$2,726.25, the circuit judge did not say, "We do not know only inferentially that Mr. Beaty intended to require A. G. Means to pay his note." What the circuit judge did say is: "Whether Mr. Beaty intended to require payment of this note, we do not know, except as we may gather his intention from the fact that he took the note, and held it." There is no fault to be found with this finding of fact by the circuit judge.

The seventh exception is included in our first point.

We are obliged to agree with the circuit judge that the papers executed on 30th December, 1887, were meant to exclude the other creditors, and therefore the ninth exception, relating to those matters, is overruled.

As to the tenth exception, which complains that the circuit judge erred in holding that by means of instruments apparently bona fide, and for valuable consideration, A. G. Means placed his property beyond the reach of his honest creditors, we must say the testimony supports the circuit judge. As to the concluding sentence, that the circuit judge erred in further holding that the badges of fraud are numerous and convincing, the circuit judge was, no doubt, as we are, impressed with the high character of Mr. Means and Mr. Beaty. All he meant was to state frankly that proofs in the case at bar were numerous and convincing that the transactions of 30th December, 1887, could not stand in a court of equity, because wanting in bona fides.

The twelfth and thirteenth exceptions are covered by what we have already held.

As to the fourteenth exception, imputing error to the circuit judge in appointing William Munro, Esq., as receiver, we see no error here, either in the person appointed or in the fact that a necessity for a receiver existed.

The sixteenth and seventeenth exceptions are too general.

The eighteenth exception cannot be sustained, because it makes no difference whether Robert Beaty, the elder, was possessed of sufficient mental strength or will power to participate in the transactions between himself and Mr. Means on the 30th of December, 1887, for he was but the conduit, so to speak, through whom A. G. Means' property was transferred to A. G. Means' children.

The nineteenth exception imputes error to the circuit judge for failing to state one or more facts upon which he based his conclusions of fraud. The circuit judge had all the testimony before him. He found that testimony sufficient. We have the same testimony, except the book, before us, and we have already indicated the points which we fear have put it out of our power to agree with the appellants.

We cannot, in passing upon the twentieth exception, hold that the bill of sale, confession of judgment, and mortgage are based upon a sufficient consideration moving between Mr. Means and Robert Beaty, the elder. The facts of this case are at variance with the conclusion that any valuable consideration supported the transaction.

The twenty-first exception is too general.

And, lastly, the twenty-second exception is covered by our previous views herein expressed.

Before concluding, however, it does seem to us that inasmuch as the defendant appellants, except H. F. Means and A. G. Means, Sr., have received from their grandfather, by assignment, the honest, bona fide debt, \$2,726.25, with interest from 16th September, 1887, held by their grandfather, Robert Beaty, Sr., against their father, A. G. Means, that they ought to be allowed to prove their debt against their father under those proceedings, but not as a judgment. No doubt, the circuit judge meant this, for he finds that this was an honest indebtedness of A. G. Means to Robert Beaty, Sr. It is the judgment of this court that the judgment of the circuit court be modified to the extent of allowing the appellants, except H. F. Means and A. G. Means, Sr., to prove their debt of \$2,726.25 against the estate of A. G. Means, Sr., but not in the form of a judgment, and, with this modification, that the decree of the circuit court be affirmed.

(53 S. C. 187)

OWINGS et al. v. HUNT et al.

(Supreme Court of South Carolina. Sept. 28, 1898.)

RES JUDICATA—INFANTS—FEE CONDITIONAL.

1. That some of the parties to an action were infants does not prevent the judgment therein being *res judicata* as to them, the requirements in such case, as to service, appointment of guardian ad litem, etc., having been complied with.

2. As respects the partition, on the death of H., of land deeded to her and "the heirs of her body," advances made by her to certain of her children are not to be considered, though made partly out of the land so held by her on fee conditional; a fee conditional not being subject to the statute of distribution of intestate estates.

Appeal from common pleas circuit court of Pickens county; O. W. Buchanan, Judge.

Action by Lidle Owings (née Hunt) and another against Amanda Hunt and others. From the judgment, plaintiffs and defendant C. L. Hollingsworth appeal. Affirmed.

Morgan & Blasingame and Cothran, Wells, Ansel & Hollingsworth, for appellants. Haynsworth & Parker, for respondents.

POPE, J. This action was commenced 8th September, 1897, in the court of common pleas for Pickens county. The complaint alleges: First. That the plaintiff Raymond O. Hunt is a minor over 14 years of age, and appears by his guardian ad litem, T. F. Hunt. Sec-

ond. That Eveline Hunt, who died on 14th March, 1890, intestate, left, as her surviving children, the plaintiffs and defendants N. M. Brock and E. H. Brock, and also A. R. Hunt, who is represented by C. L. Hollingsworth, which four children and her husband, T. J. Hunt, were her heirs at law. Third. That on the 22d July, 1867, one Esli Hunt made and delivered to his daughter Eveline Hunt his deed, whereby he conveyed to her 300 acres of land, to her and the heirs of her body. Fourth. That such deed was one in fee conditional. Fifth. That said Eveline Hunt accepted said deed, went into the possession of the 300 acres of land under its provisions, had issue born to her, held possession until her death, except of such portions as she alienated during her life, and left certain issue living at her death. Sixth. That, at the time of the death of said Eveline Hunt, she was in possession of 191 acres of the 300 acres conveyed to her by her father. Seventh. That H. M. Brock and E. H. Brock were the children of said Eveline, born after her intermarriage with James Brock, who died in 1862; and that on the 4th August, 1886, she made and delivered to H. M. and E. H. Brock a fee-simple deed of conveyance to 109 acres of the 300 acres conveyed to her by her father as their share of the said 300 acres, and they went into possession of said 109 acres, and they accepted the same as in full settlement of their interest in said 300 acres. Eighth. That, under the mortgage of Eveline Hunt to defendant, C. L. Hollingsworth, 59 acres of the 191 acres was sold after the death of said Eveline, thus leaving 132 acres. Ninth. That on the 10th of April, 1891, an action was begun in the court of common pleas for Pickens county by H. M. and E. H. Brock and A. R. Hunt, as plaintiffs, against T. J. Hunt, husband, who survived Eveline Hunt, Lidle Hunt, who is now Lidle Owings, and Raymond Hunt, as defendants, whereby it was sought to partition other lands belonging to Eveline Hunt and the balance of the 300 acres after deducting the 109 acres previously conveyed by Eveline Hunt to H. M. and E. H. Brock, and all persons interested were parties plaintiff and defendant to said action. (Reference is made to the judgment, No. 1,666.) Tenth. That by the decree in No. 1,666 it was adjudged that T. J., as the husband of said Eveline, Hunt, was entitled to occupy said 300 acres (or what remained of it) as tenant by curtesy during natural life, which judgment in that respect was observed until the death of the said T. J. Hunt. Eleventh. That A. R. Hunt, one of the plaintiffs in the suit just before mentioned, has sold and conveyed to the defendant C. L. Hollingsworth all his right, title, and estate in the said 132 acres remaining of the 300 acres of land, and said Hollingsworth now owns the same; said A. R. Hunt having been an heir of the body of Eveline Hunt at her death, and he is now dead. Twelfth. That, since the decree in the action referred to as No. 1,666, the said

T. J. Hunt mortgaged his estate by the curtesy in said lands to the defendant C. L. Hollingsworth, which said mortgage is not yet fully satisfied, and is claimed as a lien on the said 132 acres of land; but the plaintiffs allege that, T. J. Hunt having died on the 20th day of August, 1897, the said mortgage is no longer a lien upon said 132 acres. Thirteenth. That the said T. J. Hunt, after the death of Eveline Hunt, intermarried with one Rebecca Hogshed, by whom he had two children, Jesse E. Hunt and Uzee Hunt, who are still living and under the age of 14 years, but that said Rebecca, their mother, is now dead. Fourteenth. That, after the death of the second wife of said T. J. Hunt, he intermarried with the defendant Amanda Hunt. Fifteenth. That plaintiffs are informed that some of the defendants contend that said T. J. Hunt was seised as an heir at law of said Eveline Hunt of a one-third interest in the 132 acres of land, but they deny that such interest exists. Sixteenth. That the parties named as parties plaintiff and defendant to this action will give the court jurisdiction of all the parties and the subject-matter. The prayer for relief is: First, that the two plaintiffs and defendant C. L. Hollingsworth may be adjudged the owners of said 132 acres of land; second, that the mortgage of T. J. Hunt to C. L. Hollingsworth, so far as it covers the 132 acres of land, be declared null and void; third, that the 132 acres be sold in partition, and the proceeds divided between the plaintiffs and defendant, one-third to each; fourth, for such other and further relief as may be necessary.

The answer of the defendant C. L. Hollingsworth admits all of the allegations of the complaint. The defendants H. M. and E. H. Brock admit articles 1, 2, 3, 4, 5, 6, 8, 9, and 10 of the complaint. As to the seventh article, they admit their mother, Eveline Hunt, conveyed to them 109 acres of the 300-acre tract, but they deny all the other allegations of said seventh article. They deny that they have knowledge or information sufficient to form a belief as to allegations in the eleventh, twelfth, thirteenth, fourteenth, and fifteenth articles of said complaint. They allege that each of said H. M. and E. H. Brock is the owner of a one-fifth interest in the 132 acres of land. They further allege that the action which is contained in judgment No. 1,666 was to procure a partition among the parties to said action of the lands of which Mrs. Eveline Hunt died seised, and also to partition among the five children of Mrs. Eveline Hunt the tract of land which was held in fee conditional; that in the answers filed in said action it was alleged that their mother had in her lifetime made considerable advancements to these defendants, H. M. and E. H. Brock, for which they should be required to account in the settlement of her estate; that, while such matters were so at issue, a reference was ordered to take testimony thereon, and testimony was taken tending to show that the said Eveline

Hunt had made in her lifetime a deed in fee simple to these defendants for 109 acres of the 300 acres, as a gift to them, and it was sought at such reference to charge these defendants with the lands covered by said deed of conveyance as an advancement; that such matters came on for trial by the court of common pleas for Pickens county on the referee's report, and a decree was filed on 12th March, 1892, which was afterwards amended by a consent decree on 8th November, 1892; that by said decree it was adjudged that the tract of land described in the complaint was held by Eveline Hunt in fee conditional, and that the children of said Eveline named as parties plaintiff and defendant were the heirs of the body of said Eveline, to whom the tract of land passed at her death, and that T. J. Hunt was entitled to occupy the same as tenant by curtesy, and the same was set over to him for his life, and nothing further was adjudged with reference to said tract of land; that it was further adjudged that the conveyance of the 119 acres to these defendants by Eveline Hunt was a gift for which, as an advancement, they must account in the settlement of her estate, and the lands directed to be sold, and the proceeds divided in accordance with the rights of the parties; that, in pursuance of said decree, all the lands belonging to the estate of Eveline Hunt, deceased, were sold, and the interests of these defendants in said lands were turned over to the other heirs, on account of the said advancements, as aforesaid; that, by said decree, the matters now sought to be litigated in the present action were adjudged adversely to the claims of the plaintiffs.

The action now at bar was heard by Judge Buchanan, and on the — day of —, 1898, his decree was filed, wherein he held that there were two questions of law presented: "(1) Whether, under the proceedings had in the former action, the conveyance of the 109 acres of land is to be considered as an advancement, or whether it was intended by this conveyance to allot to H. M. and E. H. Brock what might be their portion of the fee conditional lands in case of the death of said Eveline Hunt; and (2) If the said conveyance was intended as an advancement, whether the said H. M. Brock and E. H. Brock should be required to account for the value thereof in the division of the balance of the fee conditional lands." The circuit judge held that, considering that each answer in the former case sought to charge H. M. and E. H. Brock with the 109 acres as an advancement to be accounted for in the settlement, not for the fee conditional lands, but of her estate, which estate consisted of lands other than the fee conditional lands and also personal property, and that such was so understood by the court and all the parties concerned, the 109 acres so received by H. M. and E. H. Brock was an advancement by their mother in her lifetime, and can only operate in the settlement of the estate of Mrs.

Eveline Hunt. He also held, A. R. Hunt having estopped himself from considering the 109 acres so conveyed to H. M. and E. H. Brock, his grantee, C. L. Hollingsworth, was likewise so estopped. The circuit judge held, in considering the second question, that this advancement to H. M. Brock and E. H. Brock of the 109 acres by their mother could not be brought into the matter of the partition of the 132 acres of the fee conditional lands, but that they each were entitled to one-fifth part thereof. He provided in his decree, as the 132 acres had already been sold under a consent order in the action at bar, each of the plaintiffs and H. M. and E. H. Brock and C. L. Hollingsworth were entitled to be paid the one-fifth part of the proceeds of sale by the clerk of court, who was custodian of said proceeds.

The appeal is intended to question the correctness of this decree of Judge Buchanan, and the grounds are as follows: (1) Because the circuit judge erred in holding that the appellants were and are estopped from raising the claim that H. M. and E. H. Brock are not entitled to a full share in the balance of the fee conditional lands, without any deduction on account of the conveyance to them of the 109 acres. (2) That he erred in holding that the appellants are estopped, by their pleadings in the case of Brock against Hunt et al., the testimony adduced by them, and the decrees therein filed, from claiming that the conveyance to H. M. and E. H. Brock of the 109 acres was anything else than an advancement. (3) That the pleadings and evidence in the former case showing Lidle Owings (née Hunt) and Raymond O. Hunt were minors, and their answers being merely formal and dependent upon the court for the protection of their rights, his honor erred in holding that they are now estopped by said pleadings to contend that the respondents H. M. and E. H. Brock are not entitled to a full share in the fee conditional lands, and that the 109 acres were conveyed to the Brocks as advancements, and that he further erred in holding that said persons, then minors, are now estopped from raising the question of *res adjudicata*. (4) Because the circuit judge erred in holding as follows: "As to whether an advancement made by a parent in his lifetime should be accounted for in the division among the children of fee conditional lands, I am of the opinion that this cannot be done." (5) Because the circuit judge erred in holding as follows: "And I hold that, on the death of Eveline Hunt, the lands in fee conditional passed (1) to her surviving husband, as tenant by curtesy; (2) and, he being dead, they passed to her children, H. M. Brock, E. H. Brock, A. R. Hunt, Lidle Hunt (now Owings), and Raymond O. Hunt, to be divided among them equally, unaffected by any previous gifts or advancements which she may have made to any of them." (6) Because the circuit judge erred in ordering that the proceeds of the sale, after paying costs

and expenses, should be divided among the five children, whereas he should have found that the said proceeds should be divided between Lidle Owings, Raymond O. Hunt, and C. L. Hollingsworth, the latter representing the share of A. H. Hunt as purchaser. (7) That the circuit judge erred in not holding that the question of advancements to the said respondents H. M. and E. H. Brock having been one of the main issues in the case of Brock against Hunt, and the court having decreed that they should account for the sum received by them as advancements, and no appeal having been taken from said decree, they were estopped from denying their liability for said advancements. (8) Because the circuit judge erred in not holding that the doctrine of advancements does not apply to the respondents in this case, for it is well settled in this state that the children of the parent in fee conditional take by succession and through their parent; that the only difference between fee conditional and fee simple is that the latter descends to the heirs generally, while the former only to a particular class named. (9) Because the circuit judge should have found that the heirs of the body of Eveline Hunt do not take per formam doni, but take through their mother, —their ancestor. (10) Because the circuit judge erred in not finding and decreeing that the 109 acres of land were a part of the fee conditional lands, and that the same were conveyed to H. M. and E. H. Brock as that much of their part of said lands.

We will now pass upon the questions raised by this appeal, not in the language of the exceptions, but in our own way, being careful to respond to every point raised.

First. Was it error in the circuit judge when he held that these appellants were estopped to question the decree in the former action of Brock against Hunt et al.? We have always understood that a judgment in an action was conclusive of every issue involved, upon every party to such action. Indeed, it has been held that such judgment is conclusive upon such parties as to every issue necessarily involved or included by the action wherein such judgment was rendered. That some of the parties to such action were minors can make no exception to this rule, where they have had all the requirements of the law fulfilled as to service, appointment of guardian ad litem, etc. To hold otherwise, it seems to us, would be to imperil the integrity of all judgments. So, therefore, the parties—all the parties—to the previous action of Brock against Hunt et al. are bound, as they have not shown any vice in such judgment, provided the terms of such judgment are conclusive upon them in holding that H. M. and E. H. Brock should hold the 109 acres as an advancement. As the circuit judge remarks, every answer in the action of Brock against Hunt et al. insists that the Brocks shall answer for the advancement to them of the 109 acres by their mother in her lifetime, and

the testimony of every witness is directed to the establishment of this conclusion. So, when we recur to the judgment of Judge Hudson, we find that he has decreed "that on the final settlement of the estate of the said Eveline Hunt, deceased, the plaintiff E. H. Brock do account for the sum of \$772 as advances; that the plaintiff M. H. Brock do account for the sum of \$833.50, as advances." When we turn to the pleadings and the testimony, we find that not only are H. M. and E. H. Brock called upon to account for the 109 acres of land as an advancement, but each one is required to account for a work animal (a horse in one case, and a mule in another), hog, heifer, feather beds, cow and calf, etc., given to them by their mother, Mrs. Eveline Hunt, in her lifetime. And it is because of the difference in the value of the personal property advanced to these sons by their mother that there is a difference in the amount of their respective advancements. Each one of these Brock sons received the same amount in land. It seems to us, all parties conceding, as they do, in the case at bar,—and they do so very properly,—that it was in the power of Eveline Hunt, after the birth of issue (this being an estate in fee conditional), to have sold this land, there might be some force and effect in such conveyance of the land during her lifetime, but the deeds are not before us, and the question has not been raised in this form; so we will pass on to the second: Does an heir of the body, after the death of the just taker, intestate, on a fee conditional, take land as such heir of the body subject to the restrictions imposed by the statute of distributions?

If the statute of distributions does not affect such heir at law as to his portion of the fee conditional, it seems that the appellants cannot hope for much relief. In answer to this question it might be well to state what a fee conditional is. We fear some of the declarations of this court and of other law writers have been misconstrued when a contrast was drawn between a fee simple and a fee conditional in so far as the extent and dignity of the two estates have been referred to,—as, for example, in *Buist v. Dawes*, 4 Rich. Eq. 423; *Selman v. Robertson*, 46 S. C. 262, 24 S. E. 187; *Du Pont v. Du Bos* (S. C.) 29 S. E. 671. But it will be observed in the examination of these cases that every one of them was careful to note the radical difference between the two, for it is stated that the prominent distinction between them is in the description of the heirs to which the estates respectively descend,—one (fee simple) to the heirs in general, and the other (fee conditional) to particular heirs of the body generally, or restricted as to sex and as to the body that shall bear them. All the rules applying to estates in fee simple are equally applicable to the estate in fee conditional, with the exception of its order of descent and the right of alienation to bar the donor. A fee conditional may be said to be a "fee restricted to some particular

heirs, exclusive of others." It has been held in this state that a fee conditional is not the subject of a devise. *Jones v. Potter*, Harp. 92. It has, however, been held in this state, that a fee conditional in the hands of heirs of the body after the death of the first taker, who died intestate, is subject to the payment of the debts of such first taker or ancestor. *Burnett v. Burnett*, 17 S. C. 545. And this result must be predicated upon the fact that the heirs of the body take the estate in fee conditional by limitation, rather than by purchase. This being so, it does not follow that such heirs of the body take the fee conditional subject to the laws of this state providing a method for the distribution of intestate estates. In cases of intestacy, an estate in fee simple absolute, which descends to the heirs generally, does vest in such heirs, so as to be distributable among them in accordance with the statute for the distribution of intestate estates. This result does not attend the fee conditional. It may be that, when the fee conditional was created, it was provided that the lands should vest in A. and the daughters born of his body, and both sons and daughters were left surviving the ancestor. To require the estate of the daughters to be distributed under the statute of distribution of intestate estates would violate the terms of the deed, and sacrifice the rights of the particular heirs of the body named in the deed. We do not find any error in the decree of the circuit judge. It is therefore the judgment of this court that the judgment of the circuit court be affirmed.

(33 S. C. 246)

MATHIS v. SOUTHERN RY. CO.

(Supreme Court of South Carolina. Sept. 28, 1893.)

REMOVAL OF CAUSES — RESIDENCE OF CORPORATION—APPEAL—REVIEW.

1. As regards the right of removal from state to federal court of a cause involving the question of negligence in furnishing section men on a railroad in the state improper appliances for their work, the owner of the road is a domestic corporation, though originally incorporated in another state, where it owns another line, it having also been incorporated within the state under 22 St. at Large, p. 92, pursuant to Const. 1895, art. 9, § 8, requiring that any corporation, to operate a railroad within the state, must be a domestic corporation.

2. Error in admitting testimony of plaintiff in a personal injury case as to his marriage, and the number and ages of his children, cannot be complained of, defendant in his cross-examination having called forth testimony from the same witness in regard to his children.

3. Objection that testimony admitted was secondary, without foundation laid, cannot be made on appeal, the only objection being that it was cumulative.

Appeal from common pleas circuit court of Lexington county; J. C. Klugh, Judge.

Action by M. F. Mathis against the Southern Railway Company. Judgment for plaintiff. Defendant appeals. Affirmed.

B. L. Abney, for appellant. Graham & Nelson, for respondent.

POPE, J. This action was brought on for trial before his honor, Judge Klugh, and a jury, and resulted in a verdict for the plaintiff for the sum of \$1,500. After judgment therefor the defendant appealed therefrom on five grounds, but at the hearing before this court it abandoned the fourth ground. The first two grounds relate to the refusal of the circuit judge to recognize the effort of the defendant to procure a removal of the action for trial from the court of common pleas for Lexington, in this state, to the circuit court of the United States for the district of South Carolina, as an obstacle to the trial of the cause in the former court. These grounds will be considered together. It is needless to remark that, if the defendant is entitled to the removal prayed for, it is our solemn duty to accord the right; and not only is it our duty, but it should be our pleasure, for if such right exists it must be admitted.

In order to properly understand these questions, we deem it proper to set out in this opinion copies of the complaint and other papers bearing on the question of removal:

"Complaint.

"The plaintiff complains of the defendant, and alleges:

"(1) That at the time hereinafter mentioned the defendant was, and is now, a corporation duly authorized, under the laws of the state of South Carolina, to maintain, equip, conduct, and operate a general railroad business in said state; and, under such authority, the said defendant owns a railroad, together with the track, cars, locomotives, lever car, and other appurtenances thereto belonging, and then and now operates the same through the county of Lexington, in said state.

"(2) That the plaintiff, on the 14th day of May, 1895, at the time of the committing of the grievances hereinafter mentioned, was in the employment of the defendant as foreman of section No. 17, a place where a foreman and several hands are kept to repair and keep up the railroad track, which section is situated along said railroad, in Lexington county, in said state, near the town of Lexington, S. C.; and while at work upon said railroad, in said section, the plaintiff and other hands or servants of the defendant were conveyed from place to place along said railroad within said section by a lever car, the property of the defendant, which was operated by the servants of the defendant; and it was the duty of the defendant to provide a good, safe, and secure lever car, with good, safe, and secure machinery and apparatus.

"(3) That yet the defendant, not regarding its duty, conducted itself so carelessly, negligently, and unskillfully in this behalf that it provided and used an unsafe, defective, and insecure lever car, of which it had notice.

"(4) That, for want of due care and attention to its duty in that behalf, on the said 14th day of May, 1895, between Lewiedale and Lexington stations, along said railroad,

in said county, and while the said lever car was in the use and service of the defendant, upon its said railroad, and while plaintiff was on the same, in the capacity aforesaid for the defendant, one of the wheels of said lever car, by reason of unsafeness, defectiveness, and insecurity thereof, struck a plank between the rails of said railroad track, thereby causing the said lever car to be thrown from the track, the plaintiff to fall in front of said car, which struck him in the back, ran over his right foot, knocked out two of his front teeth, and inflicted other painful and serious wounds on plaintiff's left knee, side, and face.

"(5) That, by reason of the negligence and carelessness of the defendant, the plaintiff was not only painfully and seriously bruised and wounded, but was permanently injured.

"(6) That thereby plaintiff became ill, and was confined to his bed for more than a month, and has not yet been able to resume his duties, and he was obliged to and did expend a considerable sum of money in attempting to cure himself, and he was otherwise injured, to his damage \$10,000.

"Wherefore plaintiff demands judgment against the defendant for \$10,000 and for costs.

Graham & Nelson,
"Attorneys for Plaintiff."

On the 31st day of August, 1897, and before the time that the defendant was required by the laws of the state of South Carolina or the rules of the circuit court of common pleas of said state to answer the said complaint, the defendant, the Southern Railway Company, filed its petition and bond in the circuit court of common pleas for Lexington county, in the usual manner of filing papers. The following is a copy of said petition and of said bond:

"Petition to Remove Cause to United States
Circuit Court.

"State of South Carolina, County of Lexington. In the Court of Common Pleas. M. F. Mathis, Plaintiff, against Southern Railway Company, Defendant. To the Honorable the Court of Common Pleas for the County of Lexington, in the State Aforesaid: Your petitioner, the Southern Railway Company, a corporation created by and existing under the laws of the state of Virginia, respectfully shows: That it is the defendant in the above-entitled suit; that it is a nonresident of the state in which said suit is brought, to wit, the state of South Carolina, and that the matter and amount, in dispute in said suit exceeds, exclusive of interest and costs, the sum or value of \$2,000; that the said suit is of a civil nature, being an action for \$10,000 damages for personal injuries to the plaintiff, caused on the 14th day of May, 1895, as it is alleged, by negligence of the defendant, while he was in its employment as foreman of a section of its road situate in Lexington county and state of South Carolina, and while being carried over said road on a lever car, said negli-

gence consisting of, as it is alleged, in that said lever car was unsafe and defective, whereby one of the wheels of said car caused the same to be thrown from the track, and plaintiff thrown from the car, and struck by it and injured; that the controversy in said suit is wholly between citizens of different states, to wit, between your said petitioner, who avers that it was, at the commencement of this suit, and still is, a citizen and resident of the state of Virginia, being a corporation created by and existing under the laws of said state, and the plaintiff, who, as your petitioner avers, was then, and still is, a citizen of the state of South Carolina, and that both the said Mathis and your petitioner are actually interested in said controversy. Your petitioner further shows that prior to June 1, 1892, the Richmond & Danville Railroad Company, a corporation of the state of Virginia, the predecessor of your petitioner, was a railroad corporation lawfully engaged in interstate commerce, and lawfully operating, under ownership, lease, or traffic contracts, the various railroads in Virginia, North Carolina, Georgia, Alabama, and including the railroads of the following companies in the state of South Carolina, viz.: The Charlotte, Columbia & Augusta Railroad Company, the Columbia & Greenville Railroad Company, the Atlanta & Charlotte Air-Line Railroad Company, besides others. That on or about the 1st day of October, 1886, the said Richmond & Danville Railroad Company, being thereunto authorized by the laws of the state of Virginia and the state of South Carolina, made its certain consolidated mortgage, selling, assigning, and transferring its rights, title, and interest in and to each and every one of said railroads as security for the payment of a series of bonds for millions of dollars, issued for value to the general public. On or about the 15th day of July, 1893, the said Richmond & Danville Railroad Company made default in the payment of the interest falling due upon bonds secured by such consolidated mortgage, and thereupon the trustee therein named, the Central Trust Company, instituted suit for the foreclosure of such mortgage, and for the sale of such mortgaged premises, in the United States circuit court for the Fourth circuit in the Eastern district and in the district of South Carolina. Such proceedings were had in such suit, and pursuant to the decrees of said courts, that on or about the 15th day of July, 1893, receivers duly appointed therein by said courts took possession of some or all of said roads, and continued in possession thereof until on or about the 20th day of June, 1894, when the right, title, and interest of the said Richmond & Danville Railroad Company therein was duly sold under such foreclosure to the holders of said consolidated mortgage bonds; and, such sale being forthwith duly confirmed by said courts, said purchasers thereupon, in accordance with the laws of the state of Virginia, organized the corporation, your petitioner, the Southern Railway Company, which

has ever since held and operated the Richmond & Danville Railroad, in the state of Virginia, and other railroads, and also the Atlanta & Charlotte Air-Line, as such purchasers of the rights of the Richmond & Danville Railroad Company therein; and forthwith your petitioner, the Southern Railway Company, did make and file in the office of the secretary of state of South Carolina the certificate required by law to enable your petitioner to transact business in said state, and did comply with every requirement as a condition precedent to transacting business in the state of South Carolina, and at all times since your petitioner has complied, and has endeavored in every way to comply, and is still willing to comply, with each and every lawful condition of the state of South Carolina, to enable your petitioner, as a railroad corporation of the state of Virginia, to transact its business as a common carrier engaged in interstate commerce within the state of South Carolina. That prior to the 1st day of January, 1893, the Charlotte, Columbia & Augusta Railroad Company and the Columbia & Greenville Railroad each was a railroad corporation duly existing and operating its railroad under the laws of the state of South Carolina, and in accordance with such laws each of said railroad corporations had duly mortgaged its said railroads, estates, properties, and franchises to secure the payment of a series of bonds issued for value to the general public. Upon or before the 15th day of July, 1893, each of the said railroads made default in the payment of the interest falling due upon the bonds secured by such mortgages, respectively, and thereupon the trustee therein named, the Central Trust Company, instituted suits for the foreclosure of such mortgages, and for the sale of said mortgaged premises, in the United States circuit court for the Fourth circuit, in the district of South Carolina, and such proceedings were had in such suits, and pursuant to the decrees of the said court, that on or about the 15th day of July, 1893, receivers duly appointed therein by said courts took possession of said two railroads, and continued in possession thereof until on or about the 10th day of July, 1894, when the right, title, and interest of each of the said two railroad companies, respectively, were duly sold under such foreclosure of such two mortgages, respectively, to your petitioner, the Southern Railway Company, which then and there, in accordance with the laws of South Carolina, was the owner of substantially all of the bonds issued under and secured by the said two mortgages then being foreclosed, and was also the owner of railroads connecting with the said two railroads then being sold under foreclosure, and became the purchaser of said two railroads,—all of which facts were duly set out in the master's report of such sales in such suits, which sales were duly confirmed, and your petitioner duly accepted as such purchaser by the United States circuit court for the Fourth circuit for the district of South Carolina, and ever since,

as such purchaser, your petitioner has been, and now is, engaged in the operation of the said two railroads in the state of South Carolina as part of its system of interstate commerce, having complied with all provisions of the law of South Carolina entitling it to purchase, own, and operate such railroads. That on or about the 1st day of January, 1895, your petitioner, the Southern Railway Company, then being the lawful owner as aforesaid of these various railroads and railroad properties and franchises, as well as of railroads, railroad properties, and franchises in various states of the Union, made and issued its certificates of stock representative of interests in such railroads and railroad system as an entirety, and also its mortgage bonds secured by lien thereon, and such certificates of stock and bonds to the aggregate amount exceeding two hundred million dollars (\$200,000,000) have been sold and issued, and are now outstanding throughout the United States of America and Europe; and ever since said time, and now, it is beyond the power of your petitioner, the Southern Railway Company, to sell or to transfer the railroads in South Carolina, constituting a part of its entire system, free of such stock and obligations, to another corporation formed or to be formed under the laws of South Carolina; and the preservation of its rights and titles, lawfully acquired by it as a Virginia corporation, is dependent upon the continuing recognition and maintenance of its said rights and of its exercise thereof in the state of South Carolina as a Virginia corporation, duly and hospitably admitted within the sovereign state of South Carolina, pursuant to the laws thereof, on the 10th day of June, 1894. That your petitioner, as a common carrier, owns, controls, and operates many lines of railway, extending from the city of Washington, in the District of Columbia, through different adjoining states of the Union, but constituting one system and under one management. That, as such common carrier, your petitioner has contracts for carrying the United States mails, and has been since its organization, and is now, engaged in so doing. That your petitioner is also carrying passengers and freights over its lines between different states, and has many, and is performing many, other special contracts in its capacity of common carrier, constituting commerce between the states. That the lines of railway in the state of South Carolina, so controlled and operated by your petitioner as aforesaid, are connecting links in a through line of railway owned, controlled, and operated by your petitioner, and having the termini in different states, and as such constitute part of the machinery whereby your petitioner carries on commerce between the states. That among the laws of the state of South Carolina, under and by virtue of which your petitioner purchased, and is now operating, its aforesaid lines in the state of South Carolina, is an act of the general assembly of the said state, entitled 'An act to declare the terms on which foreign cor-

porations may carry on business and own property in the state of South Carolina,' approved December 20, 1893 (21 St. at Large, 411), and your petitioner claims that it has fully complied with all the terms and conditions of said act ever since it has owned property or done business in the state of South Carolina. That your petitioner further shows that on the — day of January, 1897, it did file in the office of the secretary of state of the state of South Carolina a copy of its charter, authenticated in the manner directed by law for the authentication of the statutes of the state of Virginia, under whose laws it was chartered and organized; and did, further, on the 15th day of April, 1896, and prior to the alleged injury to the said Mathis, cause a copy of said charter to be recorded in the office of the register of mesne conveyances in Lexington county, in said state, in which said county it was carrying on its business as a carrier of goods and passengers. That said acts were done in compliance with the act of the general assembly of the state of South Carolina entitled 'An act to provide the manner in which railroad companies, incorporated under the laws of other states or countries, may become incorporated in this state,' approved 19th March, 1896. But your petitioner is advised that by such acts it did not deprive itself of the right, as a citizen of the state of Virginia, to remove causes and actions brought against it by the citizens of South Carolina in the courts of said state to the United States circuit courts sitting in said state, under the acts of congress in such cases made and provided, nor do such acts done by it deprive such federal courts of the jurisdiction to hear and determine such causes when so removed. And your petitioner offers herewith a bond, with good and sufficient surety, for its entering in said circuit court of the United States for the district of South Carolina, on the first day of its next session, a copy of the record in this suit, and for paying all costs that may be awarded by said circuit court, if said court shall hold that this suit was wrongfully or improperly removed thereto; and it prays this court to proceed no further herein, except to make an order of removal and to accept the said surety and bond, and to cause the record herein to be removed into the said circuit court of the United States in and for the district of South Carolina. Southern Railway Company, by B. L. Abney, Its Attorney."

It will be observed that the petition sets forth that it, the appellant, owns and operates certain railroads chartered by this state. Among these are the Charlotte, Columbia & Augusta Railroad and the Columbia & Greenville Railroad, both of which were sold under foreclosure proceedings in the United States circuit court for the district of South Carolina, and at such said sale were purchased by the Southern Railway Company. But the petition nowhere sets up that, by reason of such said sale, the Southern Railway Company is the successor of the originally chartered Char-

lotte, Columbia & Augusta Railroad Company. The latter corporation still exists, and no other change in such corporate entity has been produced by such said sale than a change in the owners or stockholders. Our constitution and our statutes, speaking for the state of South Carolina, can only operate within the territorial limits of the state of South Carolina. Therefore, when the constitution of 1895 declared, in article 9, § 8: "The general assembly shall not grant to any foreign corporation or association a license to build, operate or lease any railroad in this state; but in all cases where a railroad is to be built or operated or is now being operated in this state, and the same shall be partly in this state and partly in another state or in other states, the owners or projectors shall first become incorporated under the laws of this state; nor shall any foreign corporation or association, lease or operate any railroad in this state, or purchase the same or any interest therein, * * *"—so now it is through the Charlotte, Columbia & Augusta Railroad that the Southern Railway Company in the action at bar alone can be affected, for it is on the line of the track of the Charlotte, Columbia & Augusta Railroad Company that the plaintiff (respondent) was injured, by and through the defendant railway, by means of the hand car thereon operated, while such plaintiff resided in the county of Lexington, in this state. No other rights and duties of the Southern Railway Company can arise in the case at bar than as such rights and duties flow from the ownership and operation of the said Charlotte, Columbia & Augusta Railroad Company by the defendant (appellant), the Southern Railway Company. Whatever may have been the rights and duties of this Southern Railway Company to, by, and through its ownership of the Charlotte, Columbia & Augusta Railroad Company, prior to the decision of the case of *State v. Tompkins*, 48 S. C. 49, 25 S. E. 982, we will not inquire. But we will notice the fact that the state of South Carolina has asserted, and her own courts and the United States supreme court have recognized, her power to alter or amend the charter of said Charlotte, Columbia & Augusta Railroad Company in such manner as said state of South Carolina, through her general assembly, might by legislative action declare. *Railroad Co. v. Gibbes*, 27 S. C. 385, 4 S. E. 49; *Id.*, 142 U. S. 386, 12 Sup. Ct. 255; *McCandless v. Railroad Co.*, 38 S. C. 103, 16 S. E. 429. When, therefore, the constitutional convention, in the year 1895, ordained (article 9, § 8, as quoted hereinbefore) that any corporation, to operate as owner or lessor the said Charlotte, Columbia & Augusta Railroad Company, should be a domestic corporation; and when the general assembly of this state passed the "Act to provide for the formation of certain corporations and to define the powers thereof" (22 St. at Large, p. 92); and when,

Southern Railway Company petitioned to be made a corporation under the laws of South Carolina, to the end that she might operate the said Charlotte, Columbia & Augusta Railroad Company within the territorial limits of the state of South Carolina; and when, under an action therefor, the supreme court of this state declared, on the petition of said Southern Railway Company, that said act was constitutional, and the petitioner was entitled to be made a domestic corporation (*State v. Tompkins*, 48 S. C. 49, 25 S. E. 982),—we can see no great difficulty in the way of regarding the Southern Railway Company as a domestic corporation. If it is a domestic corporation, then it is not entitled to the benefit of those provisions of the act of congress of the United States governing the removal of causes from the state courts to the United States circuit courts because of diverse citizenship. We will not enlarge upon the questions here presented, conceiving, as we do, that the foregoing answer is sufficiently explicit. To those who may feel an interest in the investigation of those questions, we refer them to our own case of *State v. Port Royal & A. Ry. Co.*, 45 S. C. 413, 23 S. E. 363; *Railroad Co. v. Koontz*, 104 U. S. 5; *Insurance Co. v. Dunn*, 19 Wall. 214; *Steamship Co. v. Tugman*, 106 U. S. 118, 1 Sup. Ct. 58; *Stone v. State*, 117 U. S. 430, 6 Sup. Ct. 799; *Kern v. Huldekoper*, 103 U. S. 485; *Martin's Adm'r v. Railroad Co.*, 151 U. S. 673, 14 Sup. Ct. 533; *Tennessee v. Bank of Commerce*, 152 U. S. 454, 14 Sup. Ct. 654; *Postal Tel. Cable Co. v. Alabama*, 155 U. S. 487, 15 Sup. Ct. 192. We therefore overrule these exceptions relating to removal. The next exception, which is the third, relates to an objection to the plaintiff testifying as to his marriage, and the number of his children and their ages. This precise point was raised in *Johns v. Railroad Co.*, 39 S. C. 162, 17 S. E. 698, and it was there held that such testimony was not material. But the appellant here, in his cross-examination, called forth testimony from this same witness in regard to his children. The exception is overruled.

Lastly, the fifth exception, relating, as it does, to the admissibility of testimony concerning a requisition made by plaintiff upon the defendant for an additional push car (a hand car). To make this clear, we will state that the requisition was in the hands of the defendant, and no notice to produce the same had been given by the plaintiff. By the case it appears that when the plaintiff was about to testify that he had made a requisition upon the defendant in May, 1895, for a fresh or new push car, objection was made on the ground that such testimony was cumulative. This is quite a different objection to that embodied in the exception. Counsel will be confined to the rulings actually made by the circuit judge. In addition, it seems that the witness of defendant was called upon to testify by the defendant in regard to this requisition. If so,

the plaintiff in reply could refer by testimony to such requisition. We see no error here. It is the judgment of this court that the judgment of the circuit court be affirmed.

(53 S. C. 295)

TURPIN v. SUDDUTH et al.

(Supreme Court of South Carolina. Oct. 8, 1898.)

APPEAL—RECORD—REVIEW—JUDICIAL SALES—EVIDENCE—CUSTOMS AND USAGES—MORTGAGES—RECORDATION—PRIORITIES—ADVERSE POSSESSION.

1. On appeal, facts appearing in the argument of counsel, and not admitted on the record, or in open court at the hearing, will not be considered.

2. Gen. St. 1893, § 1968, provides that a mortgage, to be valid as against a bona fide purchaser, must be recorded within 40 days after execution. A mortgage given for the credit part of the price of land sold at judicial sale bore date as of the sale, and was not recorded until more than 40 days thereafter. The mortgagee alleged that the mortgage was not given until within 40 days from its recordation, claiming that the terms of the sale had not been complied with until within that period, and that the mortgage had been antedated. *Held*, that such contention was not sustained by the account book of the master, which showed payments made by the purchaser running from the time of the sale to the recordation of the mortgage, where the book also showed that more than 40 days before the recordation of the mortgage payments had been made which more than exceeded the required cash payment, and none of the items in the book were explained.

3. It was not competent to show that it was the custom of the master to date such mortgages as of the date of the sale, although they might not be executed until afterwards, since evidence of custom is not admissible to establish an independent fact.

4. A mortgage not recorded within 40 days after its execution, as required by Gen. St. 1893, § 1968, which provides that mortgages, to be valid as against bona fide purchasers from the time of their execution, must be recorded within 40 days after that event, does not take precedence of a deed executed between the date of the execution of the mortgage and its recordation, but not recorded until after the date of the recordation of the mortgage, and after 40 days from the execution of the deed.

5. Under Code Civ. Proc. § 107, providing that the right of a person to the possession of real property shall not be impaired by a descent being cast by reason of the death of a person in possession, possession of heirs may be tacked to that of their ancestor.

Gary, A. J., dissenting.

Appeal from common pleas circuit court of Greenville county; R. C. Watts, Judge.

Action by Rosalie A. Turpin against Deborah Jane Sudduth and others. From a judgment in favor of defendants, plaintiff appeals. Affirmed.

Following is the charge of the circuit judge, viz.:

"This is an action brought by the plaintiff, Rosalie A. Turpin, against the defendant Deborah J. Sudduth and others to recover possession of real estate. The plaintiff here contends that, in 1885, one S. C. Dickson bought at a judicial sale here the land in dispute,

and executed a mortgage to secure part payment of the purchase money, and that at another judicial sale she purchased this property, and therefore asks for possession of the same. The defendants come into court, and deny that the plaintiff is entitled to recover. They allege that in 1885 S. C. Dickson was the owner of this property, and sold this land to Peter C. Sudduth, and that he had no notice, actual or constructive, that there was a mortgage over it, and that since that time Sudduth, husband and father, was, up to 1888, in open and notorious possession of the property, and that since his death they have held in adverse possession against the world. Now, you are sole judges of the facts in the case, and it is my duty to give you the law in the case, and it is your duty to apply the facts to the law, as I give it to you. The law applicable to this case is in a narrow compass, as I view it, and I charge you that in 1885, if S. C. Dickson bought that property, and got a deed for the property from the officer of the court selling it, and that he executed and delivered this mortgage, which you have heard read, under whom Miss Turpin claims, and that if it was not recorded in forty days after execution, and if the testimony satisfies you that Sudduth bought the property in the meantime, and within the forty days, and that Dickson gave no notice of it and made the deed to it to Sudduth, the plaintiff could not recover. If the testimony satisfies you that Dickson bid off this property in the fall of 1885, and did not comply with the terms of sale until January of the next year, and that at the same time, January 14, 1886, the mortgage was executed, and recorded at the same time, then I charge you, as a matter of law, the plaintiff would be entitled to recover.

"Now, gentlemen, it all depends upon the view you take of the case as to when Dickson got possession of the land, by deed, and when he sold it. If he got it in November, and sold it between that and January, and Sudduth had no actual or constructive notice of the existence of this mortgage, I charge you, as a matter of law, if the mortgage was given in November, and was not recorded in forty days, then the plaintiff would not be entitled to recover; but, if you believe that the mortgage was recorded in the forty days after it was given, that would be constructive notice to Sudduth, and the plaintiff would be entitled to recover. Or, if you believe that this property was knocked down to Dickson that day, November, 1885, and entered upon Douthitt's books, but did not comply until January, and he got his deed at that time, and the mortgage was properly recorded, then Mr. Sudduth bought it subject to the mortgage, and Mr. Sudduth would not be entitled to the land. If Sudduth had no notice of it, actual or constructive, the plaintiff would not be entitled to recover, but if he had actual or constructive notice of it then the plaintiff could recover. But if this

deed and mortgage was executed at the same time, and the mortgage was recorded in forty days, then he bought it subject to that, and the plaintiff would be entitled to recover. If you find for the plaintiff, say, 'We find for the plaintiff the land in dispute.' If you find for the defendants, say, 'We find for the defendants.'

"The plaintiff's counsel request me to charge you:

"(1) A deed or mortgage bears date, so far as the recording acts are concerned, from the day on which it is delivered.' Charged.

"(2) If the jury believe from the evidence that the deed from Douthit to Dickson and the mortgage of S. C. Dickson to Douthit, dated November 2, 1885, were not, in fact, executed and delivered until January 14, 1886, the latter is the date from which the forty days within which the mortgage should be recorded must be reckoned.' Charged.

"(3) If the mortgage of S. C. Dickson was, in fact, executed on November 2, 1885, and was not recorded until January 14, 1886, a purchase from S. C. Dickson between November 2, 1885, and January 14, 1886, who claims under a deed executed within that period, but who has not recorded it until January 14, 1886, cannot prevail against the prior unrecorded mortgage, if the latter was recorded on January 14, 1886.' Refused.

"(4) If the jury believe from the evidence that S. C. Dickson purchased the land in dispute at master's sale on November 2, 1885, but did not comply with his bid until January 14, 1886, at which time he received a deed and executed a mortgage to the master, he did not acquire the legal title until January 14, 1886; and that a deed to the said premises executed by him between the sale and the execution and delivery of title cannot prevail against the purchaser under foreclosure of the purchase-money mortgage executed to the said master, provided the mortgage was recorded within forty days from January 14, 1886.' Charged.

"(5) That, under the will of Peter C. Sudduth, his widow, Deborah J. Sudduth, took a fee-simple estate in this land, and, if the jury believe from the evidence that Deborah J. Sudduth was made a party to this suit within ten years from the accrual of Peter C. Sudduth's interest in the land, then the statute of limitations is no bar to the plaintiff's claim.' Charged.

"Now, gentlemen, as I said before, if you believe that Mr. Dickson got this deed in November, 1885, and sold to Sudduth between that time and January 14th, if you believe that he executed a mortgage the same day, and that was not recorded, then the statute of limitations would commence to run; and if you believe that he and his heirs were in possession of that land adversely for ten years,—in uninterrupted possession of it for ten years,—then that would give defendants good title. But it all depends upon what took place in November, 1885. If Sud-

duth bought it, and thought he was buying unincumbered property, and he had no actual or constructive notice of the mortgage, he would be entitled to it; but if Dickson bid it off that day, and got his deed that day, and gave his mortgage that day, then the plaintiff cannot recover."

The plaintiff (appellant), having given her notice of intention to appeal to the supreme court from the rulings of the circuit judge, his charge to the jury, and the verdict and judgment rendered in the above-stated case, now comes, and gives notice of said appeal, and will ask the supreme court to reverse the same on the following grounds, to wit:

"(1) Because the circuit judge erred in refusing to allow the appellant to prove the custom or habit of Judge Douthit, then master of Greenville county, of dating deeds and mortgages as of the date of the sale, even though the terms of the sale were not complied with for a month or months after the day of sale.

"(2) Because the circuit judge erred in restricting the proof in this case to what was done by Judge Douthit in the execution of the deed and mortgage of S. C. Dickson to him, the said S. J. Douthit, master.

"(3) Because the office of S. J. Douthit being a public office, and it being relevant to prove the existence of a course of business or habit of the said officer doing business in the said office, it is respectfully submitted that the circuit judge erred in refusing to allow the plaintiff below to prove what the habit or custom of Judge Douthit was in his said office, as to the execution of deeds and mortgages.

"(4) Because the circuit judge erred in refusing to charge the jury as follows: '3. If the mortgage of S. C. Dickson was in fact executed on November 2, 1885, and was not recorded until January 14, 1886, a purchaser from S. C. Dickson between November 2, 1885, and January 14, 1886, who claims under a deed executed within that period, but who has not recorded it until after January 14, 1886, cannot prevail against the prior unrecorded mortgage, if the latter was recorded on January 14, 1886.'

"(5) Because the circuit judge in charging the jury as follows: 'The law applicable to this case is in a narrow compass, as I view it; and I charge you that, in 1885, if S. C. Dickson bought that property and got a deed for the property from the officers of the court selling it, and that he executed and delivered this mortgage which you have heard read, under whom Miss Turpin claims, and that if it was not recorded in forty days after execution, and if the testimony satisfies you that Sudduth bought the property in the meantime and within the forty days, and that Dickson gave no notice of it and made the deed to it to Sudduth, the plaintiff could not recover.'

"(6) Because the circuit judge erred in charging the jury as follows: 'Now, gentlemen, it

all depends upon the view you take of the case as to when Dickson got possession of the land by deed and when he sold it. If he got it in November, and sold it between that and January, and Sudduth had no actual or constructive notice of the existence of this mortgage, I charge you, as a matter of law, if the mortgage was given in November, and was not recorded in forty days, then the plaintiff would not be entitled to recover.'

"(7) The undisputed testimony in this case being that the deeds, said to have been executed by S. C. Dickson to Peter C. Sudduth, were neither of them ever recorded in the R. M. C. office of Greenville county until 1895, and that the plaintiff had no actual knowledge of the existence of the same, the circuit judge, therefore, erred in charging the jury as follows, to wit: 'If Sudduth bought it, and thought he was buying unincumbered property, and he had no actual or constructive notice of the mortgage, he would be entitled to it; but if Dickson bid it off that day, and got his deed that day, and gave his mortgage that day, then the plaintiff cannot recover.'"

Cothran, Wells, Ansel & Cothran, for appellant. J. A. Mooney, for respondents.

McIVER, C. J. This is an action to recover possession of real estate, and, as it is conceded that both parties claim title under one S. C. Dickson, the controversy turns upon the inquiry, which party has shown the better title from Dickson?

It appears that the land in question was offered for sale on sales day in November, 1885, by S. J. Douthit, as master for Greenville county, under proper proceedings for the partition of the estate of one Goodlett, and bid off by S. C. Dickson. The said Dickson executed his bond to Douthit as master, conditional for the payment of \$660, 12 months after date, with interest from date. Though it is not stated what was the amount of Dickson's bid, it would seem that this bond was given to secure the payment of the credit portion of the purchase money, for it is stated that the land was sold for one-half cash, balance on credit of 12 months; and he also gave a mortgage on the premises in question to secure the payment of said bond. Both this bond and mortgage bear date the 2d of November, 1885, and the mortgage was recorded on the 14th of January, 1886. This bond and mortgage were subsequently assigned to the plaintiff, and she commenced an action against S. C. Dickson on the 8th of February, 1895, for the foreclosure of the mortgage; and, having recovered judgment, the mortgaged premises were offered for sale, at public outcry, on the 7th of May, 1895, by D. P. Verner, the then master for Greenville county, and bid off by the plaintiff for the sum of \$300, and on the 8th of June, 1895, she received titles for the premises from the said master. The bond and mortgage and the deed above referred to were introduced in

evidence by the plaintiff, and, inasmuch as the mortgage appeared not to have been recorded within 40 days from its date, she undertook to show that the mortgage did not bear its true date, but that, in fact, it was not executed until the 14th of January, 1886, the day on which it was recorded. For this purpose the account book of Master Douthit, showing his settlement with the estate of Goodlett, was introduced, on which it appeared that Douthit charged himself with \$250, cash received from S. C. Dickson on the 11th of November, 1885; cash received from Dickson on 24th of November, 1885, \$453; cash received from Dickson on the 14th of January, 1886, \$660; "two bonds of S. C. Dickson and interest, \$757.10, on 13th of December, 1886;" 16th of February, 1887, cash received of S. C. Dickson, \$70.45; and on same day the following entry: "To balance on bond of S. C. Dickson, assigned to E. F. S. Rowley, trustee, \$650," who, it appears, subsequently assigned the bond and mortgage to the plaintiff. The only credit indorsed on the bond of Dickson, above referred to as introduced in evidence by the plaintiff prior to its assignment, is that of \$70.45, dated 16th February, 1887. The plaintiff also attempted to introduce evidence as to what was the custom of Master Douthit as to dating the papers when the conditions of sale were subsequently complied with; but this testimony, upon objection, was ruled out, his honor, Judge Watts, saying: "I don't think he has a right to testify as to the general custom of Judge Douthit; he can testify as to this particular case." The witness then answered: "I know nothing as to that custom in this particular case."

One of the subscribing witnesses to the mortgage, T. Q. Donaldson, Esq., was examined as a witness, who, after stating that he had probated the mortgage, which probate bears date 14th of January, 1886, was asked: "Q. Do you know whether or not that paper was delivered to [by?] Mr. Dickson at the date of the probating? A. I have no recollection of it." He was then asked this question: "Q. You knew what was Judge Douthit's custom? A. Yes, sir; I have heard that he had a custom about it, but I don't know. Q. As to this particular transaction, you don't remember about that? A. No, sir; I do not know, besides from the statement of the papers themselves."

Thus, the plaintiff traced her title from S. C. Dickson, and rested. The defendant then introduced testimony tending to show that some time in the early part of November, 1885, the said S. C. Dickson made a deed to Peter C. Sudduth, who was the husband of one of the defendants, and the father of the other defendants, for the premises in dispute; that under that deed Peter C. Sudduth went into possession of the premises in November, 1885, sowed the place in wheat in the fall of that year, and retained the possession until his death, in 1888, ever since which time

the defendants have been in possession, making improvements,—“built houses, and cleared land, and built fences, and improved it generally”; that they never heard of any claim to the land by any other person until they saw it advertised for sale under the mortgage through which plaintiff claims; that, the original deed having been destroyed by fire in November, 1885, the said S. C. Dickson, on the 23d day of August, 1888, made another deed to Peter C. Sudduth for the same premises, in which the following words occur: “This deed has been signed and delivered before, but, believing that the former deed has been burned and destroyed, I now place this deed to take the place of said burnt deed.” The deed alleged to have been burnt was never recorded, and the new deed of August, 1888, given to replace the burnt deed, was not recorded until the 19th of April, 1895. In this way the defendants undertook to trace their title from S. C. Dickson; and they also set up in their answer the plea of the statute of limitations, relying upon the adverse possession of their ancestor, Peter C. Sudduth, cast upon them by his decease.

In reply, the plaintiff offered Dr. Rowley as a witness, who testified that the bond and mortgage of Dickson to Master Douthit, was transferred to him on the 16th of February, 1887, and that he transferred the same to the plaintiff on the 30th of April, 1887, and that he had no notice of any deed or anything of the kind from the time he bought the paper,—“nothing but the bond and mortgage and assignment here”; that the plaintiff lived with him, and he attended to all her business, and that he “knew nothing of that deed,—not until the land was advertised for sale.”

It appears from the “case” that this action was not commenced until the 6th of January, 1897, as the summons bears that date; and, although it may be inferred from a statement which appears in the argument of one of the counsel, that the action had been originally commenced against two of the defendants, and was afterwards amended by making the other defendants parties, yet there is nothing whatever in the “case” to show anything of the kind; and, as we have repeatedly had occasion to say, we must look alone to the “case” for the facts upon which an appeal is to be considered, and cannot accept facts appearing only in the argument of counsel, unless they are admitted on the record, or in open court at the hearing, which does not appear here.

This appeal raises two general questions: (1) As to the competency of certain testimony ruled out by the circuit judge; (2) as to certain errors alleged to have been committed in the charge to the jury. For a full and fair understanding of the second question, it will be necessary for the reporter to incorporate in his report of this case the charge of the circuit judge and the exceptions as set out in the record.

Our first inquiry is whether there was error in ruling out the testimony as to the custom of Master Douthit in regard to dating conveyances, bonds, and mortgages executed by or to him, as master, in pursuance of judicial sales made by him. The avowed object of this testimony was to show that it was the custom of this master to date such papers on the day of sale, although they might, in fact, be executed afterwards; and the real purpose was to show that the mortgage under which the plaintiff claims, though bearing on its face the date of 2d November, 1885, and so spread upon the public records, was, in fact, not executed until 14th of January, 1886,—the object being to avoid the effect of failing to record the mortgage within 40 days, as expressly required by statute. While it is true that an instrument in writing is presumed to have been made or executed on the day of its date (1 Greenl. Ev. § 38, note a), yet it is equally true that it is admissible to show, by any competent evidence, the true date of its execution; the burden of proof being on the party alleging a delivery on another day (2 Greenl. Ev. § 297; *Soloman v. Evans*, 3 McCord, 274; *Pressly v. Hunter*, 1 Spears, 133; *McCracken v. Ansley*, 4 Strob. 1).

Accordingly, in this case, one of the subscribing witnesses to the mortgage, Mr. Donaldson, who had also probated the mortgage on the 14th of January, 1886, was allowed, without objection, to be asked whether the mortgage was delivered “at the date of that probating”; but, unfortunately for the plaintiff, he answered, “I have no recollection of it;” and, when further interrogated upon the subject, his reply was, “No, sir; I do not know besides from the statements of the papers themselves.” So that, without any direct evidence tending to show that the mortgage was antedated, the plaintiff offered to show what was the custom of Master Douthit in dating papers where the terms of sale were not complied with until some time after the sale. In the first place, there was no evidence, other than that afforded by the dates of the bond and mortgage, offered in evidence by the plaintiff herself, as to when Dickson complied with the terms of the sale, and those papers showed that he complied on the day of sale.

We suppose, however, that the account book of Master Douthit, likewise introduced by plaintiff, is relied upon to show that Dickson did not comply until after the day of sale. That account book shows that Dickson made two payments to the master, aggregating in amount more than the cash payment required,—one-half of the purchase money,—one of which was made on the 11th and the other on the 24th of November, 1885, and there is no pretense that Dickson bought any other property, except the land in dispute, at the sale of the Goodlett estate. So that, if that account book shows anything, it would seem to show that Dickson complied with the

terms of the sale, at least as early as the 24th of November, 1885, and the mortgage was not recorded within 40 days from that date. As to the other entries on that account, showing cash received by the master from Dickson, the testimony affords no means of explaining them, and we shall not resort to conjecture. The burden of proof was on the plaintiff to show that Dickson did not comply with the terms of the sale until the 14th of January, 1886, and did not either receive titles or give his mortgage until that date, and, certainly, the entries of the master's account book do not show those facts.

But, waiving all this, we are of opinion that, while testimony as to custom or the usages of trade is competent for certain purposes, yet it is not competent for the purpose of proving an independent fact. As is said in 2 Greenl. Ev. § 251: "Their true office [speaking of customs or usages of trade] is to interpret the otherwise indeterminate intentions of parties, and to ascertain the nature and extent of their contracts, arising, not from express stipulations, but from mere implications and presumptions and acts of a doubtful and equivocal character, and to fix and explain the meaning of words and expressions of doubtful or various senses." No case has been cited, and our investigations warrant us in saying that none can be found, in which such testimony has been held competent to prove a distinct and independent fact, not pertinent to explain any ambiguity in an instrument of writing, or to interpret the meaning of terms found therein, and thereby to show what was the intention of the parties. So, also, in *Fairly v. Wappoo Mills*, 44 S. C. 227, 22 S. E. 108, where the cases upon the subject were reviewed, it was said: "It seems to us that the very decided weight of authority is in favor of the proposition that evidence of custom and usage is not admissible to explain or vary the terms of an express contract, whether written or verbal, unambiguous in its terms, unless it be to show the meaning of certain terms used in such contracts, which, by well-established custom or long usage, have acquired a meaning different from that which they primarily bear; for the reason that when parties, in making a contract, use terms which, by usage or custom, have acquired a certain meaning, they must, in the absence of any evidence to the contrary, be assumed to have used such terms in such acquired sense."

It is obvious, under these well-settled principles, that the testimony in question was not competent. In the first place, there was no ambiguity in the terms of the mortgage; and the testimony did not tend to show that any of the terms or expressions used in the mortgage had, by custom or long usage, acquired a sense different from that which they primarily bear. On the contrary, the sole object of the testimony was to show a

distinct and independent fact, wholly unconnected with the intentions of the parties, upon which it could not possibly throw any light. We do not think, therefore, that there was any error in ruling out the testimony in question, and the exceptions raising this question must be overruled.

The other exceptions may, as stated by counsel for appellant in their argument, be considered together. The real question is presented by appellant's fourth exception, which imputes error to the circuit judge in refusing to charge plaintiff's third request, which was as follows: "If the mortgage of S. C. Dickson was, in fact, executed on November 2, 1885, and was not recorded until January 14, 1886, a purchaser from S. C. Dickson between November 2, 1885, and January 14, 1886, who claims under a deed executed within that period, but who has not recorded it until January 14, 1886, cannot prevail against the prior unrecorded mortgage, if the latter was recorded on January 14, 1886." It will be observed that the plaintiff, in stating this request to charge, in her fourth exception, has inserted the word "after" between the words "until" and "January," in the third line from the last line in the exception, whereas no such word there appears in the request to charge as set out in the "case." If the request to charge was as set out in the "case" (as we must assume it to have been), and not as it is set out in the exception, then a different question is presented from that which has been argued by counsel for appellant; for the question, as presented by the request to charge as set out in the "case," would be whether a mortgage executed on the 2d of November, 1885, but not recorded until the 14th of January, 1886,—after the expiration of the 40 days allowed for that purpose,—would take precedence of a deed executed between the 2d of November, 1885, and the 14th of January, 1886,—but at what date between those two dates not stated,—and not recorded "until" the 14th of January, 1886; and to that question there could be no other answer than that the mortgage would not take precedence of the deed, for the obvious reason that the request assumed that the mortgage was not recorded until after the expiration of the 40 days, while it did not assume that the deed was recorded after the expiration of the 40 days; and hence there would be no error in refusing the request. If, however, the request could be assumed to be as stated in the exception, then the question would be whether a mortgage executed on the 2d of November, 1885, but not recorded until the 14th of January, 1886,—after the expiration of the 40 days,—would take precedence of a deed executed after the 2d of November, 1885,—but exactly when not stated,—and not recorded until "after" the 14th of January, 1886,—exactly when not stated; and to this question the answer must be that the mortgage would not take precedence of the deed, for the reason that, while

the request assumed that the mortgage was recorded "out of time," it did not assume that the deed was recorded "out of time," as the date of its execution as well as the date of its recording did not appear, and hence there would be no error in refusing the request as thus presented.

But, waiving this, which may, possibly, be regarded as hypercritical by some,—though we must say that parties who rest their appeal upon the refusal of a circuit judge to charge certain requests should be very careful to so frame their requests as to present clearly and distinctly the propositions of law which they wish laid before the jury, eliminating all erroneous or indefinite propositions, so that the circuit judge may be able to see clearly what legal propositions, applicable to the case as made by the testimony, the party desires to have laid before the jury,—still we will not decline to take the most liberal view of the proposition which we presume the appellant desired to have submitted to the jury. That proposition, as we suppose, was this: that if the jury believe that the mortgage of Dickson was, in fact, executed on the 2d of November, 1885, but was not recorded until the 14th of January, 1886, a purchaser from Dickson claiming under a deed executed between the 2d of November, 1885, and the 14th of January, 1886, but not recorded until after the 14th of January, 1886, and after the 40 days allowed for that purpose had expired, could not prevail against the prior mortgage, which, though not recorded within the time prescribed by statute, was recorded before the deed to such purchaser was recorded. So that the question presented by the request, as thus framed, is whether a purchaser, without notice of a prior unrecorded mortgage, claiming under a deed executed after the mortgage, but before it was recorded, the same not having been recorded within the time prescribed by statute, such deed not having been recorded within 40 days, and not until after the mortgage was recorded, can prevail against the mortgage. This question must be determined by the provisions of the act of 1876, now incorporated in the General Statutes of 1893 as section 1968, applying to all deeds, mortgages, and other instruments of writing therein mentioned, executed after the 1st day of January, 1877, and is not to be affected by the act of 1898 (22 St. at Large, p. 746), making material amendments to that section.

Several cases have been cited by counsel for appellant as construing this section, the most notable of which is *King v. Fraser*, 23 S. C. 543, which may be regarded as the leading case upon the subject. The case of *McNamee v. Huckabee*, 20 S. C. 190, which is also cited, has no application to this case, as the question there arose under the registry law as it stood prior to the passage of the act of 1876, now incorporated in the General Statutes of 1893 as section 1968, whereby fundamental changes were made in the regis-

try law. In the case of *King v. Fraser*, supra, the question was whether a mortgagee whose mortgage had not been recorded within the prescribed time, but was afterwards recorded, took precedence of the general unsecured creditors of the mortgagor; and it was held that the mortgagee had priority over all the unsecured creditors, including those whose debts were contracted between the date of the execution of the mortgage and the date of its record, but that it was otherwise as to creditors who had acquired a lien subsequent to the execution of the mortgage, but prior to its record, as well as to purchasers without notice who had acquired title after the mortgage was executed, but before it was recorded. This is obvious from the following language used by Mr. Justice McGowan, as the organ of the court: "It is obvious that this postponement of the lien [until the mortgage is recorded] must seriously affect the rights of the mortgagee, especially in respect to liens which in the meantime may have been acquired by others. While the lien of a mortgage not recorded in time is in abeyance for the lack of registry, other creditors of the mortgagor may come in and acquire liens upon his property which will take precedence over the mortgage, without regard to its date. This is not expressly declared, but results necessarily from the postponement of the lien of the mortgage and the general nature of liens, as to which time is the essential thing. So far, therefore, as there may be conflict between liens, there is no obscurity, for, as to them, it is only necessary to inquire which is the first in the order of time. We may also say, in passing, that, if the property is actually purchased before the mortgage is recorded, and without actual notice, the innocent purchaser will undoubtedly take it unaffected by the dormant lien of the unrecorded mortgage." Upon this point the court was unanimous (see page 576), though there was a dissent upon another point. The same doctrine is recognized by Mr. Justice Pope in *Summers v. Brice*, 36 S. C. 204, 15 S. E. 374, though it was, very properly, not applied in that case, because there it appeared that the purchaser had actual notice of the mortgage, and he could not claim to occupy the position of purchaser for valuable consideration without notice for the further reason that he had not parted with anything of value at the time of his purchase. Here, however, there is no pretense of any actual notice, and the evidence is that Sudduth, when he bought the land from Dickson, did pay in cash the purchase money.

There is no exception referring distinctly to that portion of the charge as to the effect of the possession of Sudduth and of his heirs at law, but, if any of the exceptions were intended to question the correctness of that portion of the charge, they could not be sustained, for the instruction to the jury was that, "if you believe that he [referring to

Peter C. Sudduth] and his heirs were in possession of that land adversely for ten years,—uninterrupted possession of it for ten years,—then that would give defendants good title." This instruction, under the testimony in the case, was clearly free from error (Code Civ. Proc. § 107; *Burnett v. Crawford*, 50 S. C. 161, 27 S. E. 645, and the cases therein cited); for there was testimony that Peter C. Sudduth went into possession of the land immediately after the purchase of it from Dickson, in November, 1885, sowed the land in wheat that fall, and retained the possession until he died, in 1888, when he died leaving his wife and children, who were his heirs at law, and who continued in possession, making improvements on the land, up to the time of the trial. It is true that there is testimony that Peter C. Sudduth made a will, but it does not appear to have been offered in evidence, nor was there any testimony as to what were the terms, or whether it embraced the land in dispute. All that does appear in the "case" are the allegations in the answers that Peter C. Sudduth died in 1894, instead of 1888, as the testimony shows, leaving a will whereby he devised this tract of land to his wife, the defendant, Deborah Jane Sudduth, for life, with remainder to his children, the other defendants, and the further allegation that said Peter C. Sudduth "left surviving him, at the time of his death, his widow, the defendant Deborah Jane Sudduth, and his children, the defendants P. Carr Sudduth, Emms Sudduth, Marshie Sudduth, and Marion Sudduth, who are as now his heirs at law and devisees, the owners in fee and in possession of the said tract of land"; but there is not a particle of testimony to sustain these allegations, so far as they relate to the terms of the will or as to the property devised, or as to the persons named as devisees, for the copy of the will set out in the argument of one of the counsel cannot, under the well-settled rule, be considered, especially as it is not, even there, stated that the will was offered in evidence. So that the charge was not only pertinent to the case as made by the testimony, but was free from error; for the instruction was that, if the jury believed that Peter C. Sudduth and his heirs—not his devisees—were in adverse possession for 10 years, that would give them a good title.

It would seem, however, from the terms of the fifth request to charge, submitted by plaintiff, which was charged, that the terms of the will of Peter C. Sudduth were, in some way not disclosed by the "case," brought to the attention of the circuit judge, and it may be, for all that we know, that the verdict of the jury was based upon that instruction, and, if so, the judgment must stand; for that portion of the charge which presented a distinct and separate view of the case was not excepted to, and the jury may have reached the conclusion that Deborah Jane Sudduth was not made a party to this suit within 10 years from the accrual of Peter C. Sudduth's inter-

est in the land, and, if so, then the verdict was right. Indeed, from what appears in the "case," which alone we are at liberty to consider, such would seem to be the inevitable conclusion,—for, so far as the "case" shows, this action was not commenced until the 6th of January, 1897, and there was testimony tending to show that Peter C. Sudduth acquired his interest as early as November, 1885, and this testimony is not contradicted; and, if this be so, then it follows that Deborah Jane Sudduth was not a party within 10 years from the accrual of the right of Peter C. Sudduth. The judgment of this court is that the judgment of the circuit court be affirmed.

JONES, J., concurs; POPE, J., in result.

NOTE. We desire to add, in the form of this note, that we have felt no little difficulty and embarrassment in disposing of this case, arising entirely from the incomplete preparation of the "case." If appellants omit to incorporate in the "case" the facts necessary for the determination of the questions presented, they must take the consequences; for there is no rule better settled or more salutary than that this court will not consider any facts not appearing in the "case," unless admitted in writing signed by the counsel, or consented to at the hearing in open court.¹

GARY, A. J. (dissenting). My view of this case is that it was immaterial whether the mortgage was executed on the 2d of November, 1885, or the 14th of January, 1886, and that his honor, the presiding judge, was therefore in error in his charge to the jury. The case contains the following statement of facts: "It is agreed that the judgment roll * * * No. 10,340 was an action for the sale of the real estate of James F. Goodlett, deceased; that the proceeding is regular; that the land in dispute in this case was sold by the master, S. J. Douthit, and bought by S. C. Dickson, who gave the bond and mortgage mentioned above for the credit portion; said land was sold in obedience to the decree of the court on sales day in November, 1885, for one-half cash, balance on credit of twelve months." It is a principle of law, too well settled to need the citation of authorities for its support, that a judgment is conclusive, not only as to the parties to the record, but also as to their privies. The defendants, by the deeds of conveyance mentioned in the "case," succeeded to the rights of the parties to the action for partition, and thus became the privies of such parties, and bound by the said judgment. 2 Black, Judgm. § 549. The said judgment provided that the credit portion of the purchase money should be secured by a mortgage of the premises when sold. It was made the duty of the master to execute this provision, and, even if he had violated his trust by failing to take the required security, the defendants could not have held the land against such claim, and the land could have been subjected to the payment thereof. Under such circumstances,

¹ See note 31 S. E. 308.

they would have taken the land burdened with the obligation imposed by the judgment in partition. The master, however, took the required security, which was paramount to the rights of the defendants, who are merely privies under said judgment. The defendants could not claim that they were without notice of the judgment in partition; as it was constructive notice to them. The rule is thus stated in *Ellis v. Woods*, 9 Rich. Eq. 19: "The proceedings of all our courts are public. The records, as those of every public office where records are kept, are open to the inspection of every citizen of the country who has an interest or inclination to inquire or investigate. The keepers of such records are bound to produce and exhibit them on demand. When one purchases land from a defendant in execution, he cannot protect himself in the purchase, or set aside the lien of the judgment, on the plea that he had no notice of the enrollment of the judgment; or, if he purchases a negro or other chattel, he cannot avoid the prior claim of the plaintiff in the execution on the ground that he was not aware that such execution was lodged in the office of the sheriff. In these instances the purchaser has implied notice. I think that public policy requires that the doctrine should be broadly declared that the records of all our courts should be implied notice in all cases, except where legislative acts have or shall modify or restrict the doctrine." This language is quoted with approval in the case of *Kaminisky v. Trantham*, 45 S. C. 393, 23 S. E. 132. For these reasons I dissent from the opinion of Mr. Chief Justice McIVER.

(63 S. C. 285)

MAULDIN et al. v. CITY COUNCIL OF GREENVILLE.

(Supreme Court of South Carolina. Sept. 29, 1898.)

TAXATION — MUNICIPAL ASSESSMENTS — CONSTITUTIONAL LAW.

Under Const. 1895, art. 10 § 5, requiring all property to be taxed uniformly, and taxation by municipal corporations to be for municipal purposes, special assessments cannot be laid for improvement of city sidewalks; there being no power to subdivide a city into tax districts.

Appeal from common pleas circuit court of Greenville county; R. C. Watts, Judge.

Action by William L. Mauldin and others against the city council of Greenville. Judgment for plaintiffs. Defendant appeals. Affirmed.

J. A. McCullough, for appellant. Mooney & Patterson and Haynsworth & Parker, for respondents.

POPE, J. This action was begun in the court of common pleas for Greenville county on the 1st day of September, 1896, to obtain a perpetual injunction restraining the defendant, the city council of Greenville, from levying and collecting an assessment of two-

thirds of the cost for laying a sidewalk on each side of Main street from Reedy river to North street from those owners of real estate which abutted on said Main street within the limits above stated, on the ground that the act of the legislature of this state approved in the year 1891 (see 20 St. at Large, p. 1372) was unconstitutional, on the several grounds set up in the complaint. The answer denied that the act in question was unconstitutional, or that there was any failure on the part of the city council that rendered the assessment null and void, or that the plaintiff could controvert the constitutionality of the act in question by reason of the fact that as to him the judgment of this court, as found in the case of *Mauldin v. City Council of Greenville*, 42 S. C. 293, 20 S. E. 842, affirming its constitutionality, was res adjudicata. The cause came on to be heard before his honor, Judge Watts, through exceptions to the report of Master Verner; and by Judge Watts' decree it was held that the defendant should be enjoined and restrained from levying the assessments against the plaintiff and other property owners on Main street for two-thirds of the cost of improvements to the sidewalks and drains. From this decree the defendant now appeals, on 18 exceptions.

There have been two hearings had before this court. On the first, when the argument was finished in this court an order was passed directing a reargument, with leave to counsel to question "the correctness of the former decision in this case, as reported in 42 S. C. 293, 20 S. E. 842, so far as it holds that the city council has power to assess the property of any taxpayer to pay the 'cost of the improvements to the sidewalks and drains fronting their respective lands.'" 29 S. E. 812. The appellant relies upon the police power to sustain the constitutionality of the assessments made by the city council of Greenville against the plaintiffs for the cost of the sidewalks and drains recently improved by the city council of Greenville, and paid for by said city council out of the general funds of the municipality. Quite recently, in the two cases of *Cornelia Real-Estate Co. v. City Council of Charleston*, and *Stehmeyer v. Same*, 30 S. E. —, this court has, with great patience, endeavored to show that the police power, where the public health, the public morals, and the public safety are concerned, operates directly upon the persons and property of the citizen, so as to require that such person or property shall not prove injurious to other citizens; and then, also, such police power is made to operate upon persons and property where the citizen is not at fault, but to further a public purpose; and when, to accomplish the furtherance of a public purpose, the property is taken from the citizen or citizens by taxation or the right of eminent domain, that in such cases the right to tax or the right of eminent domain must be exerted in accordance with the provisions

of the constitution adopted in the year 1895, which are therein ordained to regulate taxation or the right of eminent domain. The grounds for these conclusions of this court on the police power need not be reproduced here, inasmuch, as before remarked, as this court has so recently embodied its conclusions on this subject in the two cases just quoted.

But, independently of the exercise of the police power, the appellant, the city council of Greenville, seeks on two other grounds to sustain the assessment of these lot owners for the cost of improvement of the sidewalks and drains in front of their property, respectively: First, it is insisted that this question is *res adjudicata* as to W. L. Mauldin; and, second, that such an assessment is perfectly consistent with the provisions of our present constitution. Let us examine these positions in their order.

Is the decision of the case of Mauldin v. City Council of Greenville, 42 S. C. 293, 20 S. E. 842, controlling, as *res adjudicata* of the question now presented by the case at bar? We uphold the doctrine of *res adjudicata* as it is presented in *Hart v. Bates*, 17 S. C. 35, namely: "The doctrine of *res adjudicata* is very far-reaching and effective. It is founded on principles of the wisest policy, because the peace and order of society require that a matter that is once litigated should not again be drawn in question between the same parties, or those claiming through them. But, whilst it is important to maintain the principle in all its integrity, it is not less important that it should be clearly defined, and kept within its proper limits. All agree as to its utility and necessity, but there has been a difference of opinion as to its proviso limits, and its application in particular cases. As we understand it, the rule established in the *Duchess of Kingston's Case*, is: 'First, that the judgment of a court of competent jurisdiction, directly on the point, is, as a plea in bar, or as evidence, conclusive between the same parties upon the same matter directly in question in another court; secondly, that the judgment of a court of exclusive jurisdiction, directly upon the point, is in like manner conclusive upon the same matter, between the same parties, coming incidentally in question in another court for a different purpose. But neither the judgment of a concurrent or exclusive jurisdiction is evidence of any matter which comes collaterally in question, though within their jurisdiction, nor of any matter incidentally cognizable, nor of any matter to be inferred by argument from the judgment.' 2 Smith, Lead. Cas. 424, and notes. It seems, therefore, to make out the defense at least three things are necessary: The parties must be the same, or their privies; the subject-matter must be the same; and the precise point must have been ruled." We may remark at the beginning that the present action was commenced by W. L. Mauldin for himself and such others

in like plight with himself who would elect to come into this suit, and that, by a consent order passed in the case at bar, Theron Earle, James McPherson, W. O. Gobson, and others did come in under such invitation. Each of these parties hold their property separately from each other, and are not privies of W. L. Mauldin. So, therefore, it would seem that even if W. L. Mauldin was bound by the former judgment, under the doctrine of *res adjudicata*, his co-plaintiffs are not so bound. But is W. L. Mauldin precluded from this suit by the former adjudication? In the former suit W. L. Mauldin sought to enjoin the city council of Greenville from levying an assessment upon his property on Main street to pay for the cost of an improvement to the street (Main) running in front of his property; but, in praying for an injunction against the assessment upon his property because of the improvement to the street, he also prayed that the city council of Greenville should be restrained from levying an assessment on his property to improve the sidewalks and the drain in front of his property. So, therefore, the judgment of this court, composed as it was then of the present Chief Justice and Mr. Justice Pope (for Mr. Justice Gary did not sit in that case), was in these words: "It is therefore the judgment of this court that so much of the judgment of the circuit court as grants a perpetual injunction against the defendants, preventing any assessment upon the property of the plaintiff, and other citizens of the city of Greenville in like plight as the plaintiff, to pay for the cost of improving the roadway of Main street, in said city, be affirmed, but when the said judgment enjoins the defendants from levying and assessing upon the plaintiff, and others in like plight with him, the cost of the improvements to the sidewalks and drains fronting their respective lands, it be reversed." The plaintiffs seek to show that, although such was the judgment of this court in the previous case, yet that judgment referred to the status of the parties in the year 1893, and that since that time, to wit, in the year 1896, the city council of Greenville has caused its engineer to relocate both the sidewalks and drains, claiming to act under the act of the legislature passed in the year 1891, and also by virtue of sundry resolutions passed by the said city council of Greenville, whereby they required the taxpayers in question to pay off the cost of such improvements and drains, so that each of such taxpayers would pay one-third of the cost of sidewalks and drains in front of his property, and also one-third of the cost of such improvements of the sidewalks and drains on the opposite side of the street, thus making each taxpayer who owns land on Main street pay two-thirds of one-half of the aggregate cost of such sidewalks and drains on both sides of such street so improved. It is thus hoped by the taxpayers in question that the doctrine of *res judi-*

cata may be avoided. This matter thus presented is not free from difficulty, but we much prefer not to be misled by any apparent avoidance of the former decision, so far as sidewalks and drains are concerned. The two justices who rendered the former decision confessed with candor that so much of their judgment as related to sidewalks and drains was reluctantly made, because of some previous decisions rendered while the constitution of 1790 was of force, and not because, in their opinion, such previous decisions were bottomed upon correct principles of law. The two justices in question felt a reluctance to overrule such decisions; but now, when the court is full, we propose to go to the root of the matter, and, if it becomes necessary to destroy the former decision, as found in 42 S. C. 293, 20 S. E. 842, so far as sidewalks and drains are concerned, to do so.

It must be borne in mind that the constitutions of 1787 and 1790 contained no restriction upon the power of the general assembly in the matter of taxation other than that which ordained: "No freeman of this state shall be taken or imprisoned, or exiled or disseized of his freehold, liberties, or privileges, or outlawed, or exiled, or in any manner destroyed or deprived of life, liberty or property but by the judgment of his peers or by the law of the land. * * *" So that whenever the general assembly itself, or any municipal corporation created by it and clothed by it with power, should desire and ordain the payment of a tax by the citizens, it was only necessary that the provisions of section 2 of article 9 of the constitution of 1790 (which we have just quoted) should not be violated. Under previous legislation, which had been continued of force, the citizens of the city of Charleston were required to pay for sidewalks and drains fronting their premises. Therefore, under the wholesome provision, "by the law of the land," these improvements in the city of Charleston as to sidewalks and drains were held by the courts to be constitutional. But by the constitutions of the years 1868 and 1895 very radical changes were made on the subject of taxation. It was no longer left to the general assembly or its municipalities to tax as they pleased. All taxes were required to be levied according to the value of the property, real and personal. All persons and property were required to be taxed uniformly. Whenever any property was exempted from taxation, it was specifically named in the constitution itself. The assessments of the value of property for taxation were required to be made in anticipation of the laying of taxes. Great care was taken in providing that taxes as laid by the state should be for public purposes, and by municipal corporations that taxation should be for corporate purposes. Taxes for municipalities were required not to exceed 8 per cent. of taxable property. It is true, municipalities were allowed to tax, by a graduation tax, incomes, and to impose a graduated tax on occupations and business.

By section 5 of article 10 in the constitution of 1895, the general assembly was required to compel municipal corporations to exact a tax on all the property, except that specially exempted under the constitution, for corporate purposes, and for the payment of debts contracted under authority of law. We thus see what strides the organic law of the state has made in regulating this power of taxation by the state and her municipalities. What a public purpose is to the state, a corporate purpose is to the municipality. It is the same thing in each, being differently named, so as to emphasize the difference in territorial limits. In *Loan Ass'n v. Topeka*, 20 Wall. 655, Mr. Justice Miller very ably discussed the necessity, in a tax, that it could only be legally laid when for a public purpose. It is admitted that an effort is made by persons to justify the imposition of "special assessments," as they are called, by claiming that such assessments are made for specific divisions of corporate territory, so that certain streets are called "tax districts"; but it is enough for our purpose to say that in our constitution no power is given to the general assembly to carve the territory of the state into special tax districts for state taxation, except into counties, townships, school districts, cities, towns, and villages, and what is denied under the constitution to the general assembly for state purposes is equally denied to chartered cities, towns, or villages, in dividing up such cities, towns, or villages, as the case may be, into separate tax districts to answer corporate purposes. Whenever there is a public or corporate purpose, the whole property of the city, town, or village must be taxed to subserve such public or corporate purpose. It is admitted everywhere that a public highway belongs to no one citizen or set of citizens to the exclusion of other citizens. It belongs to the public, and the public should keep it in repair. Navigable streams are always open to the public as highways. Sidewalks are, after all, nothing but a part of the highway or roadway. The highway is for vehicles and for men and animals to use whenever they see proper. So with sidewalks. All pedestrians may use them, without let or hindrance. They belong to the public. The same argument that would convert a highway into a taxing district would convert a sidewalk into one, and vice versa. As well might it be demanded that, inasmuch as a state house or a county court house or a state college happens to be located nearer the property of some citizens than others (as must be the case), therefore such persons living nearest each of these must be responsible for a larger proportion of the expense of their construction than all other citizens. Such is not the law, and has never been the law, because opposed to common sense.

W. L. Mauldin, James McPherson, and Theron Earle had good, hard sidewalks in front of their respective lots on Main street, in the city of Greenville. Both Mauldin and McPherson

had taken the pains, before laying their sidewalks, to confer with the city authorities, and locate the same on the grade required by said city authorities; but, when the latter saw proper to regrade the roadway of Main street, the result was that these sidewalks in front of the lots owned by Mauldin, McPherson, and Earle were either too high or too low, with reference to the new roadway. Hence the city council saw proper to regrade the sidewalks, and lay afresh an improved pavement on the sidewalk. For this, for the distance of 105 feet, Mauldin was required to pay \$174.59 therefor. Now, look at this proposition. Mauldin had, prior to the year 1896, under the direction of the city authorities, constructed a sidewalk and drain in front of his property, which sidewalk and drain comported with the grade of said Main street up to the year 1893. But the city authorities determined to improve Main street as a roadway by changing the grade, because thereby it facilitated public travel over said street, and such improvement was completed. Then the city council concluded to improve the sidewalks so that the grade of the same, when paved, should be in keeping with the newly-graded roadway on Main street, and to do this they assessed two-thirds of the cost of the same upon the said W. L. Mauldin for his 105-foot frontage on Main street. Was this not all required for the benefit of the public? Who would be responsible for any damages to the pedestrians which might occur by reason of the defective sidewalk? Certainly not W. L. Mauldin or McPherson or Theron Earle, if such damages occurred on the pavement in front of their respective lots.

In *Mauldin v. City Council of Greenville*, 42 S. C. 293, 20 S. E. 842, this court announced that this state has repudiated, and still continues to repudiate, the doctrine of supposed benefit to owners of lots of land abutting on public streets, in levying taxes; and we are now satisfied that such former decision, where it upheld assessments made upon owners of lots abutting on streets where improved sidewalks and drains are constructed, was wrong, and should be reversed, as opposed to our present constitution. Such conclusion on our part renders it unnecessary that we should pass upon any other question raised by this appeal. It is therefore the judgment of this court that the judgment of the circuit court be affirmed.

(96 Va. 296)

JAMES et al. v. UPTON et al.¹

(Supreme Court of Appeals of Virginia. Sept. 15, 1898.)

MORTGAGES—LIEN—DOWER—EQUITABLE ESTATES—VENDOR AND PURCHASER.

1. Where the vendee of incumbered premises paid the incumbrance, and deducted the amount from the price, a subsequent assignee of the incumbrance took subject to the dower

right of the vendee's wife, since payment of the incumbrance extinguished it.

2. Where a purchaser of land takes possession, and pays part of the price, he is beneficially seized to the extent of the price paid, although he has not acquired the legal title; and hence, under Code, § 2429, giving dower in equitable estates, his widow is entitled to dower, subject to the lien for the unpaid purchase money, whether he die possessed of the land, or alienate it during coverture without her concurrence.

3. Where one contracts to purchase lands, and takes possession, and subsequently assigns his interest, paying part of the price before making the assignment, and part after, the conveyance being made directly to the assignee after payment of the entire sum, his widow's dower right is not subject to a lien for the purchase money remaining unpaid at the time of the assignment.

Appeal from circuit court, Middlesex county.

Bill by B. Upton, Jr., and others, against Samuel James and others, to foreclose a deed of trust. Mrs. B. Upton, Sr., intervened, claiming dower in the premises in controversy. There was a decree for complainants, and defendants and intervener appeal. Affirmed as to defendants, and reversed as to intervener.

T. G. Jones and Robert McCandlish, for appellants. Pollard & Sands and W. W. Woodward, for appellees.

BUCHANAN, J. On the 10th day of January, 1870, W. K. Gatewood, trustee, sold and conveyed to John A. Miles a tract of land in Middlesex county in consideration of the sum of \$4,000, part of which was paid in cash. Contemporaneously therewith Miles executed a deed of trust upon the property to secure the payment of the deferred purchase-money bonds, which amounted to \$2,449.30.

On the 18th day of April, 1870, B. Upton, Sr., entered into an agreement with Miles, Sr., for the purchase of the land at the same price, and went into possession of it.

On the 1st day of May, 1872, Upton, Sr., assigned all of his right, title, interest, and estate in and to the property, and in and to his agreement for its purchase, to his son, B. Upton, Jr.; and in June following he assigned to him the bonds executed by Miles, and secured by the deed of trust to Evans, all of which had been paid by him (Upton, Sr.) out of the purchase money due from him to Miles. On the 2d of December, 1872, Miles and wife conveyed all their right, title, and interest in the property to B. Upton, Jr., in consideration of the sum of \$1,321 paid by Upton, Sr. On the 1st day of September, 1875, B. Upton, Jr., conveyed to his brother-in-law, Joseph Small, of St. Louis, Mo., his interest in the land, in consideration of the sum of \$1,525, as stated in the deed. Small died in the year 1884 without issue. His heirs on the 1st day of November of that year conveyed all their interest in the property, in consideration of one dollar, to

¹ Rehearing denied.

his widow, Susan Small, who has since intermarried with Samuel James.

In January, 1890, B. Upton, Jr., and his wife brought this suit against James and wife to subject the property to the payment of the bonds executed by Miles, and secured by the deed of trust to Evans, trustee. The bill, after giving a history of the sales and conveyances referred to above, alleges that Mrs. B. Upton, Jr., is now, after various assignments, the owner and holder of the bonds executed by Miles on account of his purchase from Gatewood, trustee, the payment of which was secured by the deed of trust to Evans, trustee; that Small, when he purchased, had knowledge of the existence of the deed of trust, and in his purchase undertook and expressly agreed that the property was and should be liable for the payment of the debt secured by it.

James and wife demurred to and answered the bill.

Mrs. B. Upton, Sr., during the progress of the cause came into the suit by petition, claiming that she was entitled to dower in the property. The complainants answered her petition, and denied her right to dower.

Upon a hearing of the cause the circuit court held that the widow of B. Upton, Sr., was not entitled to dower in the land; that Mrs. B. Upton, Jr., had by virtue of the assignment of the bonds secured by the deed of trust executed by Miles to Evans, trustee, a valid and subsisting lien, and directed the property to be sold for its payment.

From that decree this appeal was taken by James and wife and the widow of B. Upton, Sr.

The first question that we will consider is whether the widow of Upton, Sr., is entitled to dower in the land.

When her husband purchased the land, he agreed to pay Miles the sum of \$4,000. Within a few months after he made his purchase, he learned of the deed of trust to Evans, trustee, securing the \$2,449.50 due from Miles on his purchase from Gatewood, trustee, and also of certain judgments docketed against Miles before he (Miles) sold to him. He thereupon consulted counsel, who advised him that, to the extent that he paid off the debt secured by the deed of trust, he would have an interest in the land superior to the judgments against Miles, but that, in so far as Miles had acquired an interest in the land by paying the purchase price thereof, it could be subjected to payment of those judgments. He afterwards paid all the bonds secured by the deed of trust, and several of the judgments, and deducted the amount so paid from the purchase price, and paid the residue directly to Miles. All these payments were made by Upton, Sr., before he assigned his interest in the land to his son B. Upton, Jr., except, perhaps, a part of the amount paid directly to Miles, which may have been paid by him after his assignment to his son, but before Miles and wife, pur-

suant to the assignment, conveyed the land to the son.

When Upton, Sr., paid the bonds secured by the deed of trust out of the money which he owed Miles, and received credit therefor, the lien of the deed of trust was discharged. Upton, Sr., took no assignment of the bonds or of the deed of trust, nor had he the right to have an assignment of either. The debt secured by the deed of trust was Miles' debt, was paid out of the proceeds of the purchase money due Miles for the land, and discharged the lien as completely as if Upton, Sr., instead of paying the bonds, had paid the money to Miles, and he (Miles) had applied it to their payment. *Gayle v. Wilson*, 30 Grat. 186; *Brown v. Lapham*, 8 Cush. 551; *Pom. Eq. Jur.* §§ 797, 1213; *Shepherd's Ex'r v. McClain*, 18 N. J. Eq. 128.

Of course, if the creditors of Miles who had liens inferior to the lien of the deed of trust, but resting on the land when Upton, Sr., purchased it, subjected the land to the payment of their liens, the lien of the deed of trust would be revived in equity in order to protect Upton, Sr., and those claiming under him, to the extent that he had paid the bonds secured by the deed of trust out of the purchase money due from him to Miles. But Upton, Sr., had no interest whatever in the bonds secured by the deed of trust; and it was not within his power to make any use of them, or of the deed of trust which secured their payment, that could affect any right to dower which his wife might have in the land.

It is insisted that she has no such right, because her husband was never so seized of the land as to entitle her to dower. No conveyance of the legal title was made to the husband, nor does it clearly appear that he had paid the entire purchase price before he sold or assigned his interest in the land, though he did pay the whole of it before his vendor conveyed it to his assignee or vendee. It seems to be conceded, and, if it were not, it is clear, that, although a husband may not have acquired the legal title to land, if he has paid the entire purchase price, and has a perfect equity, so that a court of equity would compel a conveyance of the legal title, his widow is entitled to dower. But where the husband has aliened the land before acquiring the legal title or paying the entire purchase price, so as to perfect his equity, it is claimed that his widow has no right to dower.

The decision of this question depends upon the construction of section 2429 of the Code, which provides that "where a person, to whose use, or in trust for whose benefit another is seized of real estate, has such inheritance in the use or trust as, if it were a legal right, would entitle such person's husband or wife to curtesy or dower thereof, such husband or wife, shall have curtesy or dower of the said estate."

Whether under that section the husband must have a perfect equity, and have the

right to call for the legal title, before his widow can have dower in his equitable lands, has not been decided by this court in any reported case. In the cases of Rowton v. Rowton, 1 Hen. & M. 92, and Claiborne v. Henderson, 3 Hen. & M. 322, it seems to have been assumed that the husband must have a perfect equity, to entitle his widow to dower; but that question was neither involved nor decided in either case.

In the first-named case the majority of the court were of opinion that the widow had failed to prove the contract by which she claimed that her husband had acquired his equitable estate, and her bill was dismissed on that ground.

In the other case the rights of the parties vested before the act of 1785 went into effect, and the question was whether the widow was entitled to dower in her husband's equitable estate independent of that act, and the majority of the court held that she was not.

The manifest object of section 2429, which has been in force since January 1, 1787 (12 Hen. St. p. 157), was to abolish the common-law rule that a widow could not be endowed in her husband's trust or equitable estate, and to confer upon her the same right of dower in such estate as if it were his legal estate. 2 Minor, Inst. (4th Ed.) 141; 1 Lomax, Dig. side page 224.

The common-law rule upon the subject and the object and effect of the statute are well stated by Judge Baldwin in his opinion in the case of Wilson v. Davisson, 2 Rob. (Va.) 405. "In the present state of our law," he said, "the right to dower springs from the substantial, not the formal, ownership of the husband. At common law, it is true, the legal title only was regarded; and a mere legal seisin, without any beneficial ownership, enabled the wife to recover dower. Thus, the wife of a trustee who had the legal estate in fee, and the wife of a mortgagee after condition broken, had a valid title to dower. But the courts of equity corrected this injustice, and in such cases restrained the widow, and punished her with costs, if she attempted to recover by legal proceedings. Another consequence of the disregard by the courts of common law of any but legal rights was to refuse dower to the widow in trusts and other equitable estates, and consequently in the equity of redemption of a mortgage in fee. This narrowness, instead of being redressed, was followed by the court of equity and still prevails in the English jurisprudence. But in Virginia, New York, and other states of this Union, it is corrected by legislative enactments. Our act of 1785 (now section 2429 of the Code) gives dower in equitable in like manner as in legal estates; and in this, as in other respects, the rules and incidents of legal estates are now applied to trust and mortgaged property. The equity of redemption of a mortgage in fee descends to the heirs of the mortgagor; and though

the widow is not entitled to dower, as against the mortgagee, where the mortgage was executed before the coverture, or during the coverture, with her concurrence, in the mode prescribed by law, yet in either case she is entitled to dower in the equity of redemption, for of that, or, what is the same thing, of the estate subject to the mortgage, the husband is to be considered as having died seised. Heth v. Cocke, 1 Rand. (Va.) 344; Swaine v. Perine, 5 Johns. Ch. 492; Hale v. James, 6 Johns. Ch. 258. This is equally true of the vendee's right of redemption in regard to the vendor's lien. His wife is dowerable of that, but of nothing more; or, what is in effect the same, she is dowerable of the estate purchased, subject to the equitable incumbrance for the purchase money. * * * Thus, it will be seen that there is no longer any magic in the word 'seisin,' by which the shadow may be made the substance, or the substance the shadow. A legal title in the husband is nothing, as regards the wife's right of dower, unless accompanied by the beneficial ownership; and the beneficial ownership is everything, though separated from the legal title. But there can be no beneficial ownership in opposition to a paramount incumbrance, though there may be in subordination to it."

The object of the statute being to give the widow the same right of dower in her husband's equitable estate that she would have in it if it were legal estate, the question in this case is, did B. Upton, Sr., have such a beneficial interest in the land when he sold or assigned it to his son, that if he had then held the legal title, subject to the lien for the unpaid purchase price, his widow would have been entitled to dower in it in the hands of his allenee, subject to that lien?

In this state one of the common methods of securing payment of the purchase price of land, where credit is given for all or a portion of the price, is for the vendor to convey the land to the vendee, and expressly retain a lien thereon in the conveyance, to secure the payment of the unpaid purchase price. Another mode is for the vendor to enter into an executory contract with the vendee for the sale of the land, and to retain the title to secure the payment of the unpaid purchase price. If the first method be followed, and before the vendee has paid the entire purchase price he die or alien the land, without his wife's uniting with him in the manner prescribed by law, there can be no question that his widow would be entitled to dower in the land, subject to the lien upon it for the unpaid purchase money. If the last method be adopted, and the husband die or alien the land under like conditions, his widow must necessarily have the same rights of dower in the land as in the other case mentioned, unless we disregard what seems to be the plain meaning of section 2429. His beneficial interest in the land in each case is precisely the same. He is

the owner of the land, subject to the incumbrance upon it for the unpaid purchase price. The only difference is that in the one case he has the legal title, and in the other the vendor holds the legal title in trust for him, subject to the lien.

Again, it would hardly be contended by any one in this state that if a husband purchases a tract of land under an agreement for a conveyance of the legal title when the purchase money shall have been fully paid, and dies in possession of it, still owing a part of the purchase price, his widow is not entitled to dower in the land, subject to the lien for the unpaid purchase money. Yet, if that be true, how can it be held that she is not entitled to dower in it to the same extent if the husband alien it without her uniting with him in the manner prescribed by law?

In order to entitle his widow to dower, the husband must be seised of the requisite estate during the coverture. If such seisin does not exist as to his equitable estate until the purchase money is fully paid, and it is not paid before his death, how can it be held that he ever had the required seisin? His dying in possession of the property cannot affect the question. He either had during the coverture the necessary seisin to entitle his widow to dower in the land, subject to the lien for the unpaid purchase money, or he did not. If he did not have such seisin, then one of the essential requirements for dower was wanting, and it was a matter of no consequence whether he aliened the land during the coverture, or died possessed of it; for in neither event would his widow be entitled to dower. If, on the contrary, he was so seised during the coverture that, if he had died possessed of the land, his widow would have been entitled to dower in it, subject to the lien for purchase money, he could not by selling it deprive her of that right; for nothing is better settled than that, after the right of dower has once attached, the husband cannot, without his wife's concurrence, defeat that right by an alienation of the land. 1 Lomax, Dig. p. 129 (side page 107).

Not only has the husband no power to alien such property to the prejudice of his widow's right to dower, but so carefully has the law guarded her rights that where the land is subjected during the husband's lifetime to the payment of the lien or incumbrance upon it, which is superior to her dower rights, it is provided by section 2269 of the Code that "if a surplus of the proceeds of sale remain after satisfying said lien or encumbrance she shall be entitled to dower in said surplus, and a court of equity, having jurisdiction of the case, may make such order as may to it seem proper to secure her right."

We are of opinion, therefore, that a husband, who enters into an agreement for the purchase of land, takes possession of it, and pays part of the purchase price, is beneficially seised of the land, to the extent that he has paid the purchase price, although he has

not acquired the legal title, and that his widow is entitled to dower in the land, subject to the lien upon it for the unpaid purchase price, whether he die possessed of the land, or has aliened it during coverture without her concurrence in the mode prescribed by law.

A contrary rule would enable a husband to purchase land, take possession of it, pay the whole purchase price, except some trifling sum, sell it without his wife's concurrence, have the legal title conveyed to his vendee, and thus defeat his widow's right to dower, in violation, as it seems to us, of the policy and the humanity of the law.

We are of opinion that the widow of Upton, Sr., has a right to dower in the land. Her right would have been subject to the lien for the purchase money remaining unpaid at the time of the sale of the land by her husband to his son, if it had been paid by the vendee, or still remained unpaid; but inasmuch as it was afterwards paid by her husband, and the lien removed, she is entitled to dower in the entire land, subject to the provisions of section 2278 of the Code.

Upon the question of the right of Mrs. Upton, Jr., to subject the residue of the land to the payment of the claim asserted in the bill of complaint, the court is equally divided.

Two of the judges are of opinion that the record shows that Joseph Small, when he purchased the land, recognized the claim asserted by Mrs. B. Upton, Jr., as a valid lien upon the land, and expressly agreed that the land should be liable therefor, as a part of the consideration to be paid by him, and that as between B. Upton, Jr., and Joseph Small, and those who held under him, the land, subject to the dower of Mrs. B. Upton, Sr., is liable for its payment.

The decree complained of must be reversed in so far as it denies the widow of B. Upton, Sr., the right to dower in the land, and in other respects affirmed, and the cause remanded to the circuit court for further proceedings to be had in accordance with the views expressed in this opinion.

CARDWELL, J., absent.

(43 W. Va. 380)

JACKSON v. NORFOLK & W. R. CO.

(Supreme Court of Appeals of West Virginia.
April 21, 1897.)

Additional note filed. For opinion, see 27 S. E. 278.

BRANNON, J. Upon the important question of fellow servantry, I add the following late authorities taking the view above taken: Railroad Co. v. Sipes (Colo. Sup. 1896) 47 Pac. 287; Railway Co. v. Needham, 11 C. A. 56, 63 Fed. 107, full opinion; Bish. Noncont. Law, § 665; Callan v. Bull (1896) 113 Cal. 593, 45 Pac. 1017,—holding that while a superintendent is a vice principal as respects

suitable appliances, which it is the duty of the master to furnish, yet, if employes are to construct them out of material furnished them, "all, including superintendent, are fellow servants, irrespective of rank, as to any defect or negligence in their construction or adjustment, and the master is not liable for such defect or negligence." *Miller v. Railroad Co. (Or.)* 28 Pac. 70. In December, 1896, the circuit court of Pennsylvania criticised the *Ross Case*, 112 U. S. 377, 5 Sup. Ct. 184, and held the same view which I express above, that it has been practically overruled by the cases I cite. *Coulson v. Leonard*, 77 Fed. 538; *McGinty v. Reservoir Co.*, 155 Mass. 183, 29 N. E. 510,—holding superintendent and workmen fellow servants. The opinion in *Coal Co. v. Lamb*, 6 Colo. App. 255, 40 Pac. 251, says that the late cases in supreme court overrule the *Ross Case*. I see that in *Railroad Co. v. Houchins' Adm'r* (decided Dec. 2, 1897) 28 S. E. 578, the Virginia supreme court has, in a clear, strong opinion by Caldwell, J., squarely approved our decision in the above case. The United States supreme court (1897) has re-enunciated the same views given in recent decisions above cited. *Mining Co. v. Whelan*, 168 U. S. 86, 18 Sup. Ct. 40.

(43 W. Va. 599)

EASTMAN v. HOLT.

(Supreme Court of Appeals of West Virginia.
Sept. 14, 1897.)

Additional note filed. For opinion, see 27 S. E. 883.

BRANNON, J. When I wrote the above opinion, at Charlestown, I was interrupted daily by arguments of counsel, and did not have access to authority. The importance of the case and the division of the court seem to justify the addition of this note.

As to the point that the indictment is void because the court excused grand jurors because they had formed or expressed an opinion, what I said above I find justified by further examination of authority. *Whart. Cr. Pl. § 346*, says: "It is a good cause of challenge to a grand juror that he has formed or expressed an opinion as to the guilt of a party whose case will probably be presented to the grand inquest." In the Pennsylvania case of *Com. v. Clark*, 2 Browne, 325, on full argument and consideration of Chief Justice Marshall's rule in the great Burr treason trial, a defendant was allowed a challenge, after jury was sworn, for favor, in that he had expressed an opinion of the prisoner's guilt. In *State v. Bradford*, 57 N. H. 198, it was held that the court may excuse grand jurors for reasons appearing to it satisfactory, and the exercise of its discretion will not be reviewed. In *U. S. v. Gale*, 109 U. S. 65, 3 Sup. Ct. 1, Justice Bradley said, as I stated above, that there was a distinction between the allowance of qualified and dis-

qualified jurors, adding that "disqualified jurors upon the panel may be supposed injuriously to affect the whole panel; but if the individuals forming it are unobjectionable, and have all the necessary qualifications, it is of less moment to the accused what persons may have been set aside or excused. The present case is of the latter kind. No complaint is made that any of the grand jurors who found indictment were disqualified to serve, or were in any respect improper persons. It is only complained that the court excluded some persons for improper causes, because they labored under the disqualification created by the 820th section of the Revised Statutes, which is alleged to be unconstitutional. It is not complained that the jury actually impaneled was not a good one, but that other persons equally good had a right to be placed on it."

As bearing on the contention that the excusing of jurors vitiates the indictment, and also the claim that the action of the county court in making a list for grand jury service is final, and that the circuit court can for no cause inquire into qualifications, I cite *People v. Leonard*, 106 Cal. 302, 39 Pac. 617, holding that the court may go into qualifications of those drawn as grand jurors, excuse some, and summon others from bystanders, and that list is not final. I quote from the case of *U. S. v. Jones*, 69 Fed. 976: "The real contention of the defendant is that the court had no power to excuse any grand juror for any cause whatever, unless he came within the disqualification or exemption mentioned in the statute. * * * In other words, the court had no authority to excuse any juror of its own motion unless he was a minor, alien, an insane person, or prosecutor, * * * and that the statute furnished the only guide for the action of the court. If the first position of the contention is correct, then it would follow that, if the accused whose cause was to come before the grand jury had been on the list drawn from the jury box, the court would have been compelled to accept him as a grand juror, and to have allowed him to act in all cases except his own. If twelve of the grand jurors had testified that they had formed and expressed opinions that the defendant was guilty, and that they should vote in favor of indictment without further evidence, the court would have no power to excuse them, or either of them. If it was brought to the attention of the court, in a reliable manner, that one or more of the jurors had offered, in advance of being sworn, to sell his vote for any sum of money to either party, the court would have no power to excuse the juror. These illustrations are sufficient to show the absurdity of the defendant's contention. Such results would be utterly subversive of every principle of justice, would be contrary to the spirit and genius of free institutions, would be a reproach to any court that would permit such a practice to be pursued, and a dark blot upon the

jurisprudence of any country. There is no law that gives an accused person the absolute right to have grand jurors accepted by the court who have formed and expressed unqualified opinion that he is innocent. There is no law, rule, or practice that compels the court to accept any grand juror to be on the panel who has formed and expressed an opinion that the accused is guilty." *People v. Durrant*, 116 Cal. 179, 48 Pac. 75.

It will not do to say that only the defendant can except to bias in grand jurors. The opinion just quoted repels that. One biased in favor of the accused is just as objectionable as one biased against him. I met with a case where one who was surety on the prisoner's bail bond was held properly rejected, but the particular case has slipped me. There are so many authorities which sustain the action of courts in excusing jurors because they had expressed or formed opinions that they shake my mind as to the position I took in the above opinion, that the court has no authority to inquire of jurors as to the formation or expression of an opinion. On second thought, the mere fact that our statute allows an indictment to be found upon the unsworn statement of two members of the grand jury does not show that it is wrong to interrogate them as to fixed opinions, because that only means that the grand jury may act on the statement of facts by two of the grand jurors, not on their mere opinions, and mere knowledge of fact is different from fixedness or prejudice of opinion. However that may be in West Virginia, it certainly can be said that the action of the court was not an unheard-of proceeding, and does not nullify the indictment. Our Code (chapter 157, § 12) says that no indictment shall be abated because of the incompetency or disqualifications of any grand juror; yet this court is asked to hold that the presence of those jurors who took the place of the ones accused, though qualified in every respect, shall abate this indictment.

Now, as to the point that the talesmen were summoned by an unauthorized deputy, and were no grand jurors: In *Com. v. Brown*, 147 Mass. 585, 18 N. E. 587, it was held that a person sworn as a grand juror, whose name has been placed in the jury box, and drawn by the selectmen in response to venire, though previously the town had ordered it to be stricken from the list, in the absence of his personal disqualification, would not affect the validity of the indictment. Here was one acting who was not a grand juror, but his name had been by accident left in the box after it was stricken from the list. The court said: "It has often been held in other jurisdictions that an indictment found by a grand jury upon which a disqualified person is sitting is void. * * * The disqualified person may have been one of only twelve who voted for the indictment. 2 Hawk. P. C. c. 25, § 28; *U. S. v. Hammond*, 2 Woods, 197 Fed. Cas. No. 15,294; *State v. Symonds*,

86 Me. 128; *Doyle v. State*, 17 Ohio, 222; *State v. Cole*, 17 Wis. 674; *McQuillen v. State*, 8 Smedes & M. 587. How such an indictment should be regarded is a question which we need not decide, for a distinction must be noted between a juror who is personally disqualified, and one who possesses all the requisite qualifications but is irregularly and improperly drawn. The general rule is that mere irregularity in the proceedings, by which a juror gets upon the panel, does not affect the validity of his action. *Com. v. Parker*, 2 Pick. 550, 559; *Page v. Inhabitants of Danvers*, 7 Metc. (Mass.) 326; *U. S. v. Reeves*, 3 Woods, 199, Fed. Cas. No. 16,139; *U. S. v. Ambrose*, 3 Fed. 283; *Hill v. Yates*, 12 East, 229, 230; *Rex v. Hunt*, 4 Barn. & Ald. 433; *Hardin v. State*, 22 Ind. 347."

(45 W. Va. 168)

**BANK OF BERKELEY SPRINGS v.
GREEN et al.**

(Supreme Court of Appeals of West Virginia.
Sept. 12, 1898.)

**TRUSTS—DEEDS—CUSTODIUM TRUST—QUANTITY
OF ESTATE.**

G. conveyed by deed of general warranty to V. a tract of land, upon the following trust: "That the party of the second part hereby agrees and covenants that he will take, hold, and stand seised of the above-described real estate to and for the only, sole, and separate use, behoof, and benefit of Mary E. Green, wife of the said Charles S. Green, so that the said Charles S. Green will not sell, mortgage, charge, or incur the same by way of anticipation or otherwise; that the said Mary E. Green shall receive the rents and profits arising from the said property, or such person or persons as the said Mary E. Green shall by her order in writing direct and appoint to receive the same, during the joint lives of the said Chas. S. Green and Mary E. Green, his wife; and upon the decease of the said Chas. S. Green, in case his wife should survive him, then the said Mary E. Green, his wife, shall immediately take and hold the property hereinbefore described, to her and the heirs of herself forever; and upon this further trust and confidence, that the said Mary E. Green may devise and dispose of the above-described property by her last will and testament, or by a paper in the nature of a will, as if she were a feme sole, and that she may otherwise dispose of the same by the consent of her trustee, and joining with him and her said husband in a conveyance of the same or any part thereof." *Held*, that said deed conveys to Mary E. Green an equitable estate in fee.

(Syllabus by the Court.)

Appeal from circuit court, Morgan county; E. Boyd Faulkner, Judge.

Bill in equity by the Bank of Berkeley Springs against Charles S. Green and others. From a decree sustaining a demurrer to the bill, and a judgment dismissing the cause, plaintiff appeals. Affirmed.

William H. Travers and J. Hammond Siler, for appellant. Flick, Westenhaver & Baker, for appellees.

McWHORTER, J. On the 19th day of May, 1884, Charles S. Green conveyed, by

deed of that date, to T. G. Vandike, upon consideration of the use and trust therein created, and the further consideration of one dollar, with general warranty, a certain tract of three acres of land, more or less, lying and being in the new addition to the town of Bath, in Morgan county, with proper description, "in trust, however, and upon this confidence, that the party of the second part hereby agrees and covenants that he will take, hold, and stand seised of the above-described real estate to and for the only, sole, and separate use, behoof, and benefit of Mary E. Green, wife of the said Charles S. Green, so that the said Charles S. Green will not sell, mortgage, charge, or incumber the same by way of anticipation or otherwise; that the said Mary E. Green shall receive the rents and profits arising from the said property, or such other person or persons as the said Mary E. Green shall by her order in writing direct and appoint to receive the same, during the joint lives of the said Charles S. Green and Mary E. Green, his wife; and upon the decease of the said Chas. S. Green, in case his wife should survive him, then the said Mary E. Green, his wife, shall immediately take and hold the property hereinbefore described, to her and the heirs of herself forever; and upon this further trust and confidence, that the said Mary E. Green may devise and dispose of the above-described property by her last will and testament, or by a paper in the nature of a will, as if she were a feme sole, and that she may otherwise dispose of the same by the consent of her trustee, and joining with him and her said husband in a conveyance of the same or any part thereof,"—which deed was duly acknowledged and recorded. Mary E. Green died October 3, 1888, intestate, leaving surviving her Nannie L. Green and John V. Green, her children,—the latter an infant,—without having in any way disposed of said property. At the June rules, 1897, the Bank of Berkeley Springs filed its bill in chancery in the clerk's office of the circuit court of Morgan county, suing for itself and such other lien creditors of Charles S. Green as should come in, take part in, and share the costs of the suit, alleging that upon the death of Mary E. Green the said real estate, by operation of a resulting trust, became the property of said Charles S. Green, and subject to the liens set out in the bill; that the rents and profits of the land would not satisfy the liens in five years; and praying for an account to ascertain the liens and their priorities, and for sale of the property to pay the same, and for general relief. Defendant Nannie L. Green demurred to the bill, in which plaintiff joined, and the demurrer was argued and submitted, when the court, on the 1st day of September, 1897, decreed as follows: "And the court, having maturely considered all the matters of law arising on such demurrer, is of opinion that on a proper construction of the deed dated May 19, 1884, made

by Chas. S. Green to T. G. Vandike, trustee, for the use and benefit of M. E. Green, an office copy of which is filed, as Exhibit No. 2, with the plaintiffs' bill, the said M. E. Green took an equitable estate in fee simple in the property thereby conveyed, which the plaintiffs are seeking by their bill to subject as the property of C. S. Green, and that on the death of said M. E. Green a life estate only, as tenant by the curtesy, vested in the said C. S. Green, her husband, and that the fee vested in the children of M. E. Green, as her heirs at law; and the court being of opinion, further, that on the death of C. S. Green all interest on his part in the real estate involved in this suit ceased and determined, the court, upon consideration thereof, and for these and other reasons appearing on the face of the plaintiff's bill, doth adjudge, order, and decree that the demurrer to the said bill be, and the same is hereby, sustained. And, the plaintiff not asking leave to amend its bill, it is further adjudged, ordered, and decreed by the court that the plaintiff's bill be, and the same is hereby, dismissed, and that the defendants do recover of the plaintiff their costs in the prosecution of their defense in this behalf expended." From which decree plaintiff appealed to this court, assigning as error that the court should have overruled the demurrer: "(1) Because, under the provisions of chapter 71, § 8, of the Code of West Virginia of 1891, applicable to the case, the deed in question must be construed with reference to the intention of the party grantor (C. S. Green), and the said intention is manifestly to give to the beneficiary, Mary E. Green, (a) the right to collect the rents and profits of the realty during the joint lives of herself and her husband; (b) that only in case of the death of her said husband, she living, should the said property vest in her and her heirs; (c) that power of disposition or alienation was given to her upon condition that she should devise it, or otherwise dispose of it, during the joint lives of herself and her husband, by the consent of her trustee, who, with her husband, should join with her in such disposition. (2) She not having survived her husband, not having disposed of the property by will or any paper in the nature thereof, and not having alienated the said property by the consent of her trustee joining with her and her husband with conveyance thereof, there was a resulting trust in favor of the grantor, the said Charles S. Green, which should be subjected to the lien of the judgments set out in the bill. The statute above referred to, and under which the question in this case arises, is in totidem verbis with the statute of Virginia from which it has been taken (Code Va. 1873, c. 122, § 8), and has been construed by the court of appeals of that state. Professor Minor (2 Minor, Inst. p. 828) thus refers to this decision: 'In *Humphrey v. Foster*, 13 Grat. 653, 656, a noteworthy construction of this statute occurs. In that case *Humphrey*, by deed

of 23d June, 1820, conveyed to his wife, forever, certain lands, to have and to hold the said lands for life; and the question was whether by the deed she took an estate for life, or in fee simple. It is admitted that if the deed had been to the wife and her heirs, habendum to her for life, the wife would, by the first clause, have taken at common law a fee simple, and the habendum would have been repugnant and void; and it was also admitted that under the statute above cited the wife, notwithstanding the want of words of limitation, would, if the first clause stood alone, have taken a fee simple, but it could be treated as a fee simple in virtue of the statute only, and by the statute the whole deed must be looked to for the purpose of ascertaining whether there is any qualification or limitation upon the generality of the first provision, for such a deed can only convey the fee simple if a less estate be not limited by express words, or, as it stands in our present Code, unless "a contrary intention appear by the conveyance," etc. And in the case under consideration a less estate was limited by express words, namely, an estate for the wife's life. It was therefore concluded that the deed conveyed but a life estate to the wife. Of course, where 'a contrary intention [which we contend is the case here] appears by the conveyance,' the same result follows. In such a case a resulting trust ensues as a legal consequence. Professor Minor (2 Minor, Inst. 189) defines such trust, among other instances, 'Where land is conveyed in trusts which fail of taking effect.' Judge Story, with more elaboration, says (1 Story, Eq. Jur. § 1200): "The same principle applies to cases where the whole estate is conveyed or devised, but for particular objects or purposes, or on particular trusts. In all such cases, if those objects or purposes or trusts, by accident or otherwise, fail and do not take effect, or if they are all accomplished, and do not exhaust the whole property, then a resulting trust will arise for the benefit of the grantor or deviser or his heirs."

Section 8, c. 71, Code, provides: "Where any real estate is conveyed, devised, or granted to any person without any words of limitation, such devise, conveyance, or grant shall be construed to pass the fee simple or the whole estate or interest which the testator or grantor had power to dispose of in such real estate, unless a contrary intention shall appear by the will, conveyance, or grant." In the light of this statute we must view the deed in controversy, and to which only can we look, together with the situation of the parties, and the motives inducing the conveyance, to arrive at the intention of the grantor when he executed the deed. Charles S. Green, the grantor, had a wife and two children, for whom he evidently wanted to provide against his own mistakes in business, or the temptations he might have to incur his property and thus put it out of his

power to give his family such support as he desired them to have. The very language of the first part of the trust created shows the solicitude he had on this point: That the trustee "should take, hold, and stand seised of said real estate, to and for the only, sole, and separate use, behoof, and benefit of M. E. Green, wife of the said C. S. Green, so that the said C. S. Green will not sell, mortgage, charge, or incur the same by way of anticipation or otherwise"; thus clearly intending to get the property entirely beyond his reach, as well as that of his creditors. Can it be conceived that the grantor intended to so limit the estate conveyed, by a reversionary or other interest in himself, that at the very time his helpless children might most need this provision for their maintenance and support the property so conveyed should be brought within the grasp of the creditors of the grantor? Both appellant and appellees agree that the intention of the grantor in the conveyance and creation of the trust must be the guiding star in arriving at the true solution of the issue involved, and that, if possible, that intent must be obtained from the deed itself, taken altogether. In *Devl. Deeds*, § 836, it is said, "The rule is that the intention of the parties is to be ascertained by considering all the provisions of the deed, as well as the situation of the parties, and then to give effect to such intention, if practicable, when not contrary to law." What was the motive which induced the grantor to make this provision for his family? The record does not disclose of what other property, if any, C. S. Green was possessed at the time of the conveyance, or whether he was indebted to any extent at the time; but the presumption is that he was solvent, as no creditors seem to appear to question his voluntary conveyance. So that he is presumed to have made this wise provision for them while he was in condition to do so without fraud of the rights of any. This conveyance is for the only, sole, and separate use, behoof, and benefit of Mary E. Green, wife of the said Charles S. Green, so that the said C. S. Green will not sell, mortgage, charge, or incur the same by way of anticipation or otherwise, and providing that said Mary should receive the rents and profits arising therefrom, or should by writing direct and appoint such person or persons to receive the same as she might elect. Appellant cites in its petition, as well as in its brief, the case of *Humphrey v. Foster*, 13 Grat. 653, as applicable to this case. In that case Judge Allen, in delivering the opinion of the court, said: "In the present case we perceive by the habendum that an estate for life was expressly limited; and as the object, under the statute, is to ascertain what estate was to be granted by the deed, if a less estate than a fee is limited by express words in any part of the deed it must control and qualify the general words used in the premises." Here the estate for life was expressly limited in language that

could not be misunderstood. Point 1 of the syllabus in that case reads: "A deed conveys land to the grantee forever, to hold for life. As the premises would only convey a fee by virtue of the statute, and by the statute the whole deed is to be looked to to ascertain what estate is intended to be passed, the habendum in this deed is not void, but only a life estate passed by the deed." In the case at bar there is no clear-cut expression of limitation of estate, as in that case, nor such words nor expression as can reasonably be construed into such limitation. We are told by appellant that "it is manifest that the construction of the statute in both the Humphrey Case and the one now under consideration is precisely the same." In the sense that "the intention collected from the deed, will, or grant governs and determines the question," this is true; but in the one case we have the intention expressed in unequivocal language, susceptible of but one construction, while in the other a most ingenious and erudite argument is required and made on behalf of appellant to wrench from the provisions of the deed the semblance of an intention on the part of the grantor to limit the estate conveyed. It seems to be a well-settled rule, in case of doubt or ambiguity in a deed, that the same shall be construed most strongly against the grantor. In *Carrington v. Goddin*, 13 Grat. 587, Syl., point 3, it is held: "The deed will be construed most strongly against the grantor, and so as to give it effect, rather than that it should be void for uncertainty." In that case it was doubtful, on the face of the deed, whether one or two parcels of land were intended to be conveyed. So it was accordingly construed to pass both.

Appellant insists that by reason of the law as laid down in point 1 of the syllabus in the case of *Radford v. Carwile*, 13 W. Va. 572, the clause in the deed, "that the said Mary E. Green shall receive the rents and profits arising from the said property, or such other person or persons as the said Mary E. Green shall by her order in writing direct and appoint to receive the same, during the joint lives of the said Charles S. Green and Mary E. Green, his wife, and upon the decease of the said Charles S. Green, in case his wife should survive him, then the said Mary E. Green, his wife, shall immediately take and hold the property hereinbefore described, to her and the heirs of herself forever," could have no other meaning or intention "than to be a limitation or restriction upon her power of alienation, since, if there was no such purpose, but the intention was to give her an equitable fee simple, such a title necessarily, and as a legal consequence, carried with it and secured to Mary E. Green the right to the use and enjoyment of the rents and profits during coverture, and it was utterly needless and meaningless to provide specifically for the enjoyment of them by her during the joint lives of herself and husband." It is

true that Mary E. Green might have enjoyed the rents and profits under the conveyance without the special provision therein referred to, but it must be remembered that, therefore, to secure to a married woman in a conveyance the rights of a feme sole required great care; and the ordinary attorney, in preparing such a paper, felt much as he would walking on thin ice, and his main object was to get into the instrument sufficient provisions to accomplish his purpose in carrying out the intention of the grantor in making the conveyance. This provision was evidently intended to secure to Mrs. Green the control and enjoyment of the rents and profits during the life of the grantor, which perhaps was unnecessary as the law was at the time of the conveyance, but was a precautionary provision which was in harmony with the law. Formerly the law was that, while the corpus of her real estate remained hers notwithstanding coverture, yet the marital rights of the husband entitled him to the rents and profits, unless the property was made her separate estate, in which event the rents and profits were hers; and while at law her contracts were absolutely void, still in equity she might charge, incumber, or otherwise dispose of the rents and profits of her separate estate. If the intention of the grantor was to limit the estate conveyed to less than an equitable estate in fee to Mrs. Green, it could have been done in a few words, which would have needed no judicial construction. In *Walke v. Moore*, 30 S. E. 374, Syl., point 1, the supreme court of appeals of Virginia held that "a deed conveying land in trust for the sole benefit of the grantor's wife and her children, with power to the trustee, upon request of the wife, in writing, to sell the same, and reserving to the wife the right to dispose of the property by will, conveys to her an equitable estate in fee, to the exclusion of the children." The trust created in that case was as follows: "To hold all of the said property, real and personal, * * * for the sole and exclusive benefit of Virginia Baughan [the wife of the grantor] and her children, with power to the said Alvis [trustee], at any time when he shall be so requested by the said Virginia in writing, deeming it for the benefit of the said Virginia and her children, to sell all or any part of the above-conveyed property, real or personal, on such terms as he may deem judicious, and reinvest the proceeds of sale in any other property selected by her, or deemed more profitable to her and her children by him, the said Alvis; reserving to the said Virginia Baughan the right to dispose of all of the said property, both real and personal, by instrument of writing in the nature of a last will and testament." See, also, *Nixon v. Rose*, 12 Grat. 425; *May v. Joyner*, 20 Grat. 692. In *Shermer v. Shermer's Ex'rs*, 1 Wash. (Va.) 266, John Shermer by will devised to his wife the use and profits of his whole estate,

both real and personal, during her natural life, and, after that was ended, then the whole of his estate, exclusive of that already given to his wife, to be equally divided between whomever his wife should think proper to make her heir or heirs, and the testator's brother, Richard. The wife died a few days after the testator, without making any disposition or appointment of her part of the estate. The executors sold the estate, agreeably to the will, and distributed one moiety thereof among the relations of the wife. Suit was brought against the executors and distributees by the son, heir, and executor of the brother, Richard, named in the will. President Pendleton, in delivering the opinion of the court, says: "It is contended by the appellant's counsel that Mrs. Shermer was by the will only tenant for life of a moiety, with a power to dispose of the fee, and that, not having executed that power, the estate descends to the heir of the testator. In support of this position several cases have been cited, but they seem to verify the saying of a judge, 'that, in disputes upon wills, cases seldom elucidate the subject, which, depending on the intention of the testator, to be collected from the will, and from the relation and situation of the parties, ought to be decided upon the state and circumstances of each case,' to which I will add that I have generally observed that adjudged cases have been more frequently produced to disappoint than to illustrate the intention, and I am free to own that, when a testator's intention is apparent to me, cases must be strong, uniform, and apply pointedly, before they will prevail to frustrate that intention." And the court held that the executors had properly distributed the funds, and so affirmed the decree. 2 Story, Eq. Jur. § 1393, says: "If there be an express limitation to a married woman for life, with a power to dispose of the same property by will, then her interest will be deemed to be a partial interest, and equivalent to a life estate only, and she cannot dispose of the property absolutely, except in the manner prescribed by the power;" and continues (section 1394): "On the other hand, if the property is expressly given to a married woman, 'to her for her sole and separate use,' without saying 'for life,' and she is further authorized to dispose of the same by will, in such a case the gift will be construed to confer on her the absolute property, and consequently she may dispose of it otherwise than by will; for, the absolute property being given, the power becomes nugatory, and is construed to be nothing more than an anxious expression of the donor that she may have an uncontrolled power of disposing of the property." The deed to Mary E. Green was without saying "for life," and she was thereby authorized to dispose of the property by will, and also by deed, with the consent of the trustee, and joining with him and her husband in a conveyance of the same or any part thereof. In

Millhollen v. Rice, 13 W. Va. 510, Judge Green, in delivering the opinion of the court, says: "I conclude, therefore, as stated by Sir William Grant in *Bradly v. Westcott*, 13 Ves. 453, and by Chancellor Kent in *Jackson v. Robins*, 16 Johns. 588, 'that a devise or gift to A. and such persons as he shall appoint is a fee simple or absolute property in A., without appointment.'" Counsel for appellees very pertinently suggest that the fact that Charles S. Green, the judgment debtor, once owned the property, and then settled it on his wife, is liable to mislead one in the investigation of this question; "that, without his connection in this way with the making of the title to Mrs. Green, no one would for a moment contend that she did not take an equitable fee, or that a trust could in any event result to the grantor. This fact, however, does not affect the law of the case, or change the rules of construction. Let the court regard Charles S. Green, as he really is, in the light merely of an impersonal grantor, and all difficulties will melt away." If the grantor had been other than the husband of Mrs. Green, the estate conveyed would have been precisely the same, and the marital relations of the grantor to Mrs. Green represent the extent of his interest in the property after the conveyance, and at the occurrence of his death his interest ceased in the property, and the bill was properly dismissed. Counsel for appellees insist that the bill was demurrable on other grounds, upon which the bill should have been dismissed, which grounds of demurrer I deem it unnecessary to discuss.

(123 N. C. 30)

GREENLEAF et al. v. BOARD OF COM'RS OF PASQUOTANK COUNTY.

(Supreme Court of North Carolina. Oct. 18, 1898.)

JUDGMENTS—AWARD—ESTOPPEL—COUNTIES—LEGISLATIVE POWERS—BRIDGES.

1. The fact that an award had been made against a county in an action to enjoin it from accepting a bridge will not estop the county from subsequently accepting the bridge, where no judgment was made on the award.

2. The fact that a judgment was rendered against certain county commissioners, enjoining them from accepting and maintaining a certain private bridge as a public charge, will not preclude a succeeding board from so accepting and maintaining such bridge, where they can do so while acting in their legislative and discretionary capacity.

3. Code, § 2014, empowering county commissioners to establish roads and ferries, does not authorize them to accept and maintain as a public charge a private bridge leading to a private road.

Appeal from superior court, Pasquotank county; Timberlake, Judge.

Injunction by H. T. Greenleaf and others against the board of commissioners of Pasquotank county. From a judgment for plaintiffs, defendants appeal. Affirmed.

S. S. Lamb and A. C. Avery, for appellants. E. F. Aydlett and G. W. Ward, for appellees.

FURCHES, J. The object of this action is to enjoin the commissioners of Pasquotank county from accepting a bridge across Knob creek, and making the maintenance thereof a county charge. One E. F. Lamb is the owner of a ferry across Pasquotank river, some two miles or more from this bridge, which ferry he keeps up, and charges tolls for its use. Said Lamb, for the benefit of his ferry, has constructed a road from said ferry to this bridge across Knob creek, which he has also constructed and maintained up to this time as a part of his road. This road and this bridge are the private property of said Lamb. Knob creek is the boundary line of Elizabeth City, and a street called "Pennsylvania Avenue" runs to the creek at the point where said bridge is located. Knob creek is 100 feet wide, and navigable for steamboats and other vessels, at the point where said bridge spans the same, so that it is necessary to have and maintain a draw in said bridge, at a very considerable expense to the owner thereof. Said Lamb claims the right to prevent the public from using said road between his bridge and his ferry, and has in some instances charged parties for the use of the same. Said Lamb proposes to donate said bridge to the county of Pasquotank, upon the condition that the county will maintain and keep the same up as a free public bridge. The commissioners have agreed to accept this proposition, and this action is brought by the plaintiff Greenleaf and other citizens and taxpayers to enjoin and prevent the consummation of this agreement.

It is stated in the record, and claimed by plaintiffs, as one reason for this injunction, that some 10 or more years ago this same proposition was made to the then commissioners; that an action was then brought by certain of the citizens and taxpayers to enjoin the same; that the matter was then arbitrated, and an award made against the county. But there was never any judgment upon said award. We do not see how this former action and award cut any figure in this action. There was no judgment, and for that reason it cannot be an estoppel. And, if there had been a judgment, we cannot see how it could have amounted to an estoppel against the present board of commissioners, acting in their legislative and discretionary capacity, if they are so acting. And this is the only question that remains for our consideration. Is it within the discretionary power of the commissioners to accept this bridge, and make its maintenance a county charge? If it is, then this court has no right to control or interfere with their action. *Brodnax v. Groom*, 64 N. C. 244; *Long v. Com'rs*, 76 N. C. 273; *Burwell v. Com'rs*, 93 N. C. 73. The county commissioners may establish roads and ferries. Code, § 2014. They may also discontinue roads and ferries (Code, § 2038), and fix and regulate the tolls of ferries and bridges (Code, § 2046). But the establishment of fer-

ries and bridges must be considered as a part of the system of public roads, and, when established, become a part of the public road,—the public highway. They are constructed at the expense of the public, and for the benefit and convenience of the public. They must go somewhere, to be a convenience or a benefit to the public. It could not be considered a public benefit to cross this bridge to Lamb's side of Knob creek, and back. If the road from this bridge to Lamb's ferry was a public road, and this bridge was to make a part of the public highway (free to all goers and comers) from Elizabeth City to Lamb's ferry, it would then be a matter within the discretionary power of the commissioners, over which this court would have no control. *Brodnax v. Groom*, and other cases cited *supra*. But, as it is, the action of the commissioners in accepting this bridge and making it a county charge, if they were to do so, would be *ultra vires*, and cannot be allowed. There must be a public road leading to a public bridge, and the bridge must constitute part of that public road. We are not unmindful of the fact that it is stated in *Brodnax v. Groom*, *supra*, that the bridge under discussion in that case is said to be a mile from the old bridge, and at a point to which there was no public road leading. But it is manifest from what is said in the opinion of the court that this change was made to get a better location for the bridge, to which the road was to be changed. And the bridge, when built, was to constitute a part of the public highway. The defendants have the same power to accept this bridge and make it a public charge that they would have to erect a new bridge at that point if there was no bridge there, but no more.

It was said in the argument that Lamb threatened to close this bridge, and to build another, above the point of navigation, on Knob creek. This he may do, as it is his private property. But he may not have entire control of the situation. He is exercising a franchise, in operating his ferry and taking tolls, over which the commissioners have control. And it may be, if he is disposed to act ugly about the matter, that the commissioners may discontinue his ferry. But this is not a matter before us on this appeal, and is only noticed because it was a matter that entered into the discussion on the argument of the case. The judgment is affirmed.

(123 N. C. 19)

STAFFORD v. GALLOPS et al.

(Supreme Court of North Carolina. Oct. 18, 1898.)

JUDGMENTS BY DEFAULT—PROCESS—COLLATERAL ATTACK.

Under Code, § 279, requiring 10 days' notice in special proceedings, a judgment entered by default 9 days after service of the summons in proceedings to appoint a trustee under section 1276, providing for the appoint-

ment of a successor to trustees who have died, is only voidable, and cannot be collaterally attacked.

Appeal from superior court, Pasquotank county; Timberlake, Judge.

Action by A. F. Stafford against Isaac Gallops and others. There was a judgment for defendants, and plaintiff appeals. Reversed.

G. W. Ward, for appellant. E. F. Aydlott, for appellees.

FAIRCLOTH, O. J. Action for trespass by cutting wood, etc., involving title to the locus in quo. The plaintiff, in deducing his title, offered in evidence a certain record and judgment, presently referred to, which was excluded by his honor; and the plaintiff took a nonsuit, and appealed. The competency of said judgment is the only question we have to consider, and that raises the question whether the judgment was void, or irregular and voidable only. In 1887 H. C. Harris and wife, Laura T., executed their promissory notes, payable to Sarah E. Harris, and conveyed the land to John A. Harris in trust to secure the payment of said notes, and subsequently the payee assigned said notes to the plaintiff's intestate. Before the trust was closed, the trustee died. The plaintiff applied to the clerk to have another trustee appointed, and the clerk issued a summons on December 8, 1891, notifying the trustors and Sarah E. Harris to appear before him on December 19, 1891, and answer the plaintiff's complaint. The officer's return on the summons was, "Executed December 11, 1891." On the return day of the summons the defendants failed to appear, answer, or demur, and the clerk appointed a trustee with all the powers of the first trustee. The trustee, on proper notice, sold the land, and the plaintiff's intestate was the purchaser. The defendants' position is that, as they had not the 10-days notice required by Code, §§ 279, 1276, the judgment of the clerk appointing a trustee was void, and that the trustee's sale and deed conveyed no title. That is the point. Much has been written on the character and force of judgments, and we find them to be erroneous, irregular, or void. An erroneous judgment is one rendered according to the course and practice of the courts, but contrary to law; that is, based upon an erroneous application of legal principles. *Wolfe v. Davis*, 74 N. C. 597; *McKee v. Angel*, 90 N. C. 60. A void judgment is, in legal effect, no judgment. No rights are acquired or divested by it. It neither binds nor bars any one, and all proceedings founded upon it are worthless (1 Freem. Judgm. [4th Ed.] § 117; *Black*, Judgm. § 170),—as if judgment be rendered without service on the party, or his appearance (*Armstrong v. Harshaw*, 12 N. C. 187; *Stallings v. Gulley*, 48 N. C. 344; *Condry v. Cheshire*, 88 N. C. 375). An irregular judgment is one contrary to the course and practice of the courts, and is held valid until vacated or reversed. *Wolfe v.*

Davis and McKee v. Angel, supra; *Black*, Judgm. § 170; 1 Freem. Judgm. § 118 et seq. The question of jurisdiction lies behind all judgments, decrees, and orders. If they are entered by a court without jurisdiction, they are nullities, and may be disregarded by any one, whether relied upon directly or collaterally. Every court, before it can enter a lawful judgment, must have jurisdiction (1) of the subject-matter, and (2) of the person. Jurisdiction of the subject is conferred by the constitution, statutes, and the law of the land; that is, by sovereign authority. *Black*, Judgm. § 240; *Cooper v. Reynolds*, 10 Wall. 308. Jurisdiction of the person is acquired by service of process. A court, thus having acquired jurisdiction, is clothed with power to hear and determine; and its orders and decrees are binding upon all the parties, until reversed or vacated by some direct proceeding, because public policy requires it, and because a judgment is a record, and a record imports in it such uncontrollable credit and verity as it admits no averment, plea, or proof to the contrary. Co. Litt. 260a. Defective service has given rise to many irregularities in the course of the courts, but it will be found that they do not render the final judgment void, but only irregular, unless the defect is such as to amount to no service. The instances found in the opinions of this court of such irregularities are too numerous to mention here. Examples: A judgment exceeding the amount demanded in the writ is not void, but irregular and erroneous, but has full force until reversed by a direct proceeding. *Savage v. Hussey*, 48 N. C. 149. A judgment against an infant with no guardian to represent him held irregular only. *Keaton v. Banks*, 32 N. C. 381. A constable returned his warrant "Executed," but did not sign his name to his return. Held, that the judgment was not void. *McElrath v. Butler*, 29 N. C. 398. "A judgment in an action in which the required number of days' notice was not given to the defendant is erroneous, but not void, and cannot be questioned in a collateral proceeding." *Ballinger v. Tarbell*, 16 Iowa, 491; *Glover v. Holman*, 3 Heisk. 519; *West v. Williamson*, 1 Swan, 277; *Hendrick v. Whittemore*, 105 Mass. 23; *Pope v. Hooper*, 6 Neb. 178; 1 Freem. Judgm. § 126; *Isaacs v. Price*, 2 Dill. 351, Fed. Cas. No. 7,097. When the time between service and the return day of the summons is less than the time allowed by the Code, the clerk is not bound to dismiss the action, but should allow the time allowed by the Code to the defendant for an appearance. *Gulon v. Melvin*, 69 N. C. 242. The object of service of process is to advise the defendant of the plaintiff's action, and that he must appear at the time and place named and make his defense, and in default therein judgment will be prayed. If he attends, as he should, he can defend on the merits, or have irregularities corrected. Failing in this does not affect the jurisdiction or judgment, as long as

it stands unreversed. A service of four days' notice, when the law required five, is sufficient to support a justice's judgment. *Balinger v. Tarbell*, 85 Am. Dec. 527; 1 Freem. Judgm. § 126. Applying these principles to the present case, his honor committed error in excluding the judgment of the clerk appointing a trustee. That judgment, although irregular, is valid until reversed or vacated by a direct action, and cannot be collaterally attacked. New trial.

(128 N. C. 113)

IN RE EVANS' WILL.

(Supreme Court of North Carolina. Oct. 18, 1898.)

WILLS—UNDUE INFLUENCE—EVIDENCE.

Testatrix was cared for by her daughter. Her son was dissipated. A few years before her death she expressed to some friends a desire to change her will, made eight or ten years before, in which she had favored the daughter, and left the son's share in trust for his children; and when the son, to whom she had given it to have it rewritten and destroyed, returned it, she asked him why he had not done as she told him. He replied that it was hers, and she took it, saying, in effect, that she could destroy it herself. She asked a witness to write a will for her, and said she would have to run away from the daughter; that the daughter would not let her go. She said she had a will made, but that it was not hers, it was the daughter's will. Held not sufficient to go to the jury on the issue of undue influence on the daughter's part.

Appeal from superior court, Nash county; Bryan, Judge.

Proceeding to prove the will of Nancy Evans, deceased. From a judgment for the propounders, the caveators appeal. Affirmed.

The son of testatrix testified that she had given him the will to have rewritten and destroyed, and when he returned it to her she asked him why he had not destroyed it as she had directed, and when he told her it was hers, to do what she pleased with it, she took it and went into the house, saying that the stove was not gone anywhere.

Jacob Battle and Cooke & Cooley, for appellants. F. S. Spruill, H. G. Connor, and B. H. Bunn, for appellee.

FAIRCLOTH, C. J. This was a proceeding to set up and prove the last will of Nancy Evans; the propounders alleging that the will was made in 1882, and was in existence at her death, in 1895, and was destroyed by her son, Ira, after her death. The caveators contend that the execution of the will was procured by the undue influence of her daughter, Mary Friar, one of the beneficiaries; that the will gave one half of the estate to said Mary, and the other half to a trustee for the children of said Ira; and that the testatrix, before her death, desired to change her will. All the evidence was admitted without objection, and there are several exceptions to the ruling and charge of his honor. They are all untenable, and the

only one that we had seriously to consider was the tenth, in relation to the averment of undue influence at the execution of the will. Mary cared for her mother, and Ira was dissipated; they being her only children. A few years before her death the testatrix expressed to some of her friends a desire to change her will. The following are the strongest expressions found in the evidence: When her son handed her the will, she said, "Son, why don't you do what I told you?" He said, "It is yours, not mine." She took it, and said "the hot stove wasn't gone anywhere." To another witness she said she wanted him to write one for her, and he agreed to do so. She said "she would have to run away from Mary. * * * Mary would not let her go. * * *" She said "she had a will made, but it was not hers; that it was Mary's will." She never mentioned the matter again to that witness but once. The court told the jury: "There is no evidence before the jury that there was any undue influence or coercion of Nancy Evans, on the part of Mary Friar or any other person, in relation to the execution of the will." The declarations of the testatrix, made after the will was executed, fail to show a single word or act of Mary Friar tending to show any undue influence in making the will; and, if she had made the will favorable to Mary, it was her deliberate act, and, for aught that appears, she made it as she wanted it at that time. If the testatrix afterwards desired to make a change, it was her privilege to do so. The verdict excludes the contention that the will was changed or destroyed, and finds that the script propounded was a true copy. Our conclusion is that the evidence was not sufficient to allow the jury to find that the testatrix believed the contents of the will to be different from what they really are, or to show any other circumstances which tend to show that it was not her will when made, or any fraud on the part of Mary Friar, and that the court properly so instructed the jury. *Reel's Ex'rs v. Reel*, 8 N. C. 248; *Howell v. Barden*, 3 Dev. 446; 27 Am. & Eng. Enc. Law, 505, 506. There is no error. Affirmed.

(123 N. C. 63)

BIRD v. GILLAM et ux.

(Supreme Court of North Carolina. Oct. 18, 1898.)

APPEAL—REHEARING—PETITION—WILLS—CONSTRUCTION.

1. Sup. Ct. Rule 52 (27 S. E. xi., 119 N. C. 929) provides that a petition for rehearing shall be filed within 20 days after the commencement of the succeeding term, and that the justice to whom it is submitted shall order its docketing in cases wherein it is granted. Rule 53 (27 S. E. xii., 119 N. C. 929) requires the petition to be sent to the clerk, but provides that it shall not be docketed unless the justice order it, and that, if docketed, notice shall be given to the opposite party. Held, that the petition is "filed" when first received by the clerk, and is "docketed" when he enters it on

the records at the order of the justice granting the rehearing.

2. Where a testator devised to a daughter during her natural life and to the heirs of her body, but, if she should have no such heirs, to a son and the heirs of his body, these being his only children and heirs at law, a deed from the son to the daughter and from her to another conveyed the fee, though she subsequently died without issue; since whatever estate remained undisposed of under the will passed to the devisees as heirs.

On petition for rehearing. Granted. Judgment below affirmed.

For former opinion, see 28 S. E. 489.

MONTGOMERY, J. This case is before the court upon a petition (granted) to rehear it. A motion was entered by the counsel of the appellant to dismiss the petition, upon the alleged ground that it was not filed in time, under the rules of this court. His contention was that the words "filing" and "docketing," as they appear in connection with petitions to rehear cases under our rules, are convertible terms, meaning one and the same thing. A reading of rules 52 and 53, published in 119 N. C., beginning at page 929 (27 S. E. xi.), will show that they are entirely different things. Rule 52 requires the petition to be "filed" at the same term or during the vacation succeeding the term of the court at which the judgment was rendered, or within 20 days after the commencement of the succeeding term. It appears in that rule also that the justice to whom the petition is submitted orders the docketing of the petition in cases wherein it is granted. Under rule 53, the petition is required to be sent to the clerk of this court, "who shall indorse thereon the time when it was received, and deliver the same to the justice designated by the petitioner, who shall be a justice who did not dissent from the opinion; but the petition shall not be docketed unless said justice shall indorse thereon that the case is a proper one to be reheard; and notice of the action had shall be given to the petitioner by the clerk of this court, and if docketed to the opposite party also." The petition is said to be filed when it is received by the clerk; it is docketed when the clerk enters it upon the records at the order of the justice who grants the rehearing. The opinion was delivered at the September term, 1897, and the next succeeding term was begun on the first Monday in February, 1898,—the 7th day of the month. The petition was filed (received by the clerk) on Sunday, February 27, 1898. It was filed in time. The first day of the period allowed is to be excluded from the count, and the last also, because it was Sunday; and this brings the filing within the time limited. The motion must therefore be disallowed, and the petition heard on its merits. *Barcroft v. Roberts*, 92 N. C. 249.

Upon the original hearing of the case the only matter for decision was the construction of a clause in the will of John Swain, which was in the following words: "After all my

debts are paid, the land whereon I now live and in my possession I leave to my wife during her natural life; and at her death I leave the same land to my daughter Mary during her natural life, and give the same land to the heirs of her body; but, if my daughter Mary should have no lawful heirs of her body, the said land at her death shall go back to my son William and the heirs of his body." The appeal having been taken in forma pauperis, the record was not printed. In looking into the written record, we found, in a statement of facts agreed upon and signed by the counsel of both plaintiff and defendant, one in the following terms: "That Mary Susan Whitaker Bird, who is the same person as Mary Susan Whitaker, named in the summons, is the sole surviving heir at law of John Swain, the testator named in said will, and of Mary Swain and William Swain in said will, and she is also their next of kin." Upon a re-examination of the record, brought about by a statement in the petition to rehear the case, we find another admitted fact, not contained in the first statement of facts agreed, in these words: "It is admitted that Mary Swain and William Swain were the only children of John Swain, and that Mary Susan Whitaker Bird, who was living at the time the will was made, was the niece of the said John Swain, and a first cousin of Mary Swain and William Swain, and that John Swain had no other nieces or nephews." This admitted fact is entirely separate from the others, and was made and agreed upon after the first statement of facts agreed was signed by counsel, as we were informed by counsel on the argument upon the rehearing. On the first hearing, it escaped our notice; and quite naturally, we think. It now being apparent that upon the death of John Swain, the testator, William and Mary were his only children surviving him, they were, as matter of law, his only heirs at law, notwithstanding the statement in the agreed facts that Mary, a niece, was in that relation to him. It follows, therefore, that whatever estate remained undisposed of by the will of John Swain descended to Mary and William, his only children and heirs at law, and that the deed from William to Mary, and from Mary to defendant, passed a fee-simple interest in the land mentioned in the will, to the defendant Allen Gillam. There was error in the former judgment and opinion of this court, and the judgment of the court below is affirmed. Petition allowed.

(123 N. C. 99.)

ABBOTT v. HANCOCK.

(Supreme Court of North Carolina. Oct. 18, 1898.)

INSANE PERSONS—WIFE AS NEXT FRIEND—SEDUCTION—PLEADING—PARTIES—COLLATERAL ATTACK.

1. Under Code, § 180, providing that an insane person may appear by his next friend

when he has no guardian, an insane person can sue by his next friend, although there has been no inquisition of lunacy.

2. A wife may sue, as the next friend of her insane husband, for the seduction of their daughter.

3. Where the next friend of an insane person is regularly appointed, the appointment cannot be impeached collaterally by demurrer in an action by the next friend.

4. The next friend of an insane person, being an officer of the court, is subject to removal by its order at any time.

5. Where a husband resides out of the state, the wife may sue in her own name for the seduction of their daughter.

6. The objection of superfluous parties plaintiff cannot be raised by demurrer.

Appeal from superior court, Craven county; Brown, Judge.

Action by Elizabeth Abbott, in her own name and as next friend of her insane husband, against Robert Hancock, for the seduction of their daughter. Judgment for plaintiff, and defendant appeals. Affirmed.

Simmons, Pou & Ward, for appellant. O. H. Guion, W. W. Clark, Shepherd & Busbee, W. D. McIver, and D. L. Ward, for appellee.

CLARK, J. If the wife were suing here in her own right, as a free trader, because of the insanity of her husband, it would be necessary that he should have been declared insane (Code, § 1831); but the right of action for the seduction of the infant daughter is in the father, if living. *Scarlett v. Norwood*, 115 N. C. 284, 20 S. E. 459; *Hood v. Suderth*, 111 N. C. 215, 16 S. E. 397. The allegation of the insanity of the husband is admitted by the demurrer, and an insane person can sue by his next friend, though there has been no inquisition of lunacy. Code, § 180; *Smith v. Smith*, 106 N. C. 498, 11 S. E. 188. We know of no reason, nor authority, why the wife cannot be his next friend, for the purpose of bringing such action in his behalf. She was regularly appointed next friend by the clerk of the superior court, in the mode prescribed by rule 16 of the superior court (119 N. C. 963, 27 S. E. xv.), and that appointment cannot be impeached collaterally by demurrer. *Sumner v. Seasons*, 94 N. C. 371. Nor do we see that the propriety or fitness of the appointment of a next friend can in any way concern the defendant in the action. The next friend is an officer of the court, and subject to removal by its order at any time. *Tate v. Mott*, 96 N. C. 19, 2 S. E. 176.

It is averred in the complaint, and admitted by the demurrer, that the father is living out of the state. In *Gould v. Erskine*, 20 Ont. 347, it is held that at common law, in such case, the mother is entitled to maintain the action in lieu of the father. As this action is brought by the mother individually, as well as by her as next friend of her husband, *quacunqve via*, the proper plaintiff is before the court. For superfluous parties plaintiff, a demurrer does not lie. *Sullivan v. Field*, 118 N. C. 358, 24 S. E. 735; *Tate v.*

Douglas, 113 N. C. 190, 18 S. E. 202; *Wool v. Town of Edenton*, 113 N. C. 33, 18 S. E. 76. No error.

(123 N. C. 85)

LEACH et al. v. CURTIN et al.

(Supreme Court of North Carolina. Oct. 18, 1898.)

MORTGAGES — SATISFACTION OUT OF RENTS AND PROFITS—APPLICATION—TACKING—LIMITATIONS—PART PAYMENTS.

1. Where mortgagors demised lands to the holders of the first, third, and fourth mortgages, until such mortgagees should, out of the rents and profits, pay their said mortgages, the latter are entitled, as against the second mortgagee, to apply rents to the mortgages junior to his, notwithstanding he brings a foreclosure suit, where he does not therein seek possession of the premises, or ask for a receiver to get in the rents.

2. Where mortgagees of the first, third, and fourth mortgages hold possession of mortgaged premises, and satisfy their mortgages out of the rents and profits, under an agreement with the mortgagors, without stipulation as to the application of payments, they may toll the statute of limitations on the first mortgage by the application of payments thereto.

Appeal from superior court, Halifax county; Norwood, Judge.

Action by J. P. Leach & Bro. against W. R. Curtin and others. Plaintiffs appealed from rulings on exceptions to a referee's report. Affirmed.

Thos. N. Hill, for appellants. R. O. Burton and E. L. Travis, for appellees.

MONTGOMERY, J. This case is before us on the appeal of the plaintiffs to the rulings of the court below on exceptions filed by both the plaintiffs and the defendants to the findings of the referee. The referee reported, without exception on the part of either side, that the defendants Curtin and wife made four mortgages of different dates on their land,—the first, to secure Browning & Son a debt of (three notes of \$140.82 each) \$422.46; the second, to secure a debt due to the plaintiffs of \$500; the third, to secure the defendant B. R. Browning a debt of \$800; and the fourth, to secure a debt due to the defendants Browning & Son in the sum of \$338.29. On the 10th day of January, 1895, the defendants Curtin and wife executed and delivered to the defendants Browning & Son a paper writing, in which they surrendered to them the possession of the mortgaged tract of land. Browning & Son were to keep possession of the land, and rent it out, and collect the rents, until they should collect enough to pay off and discharge all the debts which Curtin and wife owed to B. R. Browning & Son and B. R. Browning; the possession of the land to be returned when the mortgage debts should have been paid. Under that instrument the defendants Browning & Son took possession of the land at once, and collected the rents up to and including the year 1897. The present action was begun on the 10th day of December,

1891; and the complaint shows that it was for a simple foreclosure of the plaintiffs' mortgage, without any demand for a receiver to take charge of the rents. The defendants Browning & Son were brought into the action on the simple allegation in the complaint that they had an interest in the land. The defendants Browning & Son applied the rents, with the exception of small credits placed upon the debts secured in the first mortgage, towards the payment of the debts secured in the mortgages junior to the plaintiffs' mortgage. The referee found that the defendants Browning & Son had the right to apply the rents which were collected up to the bringing of this suit in that way, but that the rents collected after the commencement of this action should have been applied to the debt of Browning & Son secured in the first mortgage, until it was paid off, and then to the plaintiffs' mortgage. His honor held that the defendants Browning & Son had the right to apply the whole of the rents as they had applied them. There was no error in the ruling of his honor. The rents did not belong to the plaintiffs. They could only get them as incident to their right of possession, and possession was not asked for or demanded by the plaintiffs, either in pais or in the complaint. As we have said, the complaint was one simply for foreclosure. If Curtin and wife (the mortgagors) had been in possession, they would have been entitled to receive the rents and profits, without liability to account to any person until entry made by the mortgagee. Certainly, then, it follows that the plaintiffs cannot hold to account for the rents the assignees of the defendants Curtin and wife. *Killebrew v. Hines*, 104 N. C. 182, 10 S. E. 159, 251. The referee found that the notes dated November 9, 1890, due to the defendants Browning & Son under the first mortgage, were not barred by the statute of limitations, and his honor sustained the finding. That ruling of his honor constitutes one of the plaintiffs' exceptions. Out of the rents of 1895 the defendants Browning & Son in that year made a small payment upon each of the notes secured in the first mortgage. This they had the right to do. The debtors, Curtin and wife, had given them no instructions as to the particular manner in which the rents were to be applied. There is no error in the rulings of his honor, and the judgment is affirmed. Affirmed.

(123 N. C. 16)

KRUGER v. BANK OF COMMERCE.
(Supreme Court of North Carolina. Oct. 18, 1898.)

APPEAL — REFUSAL OF JUDGMENT BY DEFAULT — PLEADING — ANSWER — FOREIGN JUDGMENT — CORPORATIONS — RECEIVERS.

1. An appeal lies from a refusal of a judgment by default and inquiry allowed by Code, § 386, on failure to file an answer to a verified complaint.

2. In an action against a foreign corporation,

an affidavit of its receiver merely averring his appointment by the court of the state of its residence is not an answer, where he does not appear and make himself a party to the action.

3. A decree in New York declaring the insolvency of a corporation of that state, and appointing receivers thereof, does not operate to divest the lien acquired by the levy of an attachment on the real estate of such corporation in North Carolina.

4. An extension of time to file an answer is a practice not to be encouraged.

Appeal from superior court, Dare county; Norwood, Judge.

Action by E. H. Kruger against the Bank of Commerce. From a refusal of judgment by default and inquiry, plaintiff appeals. Reversed.

E. F. Aydlett and F. H. Busbee, for appellant. Shepherd & Busbee and Pruden & Pruden, for appellee.

CLARK, J. The complaint was for an unliquidated account, and duly verified. No answer having been filed, the plaintiff was entitled to judgment by default and inquiry (Code, § 386), and from its refusal an appeal lay. *Griffin v. Light Co.*, 111 N. C. 434, 16 S. E. 423; *Curran v. Kerchner*, 117 N. C. 284, 23 S. E. 177. If the defendant had appeared and asked for time to file answer, its allowance would have been in the unreviewable discretion of the court (Code, § 274; *Mallard v. Patterson*, 108 N. C. 255, 13 S. E. 93), though such extension of time is a practice not to be encouraged (*Dempsey v. Rhodes*, 93 N. C. 120; *Griffin v. Light Co.*, supra). But there was no appearance, and the affidavit of one claiming to be one of the receivers for the defendant corporation, appointed by the court in New York, averring their appointment, was entitled to no consideration, as he did not come in and make himself a party to the action. The affidavit is not even accompanied by a certified copy of the alleged judgment of dissolution and appointment of receivers. It was in no sense an answer, and the plaintiff is entitled to have judgment by default and inquiry entered here, as was done in *Alspaugh v. Winstead*, 79 N. C. 526; Code, § 957. Had the foreign receiver come in and made himself a party to the action, and put his affidavit in the form of a verified answer, it would not have defeated the plaintiff's right to judgment; for it did not negative the plaintiff's grounds of recovery, but set up the appointment of receivers for the defendant corporation at its residence in New York. The court here having acquired jurisdiction by the levy of the attachment upon the defendant's realty in this state, the plaintiff's lien cannot be divested by the appointment of receivers in another state. *Moseby v. Burrow*, 52 Tex. 396. The appointment of receivers in the state of defendant's residence has no extraterritorial effect (*Boothe v. Clark*, 17 How. 322, 338), though the courts of other states, as a matter of comity, may permit such receivers to bring actions in their courts, where this will not militate to the injury of

their own citizens (6 Thomp. Corp. §§ 7334-7344; Hunt v. Insurance Co., 55 Me. 290; Beach, Rec. § 685). In City Ins. Co. v. Commercial Bank of Bristol, 88 Ill. 348, it is said: "Where real estate in one state, belonging to a corporation which has its chief place of business in another state, is attached in the courts of the state where the land lies, a decree of the court of the home state of the corporation appointing a receiver, and restraining it from further transacting business, affords no ground for quashing a writ of attachment, as the corporation is liable to suit in the state where the property is situated, to subject it to the demands of creditors." The decree in New York declaring insolvency and appointing receivers, has no effect upon the title to real property in another state. 6 Thomp. Corp. § 7343, and cases there cited. If titles could be affected by decisions of the courts of another state, of what avail would be our registration laws? This sums up the doctrine as almost universally recognized. Day v. Telegraph Co., 66 Md. 354, 7 Atl. 608. And especially is this so in states like ours, in which by statute the existence of corporations is continued, for the benefit of creditors and winding up affairs, for a prescribed time (Code, § 667) after the charter has expired or been declared forfeited. Association v. Fassett, 102 Ill. 315.

Error.

(123 N. C. 89)

ABBOTT v. HANCOCK.

(Supreme Court of North Carolina. Oct. 18, 1898.)

APPEAL—FRIVOLOUS DEMURRER.

Where a demurrer has been overruled, no appeal lies from a refusal to adjudge the demurrer frivolous.

Appeal from superior court, Craven county; Brown, Judge.

Action by Elizabeth Abbott against Robert Hancock. Defendant's demurrer was overruled, and from a refusal to adjudge it frivolous the plaintiff appeals. Appeal dismissed.

W. W. Clark, O. H. Guion, W. D. McIver, and D. L. Ward, for appellant. Simmons, Pou & Ward, for appellee.

CLARK, J. The demurrer having been overruled, the defendant appealed, as he had a right to do. Ramsay v. Railroad Co., 91 N. C. 418. The plaintiff also appeals because the judge refused to go further and hold the demurrer frivolous. Code, §§ 247, 388. This has been held not appealable. Walters v. Starnes, 118 N. C. 842, 24 S. E. 713. This is so as to refusing to strike out a frivolous or sham answer, because, if the defendant should get the verdict, the plaintiff can raise the same point by motion for judgment non obstante veredicto, and more delay would be incurred ordinarily by the appeal than by going to trial; and it is true as to a frivolous demurrer, because, even if the judge

should hold it frivolous, the plaintiff would not, as a right, be entitled to judgment, and the court, in its discretion, might permit the defendant to answer over. Dunn v. Barnes, 73 N. C. 273. It is different as to a motion for judgment for want of an answer, as that is a substantial right, which can only be asserted by an immediate appeal. Kruger v. Bank (at this term) 31 S. E. 270, and cases there cited. Appeal dismissed.

(123 N. C. 67)

BRITTON et al. v. RUFFIN.

(Supreme Court of North Carolina. Oct. 18, 1898.)

COVENANT OF WARRANTY—OUSTER.

A purchaser of growing timber cannot recover on a covenant where he had cut and removed all the timber his deed called for prior to surrendering the land to the true owner, since there was no ouster.

Appeal from superior court, Bertie county; Brown, Judge.

Action by D. W. Britton, as administrator of Josiah Mizell, deceased, and others, against Mary E. Ruffin, as administratrix of John B. Ruffin, deceased. From a judgment in favor of plaintiffs, defendant appeals. Reversed.

Francis D. Winston, for appellant. Battle & Mordecai, for appellees.

FURCHES, J. This appeal makes the fifth time this case has been here. 18 S. E. 72, 23 S. E. 927, 26 S. E. 642, 28 S. E. 963. From the reports of these various decisions, a full history of this case and the grounds of complaint and defense are fully known to the profession, and we do not propose to undertake a restatement of them here. It is sufficient to state that the plaintiff bought timber trees, standing and growing on the land, and took a deed therefor, with a covenant of warranty of title. This was in August, 1874, when the plaintiff entered upon the land, and commenced cutting, using, and appropriating the said timber. This he continued to do at such times as suited his convenience, until 1890, when he alleges that he surrendered his claim upon the demand of another, who claimed under a superior or paramount title. And it is admitted that the defendant, owing to the defective description in the deed under which he claims to hold, had no title to the land upon which said timber trees stood. But the jury find that before the plaintiff quit work, in 1890, upon the demand of the owner, the plaintiff had cut every stick of timber (and more, too) that he was entitled to under the terms of his deed; that he left no timber on the land that he was entitled to, if defendant had been the owner of the land at the making of his deed.

To entitle the plaintiff to recover in this action, two things must be established: There must be a failure of title, and there must be an ouster of possession, actual or

constructive. It is admitted that the defendant did not own the land upon which these trees stood, and consequently did not own the trees. But it is as necessary that there should be an ouster to constitute a cause of action as it is that there should be a defect of title. *Mizzell v. Ruffin* (this case) 118 N. C. 69, 23 S. E. 927; *Herrin v. McEntyre*, 8 N. C. 410; *Coble v. Welborn*, 13 N. C. 388; *Cowan v. Silliman*, 15 N. C. 46. It is not claimed that there was an eviction and actual ouster in this case. The most that is claimed is that in 1890 the plaintiff, upon the complaint of the owner of the land, desisted from further work in this swamp; and this was considered by the court to be sufficient to constitute an ouster, and to entitle the plaintiff to maintain his action. But this was upon the claim of the plaintiff that he was thus compelled to quit work in this swamp, before he got the timber he bought. But when it turned out, upon the finding of the jury, that the plaintiff had cut and carried off every stick of timber he bought, and more too, before 1890 (the time he says that he desisted from working in the swamp), he had nothing to surrender; and there is nothing to support his claim of ouster. There could be no ouster when there was nothing from which to be ousted. The land was never conveyed to him, and he never had possession of it. He only had the right to go upon the land to cut and carry away the timber; and, when this was done, his right to go upon the land ceased. Suppose A. sells land to B. for the life of C. B. enters upon the land, and holds possession of the same until after the death of C., and then the remainder-man takes possession. After this B. finds out that A. had no title to the land. Could B. maintain an action against A. for a breach of warranty? Would not the entry of the remainder-man be only the assertion of his right to enter as the remainder-man after B.'s term had expired, and not in derogation of any right B. had acquired by the terms of his purchase? If so, why would not the same rule apply here? What rights had the plaintiff in 1890, when the owner of the land took possession, and after the plaintiff had cut and carried off every stick of timber he would have been entitled to if the defendant had been the owner of the swamp? There being no ouster, the plaintiff's action must fail. It would have been different if the deed from defendant to plaintiff had contained a covenant of seisin, because this would have been broken upon the execution of the deed. This would have, at least, entitled the plaintiff to nominal damages, which would have carried with it the cost, under section 525 of the Code. *Wilson v. Forbes*, 13 N. C. 30. When this case was here, at February term, 1897 (120 N. C. 87, 26 S. E. 642), it seems to have been admitted that there had been a breach of warranty, and this, as we have seen, must include a defective title and ouster. But when it was

here at February term, 1898 (122 N. C. 113, 28 S. E. 963), and also in this appeal, ouster is denied; and we have to try the case upon the record in this appeal. Of course, when a breach of warranty is shown or admitted, —that is, defective title and ouster,—the plaintiff is entitled to at least nominal damages.

It was complained of, and excepted to by the defendant, that his honor reassembled the jury next morning after the verdict had been rendered to the clerk the night before, by agreement, when he instructed them to change their finding. This practice is allowed in the furtherance of justice, when it is perfectly apparent that it can do no harm, and is usually left to the sound discretion of the trial judge. But it is not a practice to be encouraged, as the court has the undoubted right to set aside the verdict where, in his opinion, it would be a miscarriage of legal justice to let it stand. But, as our judgment is put upon another ground, reaching the legal merits of the case, we do not pass upon the action of the court in recalling the jury. There were other exceptions, which we have not considered and do not pass upon, as we are of the opinion that the defendant's motion for judgment should have been allowed; that, as the verdict stands, the defendant was entitled to a judgment that she go hence without further day, and for costs. Code, § 526. And judgment will be so entered upon this opinion being certified to the court below. Error. Reversed.

(123 N. C. 706)

STATE v. DE BERRY.

(Supreme Court of North Carolina. Oct. 10, 1898.)

RAPE—ASSAULT WITH INTENT—EVIDENCE.

What defendant's intention was is a question for the jury, the evidence being that defendant threw prosecutrix on the bed, pulled up her clothes a little way, and that she then got away from him.

Appeal from superior court, Hertford county; Norwood, Judge.

Moses De Berry appeals from a conviction of assault with intent to commit rape. Reversed.

Maggie Vann, prosecutrix, testified in substance: "On the 25th of January, 1898, Tuesday, about 12 o'clock, the defendant came to my house in this county. He hailed, and I invited him to come in. After staying a short time, he said he would go, and asked me to go in the other house, and get his overcoat. I did so. He caught hold of me, and tried to throw me on the bed. I told him to let me go. He threw me on the bed, and pulled up my clothes a little way. I got away from him, and ran off. On Thursday I went to Jim Vaughan's, my brother-in-law. I told my husband, J. G. Vann, on the night of the same day, what the defendant had done. The defendant threatened to kill me if I told

it. He (the defendant) came to my house again on Wednesday, January 28th, about sunset. My sister-in-law, Julia Vann, was there. The defendant wrote on a slate that if I did not let him do what he wanted to do, he would kill me. I wrote the defendant two letters before I was married. Have not written him since." (Witness examines two letters which were handed to her by defendant.) She denied that she wrote them. Witness further testified: That Alice Carter, her nearest neighbor, lived about one-fourth of a mile from her. That she liked Alice, but Alice did not seem to like her. That her husband was working about 10 or 15 miles from her home when the defendant made the assault upon her. That she did not tell her sister-in-law about it until Wednesday night. She told said sister-in-law what was on the slate. She had been married about two years, and the defendant had been to her house about two or three times. That she made no outcry either during or immediately after the alleged assault. That she told no one about it until the succeeding Thursday, when she told her brother-in-law, Vaughan. Julia Vann was then introduced for the state, and testified as follows: "I am half-sister to J. G. Vann, the husband of Maggie Vann. Was at her house Wednesday night, when the defendant came there. He wrote Maggie on the slate, threatening to kill her if she told what he had done. Maggie wrote the defendant on the slate. While the writing was going on I was sitting between them. The defendant passed the slate to me, and I passed it to Maggie. I saw what was written on the slate. Maggie told me that night, after the defendant left, what had happened. I am 14 years old." Jim Vaughan, for the state, testified: "I am brother-in-law of Maggie Vann. She came to my house on Thursday evening. Asked me to go for her husband, saying that she was afraid to stay at home, because she thought the defendant would kill her. I went after her husband, and brought him to my house. Maggie told him about it in my presence. The place where her husband worked was four or five miles from my house. I live about two miles from Maggie. I told Maggie and her husband that I did not think the defendant was that kind of a man, and that I was surprised to hear of his doing such a thing. Alice Carter came to my house with Maggie." J. G. Vann, husband of the prosecutrix, was introduced by the state, and testified: "Jim Vaughan came to the camp where I was at work on Thursday evening, and told me that my wife sent him for me. I told him he was telling a story. I went with him to his house. My wife told me about the defendant's conduct to her, just as she has related it on the stand. I took her to H. D. Godwin's, a justice of the peace, and got out a warrant for the defendant that night. Defendant has not visited my house more than two or three times, that I know of, since I

was married. I did not tell defendant to bring my sister to my house from a wedding last Christmas." H. D. Godwin, for the state, testified: "I am a justice of the peace for Hertford county, and as such I issued the warrant for the arrest of defendant. On preliminary trial before me I cautioned defendant by telling him that he need not answer questions that would tend to criminate him. He was not sworn. I did not write down his statement." The witness Godwin was then asked by the state what the defendant said, and defendant objected, upon the ground that defendant had not been properly or sufficiently cautioned. Overruled, and defendant excepted. The witness Godwin, against defendant's objection, said, in answer to the above question: That defendant stated that he (the defendant) was at the house of Maggie Vann on January 25, 1898. That she was in the kitchen, and invited him in. It was raining, and he went in. She asked him to take off his hat and overcoat. He took off the overcoat, and she took it to the other house. That he remained half an hour. It continued to rain. She went to the other house to get defendant's coat, and defendant followed her. She handed him the coat, and assisted him in putting it on, and he put on the coat and left. The trial was on the 28th January, 1898. The state rested. Defendant testified in his own behalf: "I stopped at Joe Vann's, the husband of the prosecutrix, about 2 o'clock on January 25, 1898. Maggie carried my overcoat to the other house, brought me a chair, and said she was glad I had come; that she wanted me to stay until she finished drying up her lard. She said she was afraid the house would take fire and burn up. She wanted me to stay all the evening, and at first refused to get my overcoat. Said that I should not get married; she would see to it. She did not hold my overcoat for me to put on. I requested her to tell Anna, her sister-in-law, that I would come the next night, and write a letter for her. I then left. On the next night I went to Maggie's house. She wrote me on a slate to bring my horse inside the yard, and wait until Julia went to bed, and then I might sleep with her. I refused to do so, and told her that I would not let my horse stand out. She said to me that Lincoln Vaughan's horse and buggy had stood out there. I did not make any assault upon her, or any threat. I did not tell witness Godwin that I followed her in the other house when she went to get my overcoat. I did not follow her, but attended to the lard while she was out. I live three or four miles from her, and have known her a long while. We were sweethearts for some time previous to her marriage. I have kissed her since she was married, and received letters from her also." Alice Carter, for defendant, testified: "I live three or four hundred yards from Maggie. Saw her on the 28th of January last. She did not tell me of any assault having been

committed upon her by defendant. She went with me on the next day, upon my invitation, to Jim Vaughan's, but did not tell me anything about the alleged assault, nor did I hear of it until Friday. On both days she was lively and gay, and seemed to be all right. Julia Vann told me that Maggie and defendant had written to each other on the slate on Wednesday night, January 26th, but that Maggie would not let her know what they were writing." Ellen Bryan, for defendant, testified: "I saw Maggie on Saturday after Moses was put in jail. She told me about the writing on the slate, and said that she did not show the writing to Julia; that everybody could not read Moses' handwriting." John Gatling, for defendant, testified: "I am son-in-law of Alice Carter. Julia Vann told me that defendant and Maggie wrote to each other on a slate on Wednesday night, January 26th, but they did not let her see what they wrote." Several witnesses were introduced, who testified to the good character of defendant, after having qualified themselves to do so. The state then introduced Anna Vann, who testified: "I am sister to J. G. Vann. I did not ask defendant to write for me, as he has testified. I can write my own letters." Maggie Vann was then recalled, and testified: "I did not ask defendant to stay all night; did not know he had a horse; did not make the statements on that night, as testified to by defendant." The state here introduced several witnesses, who testified that they knew the neighborhood reputation of Maggie and the defendant, and that their characters were good. The court, among other things, charged the jury that if they were fully satisfied from the testimony that defendant caught hold of Maggie, and threw her violently on the bed, and pulled up her clothes, as stated by her, then he would be guilty of the crime charged in the indictment, and the jury should so find. To this part of the charge the defendant, in apt time, excepted. Verdict of guilty. Defendant moved for new trial, and assigned as grounds: "(1) That the court erred in admitting the testimony of Godwin, the justice of the peace, as to the statements made by defendant during the preliminary trial before him; (2) that the court erred in giving the jury the instruction above set out, whereas the jury ought to have been instructed that if they were fully satisfied that defendant caught hold of prosecutrix, and threw her violently on the bed, and lifted up her clothes, as testified to by her, then these would be facts from which the jury might infer that the assault was made with the intention of committing the rape." Motion for new trial overruled, and defendant appealed from the judgment pronounced, which was that defendant be confined in the state prison for a term of five years.

George Cowper, for appellant. The Attorney General, for the State.

FAIRCLOTH, C. J. The defendant is indicted for an assault with intent to commit rape. Several witnesses were examined. The prosecutrix testified that he (the defendant) "threw me on the bed, and pulled up my clothes a little way. I got away from him." His honor charged the jury "that if they were fully satisfied from the testimony that the defendant caught hold of Maggie Vann, and threw her violently on the bed, and pulled up her clothes, as stated by her, then he would be guilty of the crime charged in the bill of indictment, and the jury should so find." There is error. The charge assumes as a fact that the defendant intended to accomplish his purpose at all hazards, even by force. Intent in the crime charged, is a question of fact for the jury, and not for the court. Intent, in such cases, is a material and essential ingredient, and must be established beyond a reasonable doubt in the minds of the jury. This rule has been so often iterated and reiterated by this court that it seems sufficient to refer to the following decisions, which, with the authorities cited, cover the whole ground: *State v. Brooks*, 76 N. C. 1; *State v. Massey*, 86 N. C. 658; *State v. Mitchell*, 89 N. C. 521; *State v. Williams*, 121 N. C. 623, 28 S. E. 405.

New trial.

(S. S. C. 461)

Ex parte KIBLER.

PARKER et al. v. NEWTON.

(Supreme Court of South Carolina. Oct. 25, 1898.)

INSANE PERSONS—JUDGMENTS—JURISDICTION OF PERSON.

1. A judgment against a person who was of unsound mind at the commencement of the action, and who so remained until after judgment, is void for want of jurisdiction.

2. The fact that after the commencement of the action, and before judgment was rendered, defendant was adjudged a lunatic, and a committee was appointed, does not thereby give the court jurisdiction of defendant, where she was of unsound mind at the commencement of the action, and the committee was not made a party to the action.

Appeal from common pleas circuit court of Richland county; J. C. Klugh, Judge.

Action by George W. Parker and another against Sarah A. Newton, in which there was a judgment in favor of plaintiffs. Theodore N. Kibler, as administrator of the estate of Sarah A. Newton, deceased, filed a petition to vacate the judgment. From a judgment denying the petition, petitioner appeals. Reversed.

P. H. Nelson and Allen J. Green, for petitioner. J. S. Muller and J. T. Selbels, for respondent.

GARY, A. J. One of the questions presented by the exceptions is whether the court which rendered judgment in the case of George W. Parker and Lizzie McCarter, plain-

tiffs, against Sarah A. Newton, defendant, had acquired jurisdiction of the said defendant. As this is a preliminary question, it will be first considered. The affidavits introduced upon the hearing of this case before his honor, Judge Klugh, satisfy this court that Mrs. Sarah A. Newton was of unsound mind at the time the action of George W. Parker and Lizzie McCarter was commenced against her, and that she continued to be of unsound mind until her death, which took place after judgment was recovered against her in the action aforesaid. Having found such to be the fact, the case of *Ex parte Roundtree*, 51 S. C. 405, 29 S. E. 66, shows conclusively that the court did not, at any time during the pendency of the action aforesaid, acquire jurisdiction of said defendant. In the case of *Ex parte Roundtree*, Mr. Chief Justice McIver, in behalf of the court, uses this language: "In the argument here, counsel for respondent has raised a jurisdictional point, which, it is well settled, may be raised at any time. This point is that inasmuch as Mrs. E. A. Roundtree was, at the time this action was commenced against her, and at the time the judgment was rendered against her, a person of unsound mind, incapable of managing her own affairs, the court had no jurisdiction. If this be so, then the court which rendered the judgment never acquired jurisdiction of her person; and for that reason there was no error in vacating the judgment, for it is not pretended that she was represented by a guardian ad litem, in the action in which the judgment was obtained. Indeed, it does not appear that any guardian ad litem had then been appointed, though, in less than a year after the judgment was obtained, Mrs. E. A. Roundtree was formally adjudged to be a person of an unsound mind, and incapable of managing her affairs, and a guardian ad litem has been appointed, who represents her in this proceeding. The fact that she was a person of unsound mind, incapable of managing her affairs, at the time Michalson commenced his action against her, and at the time he obtained judgment, is distinctly alleged in the petition, and is nowhere denied. This, therefore, constitutes an insurmountable obstacle in the way of appellant, and shows conclusively that there was no error in vacating the judgment in question. See *Henderson v. Mitchell*, Bailey, Eq. 116, where it is said that a lunatic cannot be sued unless represented by a committee (now by guardian ad litem)."

The fact that after commencement of the action, and before judgment was rendered against the defendant, she was adjudged a lunatic, and a committee appointed in her behalf, cannot have the effect of taking this case out of the rule announced in the case of *Ex parte Roundtree*; for even admitting that, as the case was within the equitable jurisdiction of the court, the committee had the right to represent the lunatic, still this right could only be exercised after being made a

party to the action, which was not done. It was incumbent on the plaintiffs to have the proper persons made parties to the action, and, as they failed in this particular, their judgment must be vacated, and the petitioner granted the relief for which he prays. The view which this court takes of the jurisdictional question raised by the exception renders unnecessary a consideration of the other questions in the case. It is the judgment of this court that the judgment of the circuit court be reversed, and the case remanded to that court, for such proceedings as may be necessary to carry into effect the views herein announced.

(53 S. C. 410)

WALLINGFORD et al. v. WESTERN UNION TEL. CO.

(Supreme Court of South Carolina. Oct. 24, 1898.)

TELEGRAPH COMPANY—DAMAGES—PLEADING.

Plaintiff alleged that, by reason of defendants' failure to deliver a telegram containing an offer for a car load of mules, he was forced to keep them for several months at great expense, and was forced to sell them at the end of that time for a certain sum, which was less than the offer. *Held*, that the complaint stated a cause of action.

Appeal from common pleas circuit court of Greenwood county; James Aldrich, Judge.

Action by Samuel Wallingford & Son against the Western Union Telegraph Company. Judgment for plaintiffs, and defendant appeals. *Affirmed*.

Giles & Magill, for appellant. Wells, Ansel & Cothran, for appellees.

JONES, J. This action is for damages for failure to seasonably deliver a telegraphic message. The appeal is from an order overruling a demurrer to the complaint on the ground that it does not state facts sufficient to constitute a cause of action, in that the damages alleged were not the direct and proximate result of the alleged failure to promptly deliver said message. It appears from the complaint that Samuel Wallingford and his son, S. L. Wallingford, are partners in the business of selling mules in Sheridan, Ind., and that the father resided at Greenwood, S. C. On the 27th day of December, 1895, the defendant corporation received from S. L. Wallingford, at Sheridan, Ind., and, for a consideration received, agreed to transmit and deliver to Samuel Wallingford, at Greenwood, S. C., the following message: "Shall I sell Simms & Wedham load for hundred, four months, six per cent.?"—meaning, "Shall I sell Simms & Wedham a car load of mules, consisting of thirty head, at \$100 per head, on four months' time, at six per cent. interest." This message was received by the defendant's agent at Greenwood, S. C., on the 27th December, 1895, and, as alleged, the defendant carelessly and negligently failed to

deliver same to Samuel Wallingford for more than a week thereafter. It appears also that plaintiffs would have sold the mules at the price named, but for the negligent failure to deliver the message within a reasonable time. The damages alleged were as follows; "(10) That by reason of the careless and negligent conduct of the defendant's agent, in failing to deliver said message to the said Sam Wallingford upon its receipt, or within a reasonable time after its receipt, at Greenwood, South Carolina, the plaintiffs were forced to keep said thirty head of mules for three months, at great expense and care to the plaintiffs, to wit, the sum of seven dollars per head per month, in feed and attention, and were forced to sell said thirty head of mules at the expiration of said three months at a great loss to the plaintiffs, to wit, at the price of seventy-seven and fifty one-hundredths dollars per head, making the total loss to the plaintiffs upon each head of the said thirty head of mules the sum of forty-three and fifty one-hundredths dollars; and thereby the plaintiffs have been damaged by the careless and negligent conduct of the defendant as aforesaid in the sum of thirteen hundred and five dollars." The complaint further alleged that defendant had notice of the importance of the said message, and the damage and loss that would likely fall upon the plaintiffs if the message was not delivered promptly and correctly to Samuel Wallingford.

It is not, and could not be, questioned that a telegraph company is liable for damages that are the natural and proximate result of its neglect to seasonably deliver a message received by it for transmission and delivery. The question here is whether the damages as alleged in the complaint are of the kind named. Damages are a natural result when they are such as usually follow in the ordinary course of things, and they are proximate when they result directly, not remotely, from the alleged cause. Such damages are recoverable because they are supposed to be within the contemplation of the parties when they contract. In this case the loss of the sale of the mules on the terms named was the direct and natural result of the failure to deliver the message, as it is admitted by the demurrer that such sale would have been consummated if the message had been delivered in time. Whether this damaged plaintiffs depends on whether the market value of the mules at the time the message ought to have been delivered was less than the price offered. The measure of damages in such a case as this is the difference between the market value of such mules on the same terms at the time the message should have been delivered and the price offered, in case such market value was less than the price offered. By "market value" is meant the price that could have been obtained in open market, on fair competition, on similar terms, at Sheridan, Ind. or, if there was no market

price there, at any convenient market for mules where there was at the time a market price. Where transportation and other expenses would have been incurred in selling at a convenient market other than Sheridan, such expenses became an element of damages. If there was no market price for mules when the message ought to have been delivered, and plaintiffs were forced to keep the mules for a time, then the measure of damages would be the price offered, less the market price which could have been obtained at the earliest day thereafter, with expenses of keep and of transportation, if any. We have assumed the solvency of the party making the offer, inasmuch as no question has been suggested as to that. The foregoing principles are well supported by authority. See *Sitton v. MacDonald*, 25 S. C. 71; *Telegraph Co. v. James* (Ga.) 16 S. E. 83; *Squire v. Telegraph Co.*, 98 Mass. 232; *Manville v. Telegraph Co.*, 37 Iowa, 214; *True v. Telegraph Co.*, 60 Me. 9; 25 Am. & Eng. Enc. Law, 848. The complaint alleges that the plaintiffs were "forced" to keep the mules for three months, by which we understand, giving the complaint a liberal construction, that they could not sell the mules before the expiration of that time; and the complaint also alleges that at the expiration of that time they were "forced" to sell at \$77.51, which we take to be equivalent to saying that \$77.51 was the best price they could obtain. As we construe the complaint, it is not demurrable for failure to state facts sufficient to constitute a cause of action, under the principles announced above. The judgment of the circuit court is affirmed.

(38 S. C. 358)

POWERS v. STANDARD OIL CO.

(Supreme Court of South Carolina. Oct. 18, 1898.)

INJURY TO EMPLOYE—EVIDENCE—OBJECTION—CONTRIBUTORY NEGLIGENCE—ASSUMPTION OF RISK.

1. On the issue of whether defendant was plaintiff's employer, the fact that the cards, bill heads, etc., used in the business in which plaintiff was employed were in defendant's name, is admissible.

2. Objection to testimony after it is received is too late.

3. One party may introduce part only of a record, the other party then being at liberty to introduce the whole.

4. An employé injured by the breaking of a rotten plankway, along which he was obliged to walk in the discharge of his duty, need not show that his employer owned the planks, but merely that it was operating and conducting the business in which the plankway was provided for the use of its employes.

5. Contributory negligence of, or assumption of risk by, an employé injured by the breaking of a plankway along which he was obliged to walk, is not so clearly shown that the question should be taken from the jury, by his testimony that he had, every day, when crossing it, seen its rotten condition, and knew that it was in bad condition, and had spoken to the manager about it, who had promised to have it fixed, but that he had to cross it or lose his

job, and thought it would carry his weight when it broke.

Appeal from common pleas circuit court of Richland county; J. O. Klugh, Judge.

Action by Jerome W. Powers against the Standard Oil Company. Judgment for plaintiff. Defendant appeals. Affirmed.

Mordecai & Gadsden, for appellant. P. H. Nelson and W. D. Melton, for respondent.

JONES, J. This appeal is from a judgment on a verdict against the defendant for damages for personal injuries alleged to have been sustained by plaintiff, while in the defendant's employ, by reason of defendant's negligence in keeping an unsafe, elevated plankway, along which plaintiff was required to walk in the discharge of his duty as employé, which plankway, being rotten, gave way under plaintiff, causing him to fall some distance to the ground, and resulting in the injuries complained of.

The first exception complains of error in admitting in evidence the tickets, letter heads, bill heads, postal cards, etc., marked Exhibits "A" and "B." These cards, bill heads, etc., were stamped, "Standard Oil Company (of Ky.)." One of the issues raised was whether the Standard Oil Company of Kentucky, defendant, or the Standard Oil Company of New Jersey, employed the plaintiff; the defendant company contending that it had not employed plaintiff. The plaintiff had testified that he was employed by the defendant, and to show that defendant was conducting the business at Columbia, S. C., where plaintiff was working and was injured, after showing that such or similar cards and bill heads, etc., were used in the conduct of the business in which plaintiff was employed, offered the same in evidence. We think the evidence was competent, being relevant to show who was carrying on the business in which such papers were used. But, even if this were not true, appellant could not complain of the evidence, because the record does not disclose that it objected to the introduction of these papers at the time they were introduced. The record does show that, after the papers were all received in evidence without objection, appellant's counsel asked, "Does your honor rule them competent?" to which the court replied, "Yes, sir; I think they have been sufficiently proved to be offered in evidence for whatever they are worth." If this could possibly be construed as an objection to the testimony, it came too late, since the evidence had already been received without objection. This is not merely technical. It is a salutary rule, which requires an objection to testimony before it is received, in order to base an exception for error.

The second exception assigns error in holding that plaintiff could introduce part of a record from the office of the secretary of state, whereas he should have held that the en-

tire record must be put in evidence. The record referred to was under the act of 1893, declaring the terms on which foreign corporations may carry on business in South Carolina, and consisted of (1) a written declaration designating some place within this state as the principal place of business or place of location of said corporation in this state, at which all legal papers may be served upon any officer or agent found therein; (2) copies of its charter and by-laws; and (3) a sworn statement showing the residence and post-office address of such corporation, the amount of capital stock, and the names and residences and post-office addresses of its president, secretary, and directors. The paper introduced and received in evidence was the sworn statement last mentioned, purporting to be that of the "Standard Oil Co. (of Ky.)." It is common and approved practice in this state, on proof and production of a record consisting of several papers, to introduce in evidence such part thereof as may be deemed relevant to the matter in issue. The part introduced can prove only what it purports to prove on its face, and when a part of a record has been introduced by one party the whole may be introduced by the other party, if he desires. The exception before us does not go to the proof of the record, or its competency and relevancy as a whole, but merely complains that a part was introduced, instead of the whole. We find no error in the ruling complained of.

The third, fourth, and fifth exceptions allege error in not granting the motion for nonsuit, in that no competent testimony had been introduced tending to establish that the defendant company employed plaintiff, or that the planks which were alleged to be rotten and unsound were the property of the defendant. The plaintiff expressly testified that at the time he received the injury he was working for the Standard Oil Company of Kentucky; and, as already referred to in considering the first exception, evidence was introduced tending to show that the defendant was conducting the business in the prosecution of which, as employé, plaintiff was injured. It was not necessary to prove that defendant was owner of the planks, the unsound condition of which it was alleged caused the injury. It was sufficient, to prevent a nonsuit, to offer some evidence tending to show that defendant was operating and conducting the business in which the plankway was provided for the use of its servants in their employment. There was no error in refusing the nonsuit on these grounds.

The sixth exception alleges error in not granting the nonsuit on the ground that plaintiff testified that he knew of the patent defect in the planks, and that he voluntarily assumed the risk. The testimony touching this matter referred to by appellant is as follows: "Q. Did you notice the rotten condition of that plank that morning? A. Had been noticing it every morning. Q. Did you state

to Mr. Mundy you would give up your job, rather than go across that plank? A. No, sir. Q. You knew it was rotten? A. I knew it was in bad condition. Q. You took the risk when you went on it? A. I had to do it. It was necessity with me. Q. Why? A. Bread and meat. Q. You would have lost your job if you had refused to go on it? A. Yes, sir." The plaintiff also testified that in July, previous to the day he received the injury, which was July 26th, he had called the attention of the manager to the fact that the plankway was dangerous, and that the manager promised to have it fixed; that he crossed the plankway every day until the 26th of July; and that on that day he thought it would carry his weight. In reference to the motion for nonsuit on this ground, the circuit judge ruled that "contributory negligence is a matter for the jury." The answer of the defendant set up the defense of contributory negligence. The testimony of the plaintiff did not admit or so clearly establish the defense as to render a nonsuit proper under the rule stated in *Pool v. Railroad Co.*, 23 S. C. 288, and *Slater v. Railway Co.*, 29 S. C. 100, 6 S. E. 936. The ruling of the circuit court is sustained by the cases of *Lasure v. Manufacturing Co.*, 18 S. C. 281, *Farley v. Veneer Co.* (S. C.) 28 S. E. 197, and *Parker v. Railroad Co.*, 48 S. C. 384, 26 S. E. 669, where the rule is stated that it is a question for the jury to determine whether a servant is guilty of contributory negligence because he remains in the service of his master after he has knowledge of defects in the machinery or appliances with which he is furnished to work.

The seventh exception complains that the circuit judge in his ruling above ignored the distinction between contributory negligence and the voluntary assumption of risk by the plaintiff, and in not nonsuiting plaintiff on the evidence submitted on that point. Whether plaintiff voluntarily assumed the risk after knowledge of the defect was, like the matter of contributory negligence, a question for the jury, unless the evidence by plaintiff is so clearly one way as not to admit of any other construction than that the plaintiff did assume the risk after knowledge of the defect. As stated in *Hooper v. Railroad Co.*, 21 S. C. 547: "An employé may waive the right to exact of his employer such appliances as the law in its strictness might require; and as a general rule the acceptance of service, or remaining in the service without complaint, after full knowledge of a permanent, patent defect, amounts to such waiver as to that particular defect." In this case the circuit judge could not say that plaintiff's evidence established such a waiver so clearly as not to admit of a contrary view. There was evidence, as stated, that defendant, through its manager, had been notified of the defective plankway, and had promised to repair it. A promise by the master to remedy a defect tends to rebut the inference of waiver of the defect by the servant's remaining in the master's

service after knowledge. If the servant continued in discharge of his duties, relying on the master's promise to remove a defect, he could not be said to have waived such defect. The jury was the proper tribunal to determine this question in this case. The judgment of the circuit court is affirmed.

(53 S. C. 350)

CAIN et al. v. CAIN et al.

(Supreme Court of South Carolina. Oct. 18, 1898.)

CO-TENANTS—ACCOUNTING—ADVANCEMENTS.

1. Where one is accountable for rents and profits of land, and does not show what he received, evidence of rental value is admissible.

2. Rents and profits received by the occupying tenant should, in an accounting by the co-tenants, be regarded as paid pro tanto by the increased value imparted to the premises by his improvements.

3. Where one co-tenant cultivates the land, and the others occupy with him the common dwelling, and receive their support from the product of the farm, what they so receive should be considered on an accounting, though the cultivating tenant is the father of the others, who are minors.

4. A vested remainder in real estate is the subject of advancement.

5. The value of an advancement, consisting of a vested remainder in real estate, is, in the absence of extreme youth or old age of the life tenant, one-half the value of the fee.

6. Where one makes an advancement to his children by his second wife of the remainder in land, worth \$1,600, after life estate of such wife, it will be considered none the less an advancement because said wife furnished \$600 of the purchase money, on the agreement that it should be conveyed to them as it was, but value thereof will be computed on the basis of the fee being worth only \$1,000.

Appeal from common pleas circuit court of Florence county; Ernest Gary, Judge.

Action by Charlton W. Cain and others against Hattie C. Cain, in her own right and as administratrix of T. C. Cain, deceased, and others. From the judgment, plaintiffs appeal. Modified.

Willcox & Willcox, for appellants. Woods & Shipp and J. P. McNeill, for appellees.

JONES, J. Plaintiffs bring this action for partition of land, an accounting for rents and profits, and to have certain of the defendants account for advancements. Sarah E. Cain died intestate in June, 1883, seised of one of the tracts of land described in the complaint, leaving as her heirs at law her husband, T. C. Cain, and the plaintiffs Charlton and Sallie Cain, her children. T. C. Cain and the plaintiffs, who are still minors, lived on and received their support from the land until February, 1898, when T. C. Cain married the defendant Hattie C. Cain. The family, including the plaintiffs, continued to reside on the place, and to derive their support therefrom, until the death of T. C. Cain, in 1896. Hattie C. Cain became administratrix of T. C. Cain. Four of the defendants are minor

children of T. C. Cain by his second wife, Hattie. A few days before his death T. C. Cain conveyed a tract of land said to be worth \$1,600 to his wife, Hattie C. Cain, for life, and at her death to her said four children. Plaintiffs now seek an accounting by the administratrix of T. C. Cain for rents and profits of the tract inherited from Sarah E. Cain, from the death of Sarah E. Cain, in 1883, to the death of T. C. Cain, in 1896, and an accounting by the four children of Hattie C. Cain for the value of this estate in remainder in the tract conveyed to them by T. C. Cain just before his death.

The special referee to whom the case was referred held the administratrix accountable for two-thirds of the rents and profits received by T. C. Cain for 12 years, at \$90 per year, that sum, according to the testimony, being about the rental value of the premises. In reaching this result, the referee admitted and considered the testimony as to the rental value of the land. The circuit court held that the referee erred in this, and that he should have held the administratrix accountable for only the value of the rents and profits actually received. We think the circuit court misunderstood the ruling of the referee in this regard, as the referee's report clearly shows that he held the administratrix of the occupying tenant accountable only for rents and profits received. The evidence as to the rental value of the premises occupied and cultivated was admitted and considered merely as tending to establish the value of the rents and profits received, in the absence of any definite showing by the administratrix as to the actual receipts. Under such circumstances, the evidence was admissible. If the occupying tenant wishes to limit his accountability to rents and profits actually received, it is his privilege to show what he has received; but, if he is unwilling or unable to make such showing, it is competent to show, by speculative testimony, what he has probably received. Under ordinary conditions, it is probable that a fair rental value of premises will closely approximate the value of rents received in case of a lease to third persons, or the value of the net profits received, in case the occupying tenant cultivates the land himself and takes and appropriates the products thereof.

We agree, however, with the circuit court in holding that the referee erred in charging the occupying tenant with \$1,080 as the amount of rents and profits received. It is true this sum represents the rental value of the premises for 12 years, as estimated by several witnesses; but it also appeared in evidence that this rental value was due in part, at least, to the fact that T. C. Cain, the occupying tenant, had made improvements on the common property, clearing some 18 acres, building barns, etc. At an early period in this state the rule was stated to be that the occupying tenant was liable for the rents and profits received of so much of

the premises as was capable of producing rent at the time he took possession, but was not liable for what was rendered capable by his labor; so that he was not charged with rents and profits received from land cleared and put in cultivation during his occupancy. *Thompson v. Bostick*, 1 McM. Eq. 75; *Hancock v. Day*, Id. 69; *Holt v. Robertson*, Id. 475; *Volentine v. Johnson*, 1 Hill, Eq. 49. This was upon the theory that as the occupying tenant could not, as matter of right, charge for improvements made without the consent of his co-tenants, it would be inequitable to charge him with rents and profits resulting therefrom. But the rule is now established in this state that, in an equitable accounting for rents and profits, the occupying tenant may be allowed as a set-off against rents and profits received, not the cost of the improvements made by him, but the increased value of the premises resulting from such improvements, provided the circumstances are such as to render it an obvious hardship to deprive him of it, and provided, further, that the allowance for such improvements may be made consistently with the equity of the co-tenant. *Johnson v. Harrelson*, 18 S. C. 604; *Buck v. Martin*, 21 S. C. 592; *Johnson v. Pelot*, 24 S. C. 264. In such equitable accounting, "the rents and profits shall be regarded as paid and discharged pro tanto by the increased value which may have been imparted to the premises by the improvements." *Sutton v. Sutton*, 26 S. C. 33, 1 S. E. 19, quoted with approval in *Tribble v. Poore*, 28 S. C. 565, 6 S. E. 577. While the testimony does not show specifically the value of the improvements, there was general testimony by Mrs. Cain to the effect that, after supporting the family, including the plaintiffs, T. C. Cain put what money he made back on the place in improvements, fertilizing, building barns, etc. The referee erred in not ascertaining the value which the improvements imparted to the premises, and in not deducting the same from the rents and profits actually received by T. C. Cain. In this connection the referee should ascertain and report what amount of the rents and profits T. C. Cain received, took, or appropriated in excess of his share. The testimony shows that, while T. C. Cain cultivated the tillable land, yet the plaintiffs occupied with him the common dwelling house, and received their support from the products of the farm. The referee seemed to think that, since it is the duty of a father to support his minor children, no account should be taken of so much of the farm products as went to the support of the plaintiffs; but this case is not one involving the liability of a father to support his minor children, but is an equitable accounting for rents and profits received among co-tenants, and it would be inequitable to make the father, under the circumstances of this case, account for the whole rents and profits of the farm as received by him, when the children resided with him as a family

on the common property, and received their support therefrom. The land held in common seems to have been the main, if not sole, reliance for the support of the family. But whatever of the rents and profits T. C. Cain received and appropriated to himself in excess of his share, to the exclusion of plaintiffs, he should account for. By the common law, one tenant in common, in the absence of an agreement, express or implied, could not require his co-tenant to account for receiving more than his share of the rents or use of the common property. But by St. 4 Anne, c. 16, § 27, one co-tenant was allowed an account against his co-tenant "for receiving more than comes to his just share or proportion." The courts of England and many of the states of this Union have held that this statute is confined to cases where rents have been received from a third person, and has no application to cases wherein the occupying tenant has cultivated the land and appropriated to himself the products. Hence authorities elsewhere are numerous to the effect that an occupying tenant is not liable to account to his co-tenant for the products of the common property which he appropriates to his own use. See 3 Shars. & B. Lead. Cas. Real Prop., 98, note to *Griswold v. Johnson*, and note to *Ward v. Ward* (W. Va.) 52 Am. St. Rep. 926 (s. c. 21 S. E. 746). But the courts of equity in this state give relief to co-tenants beyond the statute of Anne or statutes of similar import. It is the settled law of South Carolina that the occupying tenant is not only liable to account for rents of the common property received from others in excess of his share, but in case he cultivates or uses the common property in excess of his share, and takes or appropriates the proceeds or use, he is accountable to his co-tenant for the net profits arising from such use. This is the rule of accountability when the possession of the occupying tenant is not tortious. When, however, his possession is tortious, he is chargeable with what he actually received, viz. the rental value. *Jones v. Massey*, 14 S. C. 309; *Thompson v. Peake*, 38 S. C. 454, 17 S. E. 45, 725.

But, to make the rule stated applicable to the present case, where the co-tenants all occupy the dwelling house of the common property and all receive their support from the proceeds of the farm, it should be shown that T. C. Cain appropriated to himself more than his share of the proceeds of the farm, and for that excess he should account. Under the authorities in this state, to take the net profits arising from the occupying tenant's cultivation of more than his share of the common property is to receive the "rents and profits" thereof. *Jones v. Massey*, supra; *Thompson v. Bostick*, supra. But, in every case where the possession of the occupying tenant is not tortious, it is essential that the occupier take or receive more than his just share of the proceeds or products of the common property, in order to render him lia-

ble to account to his co-tenant, in the absence of agreement, express or implied.

As to the matter of advancements: The circuit court ought to have ruled on this question, but did not. The referee decided against the claim for advancements. He held that "no advancement has been shown for the purpose of this case. A future interest to the children is only shown, and which they may never actually enjoy. The life tenant has been given only a life estate. The nature of the estate conveyed and the estate descend are so different that I know of no rule by which to determine the value of the alleged advancement. Advancements are purely statutory, and I have been furnished no authority for applying by analogy the rule for estimating dower interest. Besides, a large part of the original purchase money was furnished by the life tenant on condition of this conveyance to herself and children." We do not think the claim for advancements can be rejected on the grounds stated by the referee, and, as the case must go back to the referee, the question of advancements must also be considered by him.

A vested remainder in real estate is clearly the subject of an advancement, for, while the possession is in futuro, such a remainder is a present and fixed interest in the seisin and property. *Hughey v. Elchelberger*, 11 S. C. 36; 1 Am. & Eng. Enc. Law (2d Ed.) 766. In the case of *Hughey v. Elchelberger*, supra, where the donor reserved the right to use, occupy, and enjoy the land, and even to revoke the gift, the land, on the death of the donor intestate, was held to be an advancement. In this case there is no contingency which might defeat the estate given the children in remainder. Such an estate, being the subject of advancement, is, of course, capable of valuation. The value of the estate in remainder is the difference between the value of the estate in fee and the value of the life estate. In the absence of the adoption in this state of any table of life annuities, we see no good reason why the rule, which experience has approved, of assessing the one-sixth of the fee-simple value of the estate in money in lieu of the widow's dower or life estate in one-third, may not be adopted in estimating as an advancement the value of an estate in remainder after a life estate. If a life estate in one-third is valued at one-sixth of the whole, then a life estate in the whole or any definite part may be valued at one-half its fee-simple value. Hence an estate in remainder after a life estate may be valued at one-half of the fee-simple value of the whole. It may be, in estimating the value of the life estate, as Judge Nott said in *Wright v. Jennings*, 1 Bailey, 280, in reference to assessing one-sixth of the fee-simple value in lieu of dower, that "in extreme cases, of youth on the one hand, or of age and infirmity on the other, something more or less, according to circumstances, may be allowed." It might be more scientific to

have a rule based on life expectancies and tables of annuities, but, in the absence of legislation, we prefer to follow the rule above stated, which is simple, easy of application, and approximately just.

In reference to the fact that the life tenant furnished \$600 of the money with which T. C. Cain originally purchased the land under an agreement that T. C. Cain would convey the land to her and her children, we would say that this ought not to control in determining whether there was any advancement at all. The consideration expressed in the deed to Hattie C. Cain and children was \$1,600, no part of which was paid by the grantees, except as the \$600 originally furnished by Hattie C. Cain may be regarded as entering into that consideration. The remaining \$1,000 of the original purchase money was paid by T. C. Cain, and if there was an understanding, as Mrs. Cain testifies, that the land was to be conveyed to her and the children in the manner it was done, then T. C. Cain intended to make provision for the children in the land when he bought it, and this intention he carried out in the deed executed a few days before his death. Having died intestate, if he had not conveyed this land as he did, it would have been distributable among all his heirs at law, subject, at most, to a resulting trust in favor of Hattie C. Cain to the extent of the purchase money furnished by her. The testimony shows that the original purchase price of the land was \$1,600, and that the land was worth that sum. If, therefore, Hattie C. Cain furnished six-sixteenths of the purchase money on condition of a conveyance to herself and children, all the claims of equity as to the money furnished by her may be met by regarding the value of the remainder in ten-sixteenths of the land as the value of the advancement to the four children by T. C. Cain from his own estate, for which they should account. According to our statute and decisions thereon, the value of an advancement must be estimated at the time of the death of the intestate, relation being had to its condition at the time of the gift. The judgment of the circuit court is modified so as to recommit the case to the referee to take the accounting, and determine the question as to advancement, with the principles herein announced.

(53 S. C. 364)

MILLER et al. v. SOUTHERN LAND & LUMBER CO. et al.

(Supreme Court of South Carolina. Oct. 18, 1898.)

RECEIVERS—INSOLVENCY—EXCEPTION.

1. An exception claiming that the order appointing a receiver, on the facts proved and decided, was illegally, improvidently, and erroneously made, is not too general; the record showing the facts proved and decided.

2. The appointment of a receiver, authorized by Code, § 265, subd. 4, "when a corporation

is insolvent or in imminent danger of insolvency," is improperly made; the assets of the corporation being three times its stated indebtedness, though it is also indebted to its officers in an amount not shown; it being shown that, instead of its property being seriously depreciated, large additions have recently been made to it; and it not appearing that it is in any way endeavoring to dispose of its property with intent to hinder, delay, or defraud its creditors.

3. A receiver should not be appointed on application of one who has been tendered the amount due him; the appointment being opposed by the other creditors.

Appeal from common pleas circuit court of Hampton county; James Aldrich, Judge.

Action by F. J. Miller and another, trading under the firm name of Miller, Nixon & Co., against the Southern Land & Lumber Company, a corporation. Wood Bros., creditors of the corporation, were, on their petition, made defendants; and, a receiver for the corporation having been appointed on their motion, said corporation appeals. Reversed.

Wm. T. Gary, for appellants. W. S. Tillinghast and W. B. Smith, for respondent Wood Bros. E. F. Warren, for respondents Miller, Nixon & Co.

JONES, J. This appeal is from an order appointing a receiver of the property of the Southern Land & Lumber Company, made on the application of Wood Bros., defendants, and creditors of said company. The grounds of appeal are: (1) That the circuit judge erred in his conclusion of law to the effect "that under Code, § 265, subd. 4, and the law generally upon this subject, the plaintiffs (rather, Wood Bros., and the creditors represented by them) are entitled to the relief asked for; i. e. the appointment of a receiver of the property and assets of said corporation. (2) That the Southern Land & Lumber Company also excepts to said conclusions of law generally, in that, upon the facts proved and decided therein, the movants were not entitled to an order for the appointment of a receiver," etc.; "and the order appointing such receiver was illegally, improvidently, and erroneously made, and the same should be set aside."

Respondents contend that the exceptions are too general. This point may be well taken as to the first exception, but the second exception is not obnoxious to that objection. It complains that the order appointing the receiver, upon the facts proved and decided, was illegally, improvidently, and erroneously made. The record shows the facts proved and decided. It appears that the Southern Land & Lumber Company is a corporation; that Wood Bros. are creditors thereof, as it seems, to the amount of \$46.84; that an officer of the said corporation tendered to Wood Bros. the amount due, but that Wood Bros. declined to receive the same; that only Wood Bros. of the creditors have been made parties to the suit, and to the motion for the appointment of a receiver; that the

plaintiffs Miller, Nixon & Co., with other creditors of the corporation, joined in a written request to the court that a receiver be not appointed at the hearing; that the entire indebtedness of the corporation, excepting some amounts due to the officers of said corporation, which were not stated, was \$8,840.31; that the real estate of the corporation which was assessed for taxation amounted to \$20,000, consisting of about 10,000 acres of pine lands, and the personal property of the corporation was assessed for taxation at \$11,170; that, after the last tax return, \$8,000 of machinery, etc., had been added to the corporation's plant; that the value of the corporation's assets, as alleged by Wood Bros. and fixed by the court, was \$25,000. In the return of the corporation, showing why a receiver should not be appointed, it is stated "that while it is true that there is considerable indebtedness of said company which is past due and unpaid, which fact may constitute a technical case of insolvency, it is also true that said defendant owns an amount of property in this state, consisting of lands, lumber, sawmills, machinery, mules, wagons, and other property, largely in excess of all its indebtedness due and to become due, and is abundantly able to discharge all of its obligations of every kind." The circuit judge held that the defendant corporation "is either insolvent, or in imminent danger of insolvency. In the law, the defendant is insolvent; and, as the debts due to the officers are not stated, it may be in fact and hopelessly so. It seems to me that under Code, § 265, subd. 4, and the law generally upon this subject, the plaintiffs (rather, Wood Bros., and the creditors represented by them) are entitled to the relief asked for." The circuit judge evidently considered that Wood Bros. were entitled to the order appointing a receiver because, in his opinion, the conditions mentioned in section 265, subd. 4, of the Code had been met. It is there provided that a receiver may be appointed by a judge of the circuit court, either in or out of court, "(4) when a corporation * * * is insolvent or in imminent danger of insolvency," etc. Whatever may be the definition of "insolvency" as held in other jurisdictions, in this state insolvency is that condition of a debtor when his entire property and assets are insufficient to pay his debts. *Akers v. Rowan*, 33 S. C. 470, 12 S. E. 165; *Mitchell v. Mitchell*, 42 S. C. 483, 20 S. E. 409. We are quite prepared to adopt the definition of "insolvency" as given in the recent bankrupt act of congress, wherein it is provided that "a person shall be deemed insolvent whenever the aggregate of his property exclusive of any property which he may have conveyed, transferred, concealed or removed, or permitted to be concealed or removed, with intent to defraud, hinder or delay his creditors, shall not at a fair valuation be sufficient in amount to pay his debts." It is clear that under this definition of "insolvency" the de-

fendant corporation was not at the hearing shown to be insolvent. Nor do we think the facts shown warranted the conclusion that the corporation was in imminent danger of insolvency. The assets of the corporation, as shown, were about three times the stated indebtedness, and there was no showing that the corporation's property was seriously depreciated; but, on the contrary, it was shown that large additions had recently been made to the plant. Nor did the circuit judge find that the corporation was in any way endeavoring to dispose of its property with intent to hinder, delay, or defraud its creditors. The showing made did not warrant the appointment of a receiver. While a court of equity, in proper cases, has the power to place a debtor's property in the hands of a receiver, this power should be exercised with great caution, lest the injury thereby caused be far greater than the injury sought to be averted. The movants in this case were threatened with no loss which rendered a receivership necessary. Having been tendered the amount due them, and refused it, we do not think their clamor for so severe a remedy should be heeded; and we fail to see how, in this proceeding, Wood Bros. represent anybody but themselves. The order appointing a receiver in this case is reversed.

(53 S. C. 396)

JENNINGS v. HARE et al.

(Supreme Court of South Carolina. Oct. 21, 1898.)

MORTGAGES—COSTS—PERSONAL LIABILITY.

Under an order of court, in a foreclosure action, providing for the payment of the costs of the action, together with the expenses of the sale, out of the proceeds of the sale, and adjudging that defendant should not be liable to a judgment for any deficiency after the application of the proceeds, no judgment for the costs of the action can be entered against defendant individually.

Appeal from common pleas circuit court of Greenville county; Ernest Gary, Judge.

Action by L. I. Jennings against Florence S. Hare and another. From an order refusing to set aside a personal judgment, defendant Black appeals. Reversed.

Haysworth & Parker, for appellant. A. Blythe, for respondent.

JONES, J. This was an action for foreclosure of a mortgage, and resulted in a judgment for the sale of the premises. The land was advertised for sale, and was bid in by the plaintiff for a sum insufficient to pay plaintiff's debt. The plaintiff has never complied with his bid, nor paid any part thereof, and no report on sales has been made, and no deed executed. After said sale, plaintiff, conceiving himself entitled, under the order of the court, to tax the costs of the action against the defendant Black, caused the clerk to enter up a judgment against Black for

\$96.55, costs of the action, including the costs, commissions, and expenses of said sale. Black then moved the circuit court to set aside said judgment and execution for costs. The motion was refused, on the ground that the matter of costs is *res adjudicata*, inasmuch as the master recommended that the defendant W. C. Black pay the costs of the action, to which recommendation no exception was taken, and the report of the master confirmed in that particular. The question presented is whether this ruling is erroneous.

We think the circuit court erred in so ruling, and in not setting aside the judgment and execution for costs. The master's recommendation was as follows: "The master respectfully recommends that the defendant W. C. Black be required to pay his co-defendant, by a day certain, subject to the discount for rent above mentioned, the sum of \$122.05, with interest from date of this report, and that he be further required to pay the costs of this action; that, in the event he shall fail to pay the said sum of money as above required, then the premises in question be sold by order of the court, and the proceeds applied to the payment of said sum of money and the costs above recommended, and that the balance of the proceeds of said sale be applied to the debt due the plaintiff, as hereinbefore reported; that, in the event the said balance shall not be sufficient to pay the plaintiff's debt, then the plaintiff to recover judgment against the defendant Black for deficiency, provided such deficiency does not exceed the sum of \$125.05, with interest from this date." It will thus be seen that the master, in case of a sale of the premises, recommended that the proceeds be applied to plaintiff's debt, after certain other payments, including the costs of the action. The circuit court, Judge Benet presiding, confirmed the report of the master, "except as provided hereafter," and then proceeded to provide for a sale of the premises, and to direct the disposition of the proceeds of sale, as follows: "That out of the proceeds of said sale the master deduct the amount of his fees and expenses of said sale and lien for taxes or assessments, and that he then pay the plaintiff the amount found due him, and the costs of said action, and, if any balance should remain in his hands after such payments, that he do then pay the same to the defendant Florence S. Hare, or her attorney or legally appointed guardian. In the event the proceeds of sale be insufficient to pay the debt of plaintiff, the plaintiff shall be entitled to no judgment against W. C. Black for such deficiency, and so much of the master's report as gives judgment for such deficiency be overruled." It is thus clear that Judge Benet did not adjudge that Black should pay the costs of the action, but he provided for the payment of the costs, including the expenses of the sale, out of the proceeds of sale, and expressly adjudged that Black should not be liable to a judgment for

any deficiency after the application of the proceeds as directed. The costs of the action are payable out of the proceeds of the sale of the property, and not by defendant Black individually, under the judgment of the circuit court. The order appealed from is reversed, and the judgment and execution for costs against the defendant Black is set aside.

(53 S. C. 398)

VERNER et al. v. BOOKMAN et al.

(Supreme Court of South Carolina. Oct. 22, 1898.)

ADMINISTRATORS—JUDGMENTS—REVIVAL—RIGHTS OF THIRD PERSONS.

1. A judgment against an administrator ascertaining and directing payment of a final balance, entered in a suit for an accounting and settlement of the estate, is a judgment against him individually.

2. Act 1878 (15 St. at Large, p. 498) provides that final judgments of a court of record shall be a lien on the real estate of the judgment debtor for 10 years from date of entry, but plaintiff in such a judgment may, within three years "after its active energy has expired, revive the judgment, with like liens as in the original for a like period." *Held*, that a judgment revived within the three years has a continuous lien from the date of its entry, and its priority is preserved as against all liens which existed against the judgment debtor during the period of its original active energy.

Appeal from common pleas circuit court of Lexington county; J. C. Klugh, Judge.

Action by J. S. Verner and others against Carroll Bookman and others to foreclose a mortgage. From a judgment for plaintiffs, defendants other than C. Bookman appeal. Reversed.

Bachman & Youmans, for appellants. Abney & Thomas, for respondents.

JONES, J. We concur with the circuit court that the decree in the case of Fry against Bookman, Adm'r, signed and filed September 26, 1879, and entered in the book of Abstract of Judgments, ascertaining and directing the payment of a final balance against the administrator in a suit for accounting and settlement of the estate, was a judgment against Carroll Bookman individually. *Rhodes v. Casey*, 20 S. C. 493. The main question presented by this appeal is whether this judgment of September 26, 1879, revived in favor of Mrs. H. I. Benjamin, assignee, September 23, 1892, was a lien on the mortgaged land herein in February, 1893, when said land was sold under said judgment, by the sheriff, to Monteith, who subsequently conveyed to Mrs. Bookman, superior to the lien of the mortgage herein sought to be foreclosed, executed in 1885. The decree of the circuit court on this point appears in the official report. At the time the judgment was entered the act of 1873 was in force. The act (15 St. at Large, p. 498) provided as follows: "Final judgments hereafter entered in any court of record in this state shall constitute a lien upon the real estate of the judgment debtor * * * for a period of ten

years from the date of entry of such judgments: * * * provided that the plaintiff in such judgment may at any time in three years after its active energy has expired, revive the judgment, with like liens as in the original for a like period, by the service of a summons on the debtor, as provided by law, requiring him to show cause, if any he can, at the next term of the court for his county, why such judgment should not be revived; and if no good cause be shown to the contrary, then it shall be decreed that such judgment is revived according to the force, form and effect of the former recovery." We are of opinion that a judgment revived under this act within three years after its active energy has expired, has, upon its revival, a continuous lien from the date of its entry, and preserves its rank of priority as against all liens existing against the judgment debtor during the period of its original active energy. We cannot do better than reproduce what Mr. Justice McGowan said on this subject in *Ex parte Witte Bros.*, 32 S. C. 228, 10 S. E. 950, as follows: "We have always supposed that a *scire facias* on judgment must pursue the terms of the judgment; that it is a continuance of the action, and must conform to the record; that the authority to issue an execution on a judgment is derived from the original judgment, which, revived, continues its vitality, with lien and other incidents, from the time of its rendition. See *Ingram v. Belk*, 2 Strob. 208; *Parnell v. James*, 6 Rich. Law, 873; In re *Dougherty's Estate*, 42 Am. Dec. 326; *Irwin v. Nixon*, 51 Am. Dec. 559. In the case from 6 Rich. Law, Judge Withers forcibly said: 'When *scire facias* is issued between the same parties to a judgment, "It is * * * manifestly not an original proceeding, but a continuance of a former suit." * * * If the first judgment be merged, this might greatly disturb the plaintiff's relative priority of lien,' etc. It seems to me that any other interpretation of the act of 1873 would necessarily result in great confusion, surprise, and injustice to parties who have been resting upon what was believed to be the acknowledged law—that diligence was rewarded, and that a judgment regularly 'revived' continues to have a lien from its original entry." In the case of *Woodward v. Woodward*, 39 S. C. 264, 17 S. E. 638, these general views were reaffirmed, but an exception was made in the case of an innocent purchaser from the judgment debtor; and it was held that such a purchaser of the judgment debtor's land, after the expiration of the judgment's active energy, but before its revival, was not affected by the subsequent revival. But the court reiterated the principle announced in this case as follows: "It seems that the doctrine as to the effect of a revival under the circumstances stated leaves untouched the rights of the parties to the judgment, and the relative rank of all liens acquired before the judgment lost its active energy, and pro-

fects only the rights of innocent third parties, in the view, as stated, 'that it would be against principle and work manifest injustice to give it this retrospective operation, so as to extinguish the intermediately acquired rights of third persons.'" The case of *Kaminsky v. Trantham*, 45 S. C. 393, 23 S. E. 132, does not lead to a contrary view. In that case the court held that a purchaser at a sale under a "junior" judgment obtained after a "senior" judgment had lost its active energy, the sale being made before the revival of the senior judgment, could not refer his title to the senior judgment so as to defeat the lien of an intermediate mortgage existing before the senior judgment lost its active energy. In that case there was a very vigorous dissent by the chief justice, stressing the point that the lien of the senior judgment was continuous from its entry, because revived according to law, and that, therefore, the sale under the junior judgment was referable to the senior judgment. That case was but an application of the doctrine that the revival of a judgment within the time allowed by the act of 1873 could not relate back to the original entry, so as to defeat or affect liens and rights of purchasers created and intervening between the expiration of its original active energy and its revival. The law required the proceeds of the sale of real estate by a sheriff to be applied "to any judgment having prior lien thereon." The real point in *Kaminsky's Case* was not so much whether the Pegues or senior judgment was a continuous lien on the land bought by Hay, but whether it was a prior lien to the lien of the junior judgment under which Hay bought. The latter judgment, while junior in point of time, was prior in point of right and lien, to the Pegues judgment, because it was created after the Pegues judgment had lost its energy, and before its revival; and therefore the sale under the junior judgment, having prior lien, could not be referred to the judgment which, though senior in point of its original entry, was not a prior lien. In the case at bar the mortgage lien was created before, not after, the judgment lost its original energy. No liens or right of purchaser created during the dormancy of the judgment are involved in this case. The judgment originally senior in time and lien to the mortgage having been revived in the time allowed by law, according to the force, form, and effect of the former recovery, its revived lien under the act of 1873 relates back to its original entry, and so preserves its rank of lien according to the status existing when its active energy expired or was suspended. The legislature so construed the act of 1873, for in 1885 it enacted that "such [revival] lien shall not revert back to the date of the original entry of such judgment." Our conclusion renders it unnecessary to consider the other grounds of appeal. The judgment of the circuit court is reversed.

(123 N. C. 1)

OVERTON v. HINTON et al.

(Supreme Court of North Carolina. Oct. 10, 1898.)

DOWER—MORTGAGED LANDS.

A widow is entitled to have dower laid off in lands mortgaged for the price, and to have the remaining two-thirds sold to satisfy the debt, and, in case the proceeds are not sufficient, to have the remainder in fee after the dower sold, and to have the dower subjected to the debt only in case a balance then remains due; and a sale of the entire property, over the objection of the widow, after commencement of the dower proceedings, is unavailing.

Appeal from superior court, Camden county; Norwood, Judge.

Proceedings by Lydia Overton against J. L. Hinton and others for assignment of dower. Judgment of nonsuit, and plaintiff appeals. Reversed.

The plaintiff is the widow of the late Mitchell Overton, and filed her petition before the clerk for dower, alleging that her husband died seised in fee simple of the tract of land. In the answer it is alleged that John L. Hinton was the owner in fee of the land, and had agreed to sell the same to Mitchell Overton for \$10,000; that Overton executed notes in the sum of \$10,000, payable to said Hinton, and secured the same by a deed of trust on the land, and that the defendant C. L. Hinton was the trustee in the deed; that the notes were given to represent the purchase money of the land; that Overton failed to pay the same, and the trustee sold the land under the power contained in the deed, and defendant J. L. Hinton became the purchaser, on November 23, 1896; that petitioner is not entitled to dower in said land; and that defendants go without day. The plaintiff, replying to the answer, said that the purchase money for the land was to be paid by Mitchell Overton securing insurance policies on his life to the amount of \$10,000, as she is informed, and he complied with his part of the contract; that said Hinton sold the land to Mitchell Overton, and agreed to accept in payment of the same the two policies of insurance upon the life of Mitchell Overton, for \$5,000 each, to be delivered to J. L. Hinton, and said Overton to keep the premiums paid; that the policies were secured and assigned as aforesaid in compliance with the agreement, and that said Hinton has collected \$5,000 from the Penn Mutual Life Insurance Company on one of said policies, and plaintiff does not know what amount he has collected from other sources and policies; that at the time plaintiff's husband purchased the land from Hinton it was fully understood that the farm was not worth \$10,000, and in truth the lands were not worth more than \$3,000 or \$4,000, and that Hinton well knew the value thereof, and that he had received from said Overton \$5,000 on the policy in the Penn Mutual, which is more than enough to pay for the land; that it was mutually agreed that the mortgage and notes were

only to be held by Hinton to require Mitchell to pay the premiums on the policies, and the policies were to cancel the notes at the death of Overton. An issue of fact, as to whether plaintiff was entitled to dower as alleged in the petition, was raised before the clerk, and the cause was sent to the superior court for trial, where, upon intimation by the court that plaintiff could not recover upon the record and evidence, the plaintiff submitted to a nonsuit, and appealed.

Case: Plaintiff introduced the deed of J. L. Hinton to Mitchell Overton, dated October 10, 1892, for the land described in the petition, and plaintiff testified in her own behalf that Mary, William, and Susan Overton are the only children of her deceased husband, and that the land mentioned in the deed is the same as that described in the petition; that the summons was issued November 16, 1896. Defendants introduced a deed of trust from Overton to C. L. Hinton, trustee, dated October 10, 1892, conveying the same land set out in the petition; also, deed from Hinton, trustee, to J. L. Hinton, dated November 24, 1896, for the land described in the petition. Plaintiff objected. Objection overruled, and plaintiff excepted. The bond for the purchase money, dated October 7, 1892, for \$10,000, signed by Overton, and payable to Hinton, was also introduced, with sundry credits indorsed thereon, to wit: July 9, 1894, \$48.19; on May 6, 1896, \$110; on November 20, 1896, \$5,000, from life insurance. Plaintiff was again introduced in her own behalf, and testified that she was present in November, when the sale was made, and that she objected to the same, and that the trustee was not present. She then proposed to prove that she objected to the sale, and that, if he did sell, he should first sell two-thirds of the land, then the remainder after the dower, and lastly the dower interest. Defendants objected. Objection sustained, and plaintiff excepted. J. L. Hinton directed the sale. The land was sold in one body, and bid off by J. L. Hinton. The plaintiff did not know who cried the property at the sale. Her attorney was present, representing her. Jesse Overton was introduced for plaintiff, and testified: "I was present at the sale. William Morris was the man who cried the sale. J. L. Hinton was present, and bid it in. Mrs. Overton objected to the sale. J. L. Hinton told Morris to sell the land." Petitioner offered to prove by this witness that plaintiff objected to the sale, and demanded that, if it was sold, it should be sold as indicated above. Defendants objected. Sustained. Plaintiff excepted. None of the Hinton's were present at the sale, except J. L. Hinton. Plaintiff's attorney objected for her, when J. L. Hinton said: "You need not object. I will sell it." Defendants introduced W. R. Dozler, who testified: "I got a note from C. L. Hinton, trustee, asking me to sell the property. In pursuance of this request, I procured a commission to sell the same. I wrote the notice

of the sale, and got some one to cry the property. I feel sure that it was W. S. Bartlett who cried the sale. The notice of the sale was introduced. J. L. Hinton brought me the note. C. L. Hinton is J. L. Hinton's son. I asked J. L. Hinton if he was ready to have the sale." W. S. Bartlett, introduced for defendants, said that he made the sale of the property in controversy, and that the attorney for plaintiff objected on the ground that the debt was paid. Dozier asked him to cry the sale for him. "I don't think J. L. Hinton said anything to me about it." The plaintiff asked the court to be allowed to withdraw the reply, as the plaintiff had not introduced any evidence showing the payment, and that there was a suit in ejectment now pending in court for the land. The court declined to allow the reply to be withdrawn, and intimated, upon all the evidence, that plaintiff could not get along, and that he would charge the jury to answer the issue, "No." Plaintiff excepted, and submitted to a nonsuit, and appealed.

E. F. Aydlott, for appellant.

DOUGLAS, J. This was a special proceeding for the assignment of dower. Upon the trial in the superior court, his honor intimated that the plaintiff could not recover. Thereupon the plaintiff submitted to a nonsuit, and appealed. Summons for the defendants were issued to Camden county on the 16th day of November, 1896, and to Pasquotank county on the day following. On the 23d day of November, after the issue of summons, but before its return day, the defendant C. L. Hinton, through some one else, sold the land in question under a deed of trust executed during his life by the husband of the petitioner to secure the purchase money of the land. At this sale the defendant J. L. Hinton bought the land, which was sold as a whole. The petitioner publicly objected to the sale. The said J. L. and C. L. Hinton (the latter the trustee, and the former the creditor and purchaser) are the only real defendants in the case, as the heirs at law made no objection to the assignment of dower. The defendants Hinton answered, setting up the original purchase of the land, the deed of trust, its default, and sale thereunder. The plaintiff replied, alleging other matters, which cannot be considered, as the reply was abandoned at the trial. The plaintiff, however, insisted that she was entitled to the exoneration of her dower, to the extent that the undowered land should be first sold, and then the fee in remainder after her dower; leaving the dower itself unsold, unless necessary after the complete exhaustion of the other sources. To this, we think, she was clearly entitled. *Thompson v. Thompson*, 46 N. C. 430; *Ca-roon v. Cooper*, 63 N. C. 386; *Smith v. Gilmer*, 64 N. C. 546; *Creedy v. Pearce*, 69 N. C. 87; *Ruffin v. Cox*, 71 N. C. 253; *Askew v. Askew*, 103 N. C. 285, 9 N. E. 646. The sale

of the land after the commencement of proceedings, and over the protest of the plaintiff, does not help the defendants, and the sale must be set aside. The plaintiff petitioner is entitled to have her dower laid off in the lands in question, the remaining two-thirds of which may then be sold to pay the balance due on the debt secured by the deed of trust. If the proceeds of sale are not sufficient, then the remainder in fee after the dower must be sold, and the proceeds applied in the same manner. If a balance still remains due on said debt, then, and then only, can the dower itself be subjected thereto. There is error in the intimation of the court. New trial.

(123 N. C. 92)

BRYAN v. STEWART.

(Supreme Court of North Carolina. Oct. 18, 1896.)

FALSE IMPRISONMENT—WARRANT — COMPLAINT—
JOINDER OF CAUSES—CLERKS OF COURTS
—JUDICIAL ACTS.

1. In an action for false imprisonment, under the Code, the common-law actions of trespass vi et armis and of trespass on the case may be joined in one complaint.

2. The issuance by the clerk of a warrant under Code, § 292, providing that "an order for the arrest of the defendant must be obtained from the court in which the action is brought or from a judge thereof," is a judicial, and not ministerial, act.

3. Where a person is wrongfully arrested on a warrant issued by the clerk under Code, § 292, he cannot maintain an action for false imprisonment against the person causing the warrant to issue, when all the elements of an action for malicious prosecution are eliminated by consent, as such process is erroneous only, and not void.

Appeal from superior court, Craven county; Brown, Judge.

Action by Macon Bryan against J. W. Stewart for false imprisonment. From a judgment for defendant, plaintiff appeals. Affirmed.

Simmons, Pou & Ward and W. D. McIver for appellant. W. W. Clark, O. H. Guion, and Shepherd & Busbee, for appellee.

FURCHES, J. In 1896, the defendant Stewart brought an action against the plaintiff Bryan in Craven superior court. The plaintiff Stewart, in his complaint in that action, declared on two causes of action,—one, a promissory note; and the other, for embezzling money which Bryan had collected as the agent of Stewart. This complaint was verified and filed at the return term of court, and, no answer being filed or other defense made thereto, the court gave judgment upon the note, and, after giving judgment upon the note, proceeded to find the facts alleged in the complaint constituting the embezzlement, but entered no judgment upon this cause of action, and the case went off the docket. The plaintiff in that case, Stewart, caused a *fi. fa.* to be issued thereon against the defendant Bryan, which was re-

turned nulla bona. He then applied to the clerk for a warrant of arrest, which was granted, and the defendant Bryan was arrested thereon. The defendant Bryan thereupon applied for relief in habeas corpus proceedings, which relief he obtained on appeal to this court, as will more fully appear from the case as reported in 121 N. C. 46, 28 S. E. 18. It is held in that case that the clerk was not authorized to issue the warrant of arrest, and the defendant Bryan was discharged, and this action is brought to recover damages for false imprisonment. This action was tried at February term, 1898, of Craven superior court, upon the following facts, which were agreed upon by counsel, and the further agreement of counsel, which appears of record, and which will hereafter be set forth. Issues: (1) "Did the defendant wrongfully and unlawfully cause the plaintiff to be arrested and imprisoned under execution process in the case of J. W. Stewart vs. Macon Bryan? Answer. No." (2) "What actual damage has the plaintiff sustained by reason of such arrest and imprisonment? Answer. \$850." The following appears of record: "By consent of counsel it is agreed that only the issue of damages be submitted to the jury. The defendant offered no evidence. By consent it is agreed that the court shall answer the first issue, and determine the liability of the defendant. By consent it is also agreed that if the court shall be of opinion that the defendant, in any view of the evidence, is liable, the court shall give judgment for the amount assessed by the jury, and that, if the court shall be of the opinion that the defendant is not liable, the court shall dismiss the action, at the plaintiff's cost. Nothing herein contained shall be construed as abridging the right of the court to set aside the verdict for excessive damages. By consent. G. H. Brown, Judge. Nothing herein contained shall affect the right of either party to appeal to the supreme court. G. H. Brown, Judge. L. J. Moore, W. D. McIver, Simmons, Pou & Ward, Attorneys for Plaintiff. J. E. Shepherd, Clark & Gulon, M. De W. Stevenson, Attorneys for Defendant." And in the statement of the case on appeal the following paragraph appears: "It is admitted that it is not an action for malicious prosecution, nor for malicious abuse of process, but an action for false imprisonment under alleged illegal process."

At common law there were two actions for an illegal arrest. One was where there was no legal excuse or justification for making the arrest, as where it was made without legal process, or, if made under the form of legal process, where the same was absolutely void. This was an action of trespass *vi et armis*. The other was where the process was erroneous, but not absolutely void. This was an action of trespass on the case, and was subject to the same rules and requirements as if it were an action for malicious prosecution. *Bish. Noncont. Law*, § 211; *Carman v. Emerson*,

18 C. C. A. 38, 71 Fed. 264; *Pol. Torts*, 148. If the process is absolutely void, it will not protect the defendant who procured it to be issued, nor will it protect the officer making the arrest; but if the process is erroneously issued, but not void, it will protect the officer making the arrest. *Murfree, Sheriffs*, § 929; *Pol. Torts*, 148. And it will protect the defendant, who procured it to be issued, in an action *vi et armis* for false imprisonment, though such process, erroneously issued, will not protect the party procuring it to be issued from an action on the case, in the nature of malicious prosecution, where the want of probable cause and malice are alleged and shown. *Newell, Mal. Pros.* 199, 200; *Pol. Torts*, 148.

Under the present Code practice, we are of the opinion that what was formerly an action *vi et armis* and an action of trespass on the case, in the nature of false imprisonment, might be joined with each other in the same action, and declared on in the same complaint. But, if this were done, still the allegation, on the case in the nature of malicious prosecution, would have to be sustained by evidence of malice and the want of probable cause, to entitle the plaintiff to recover. But by the agreement of the parties, entered of record, the action of trespass on the case, in the nature of an action for malicious prosecution, is eliminated and taken entirely out of consideration in this case, and it is left to be considered as an action of trespass *vi et armis* for false imprisonment alone. This being so, the correctness of the ruling of the court below and the defendant's liability for damages depend upon the question as to whether the process upon which the plaintiff was arrested was void or only erroneous; and this depends upon the fact as to whether the clerk who issued it was acting in a judicial capacity, or simply in the discharge of a ministerial duty. It would seem, the clerk, in issuing the ordinary *fi. fa.*, would be acting in his ministerial capacity, because the law requires him to do this without any application or request on the part of the plaintiff in the action. And it is held in the case of *Jackson v. Buchanan*, 89 N. C. 74, that the issuance of an order for the seizure of property, in claim and delivery, is a ministerial act. But this order is issued under section 323 of the Code, which requires the clerk to issue the order; while the order of arrest is obtained under section 292 of the Code, and is in the following words: "An order for the arrest of the defendant must be obtained from the court in which the action is brought, or from a judge thereof." Thus, it is seen that the judge and the clerk have concurrent jurisdiction as to the issuance of an order of arrest, and it seems to us that this fact ought to settle the question.

Suppose this order of arrest had been issued by the judge; would it be contended that he was acting as a ministerial officer, and performing a ministerial act? And yet

the judge and the clerk have the same, concurrent, jurisdiction. The distinction between an order in claim and delivery, and an order in arrest and bail, is clearly recognized by the court in *Jackson v. Buchanan*, 89 N. C. 76. That the clerk, in issuing the order of arrest, was acting in his judicial capacity, is sustained in *Austin v. Vrooman* (N. Y. App.) 28 N. E. 477. *Bish. Noncont. Law*, § 211. It is admitted that the clerk had the right—the jurisdiction—to issue the process under which the plaintiff was arrested; and we are clearly of the opinion that, in doing so, he acted in his judicial capacity, and not simply as a ministerial officer. This being so, the capias under which the plaintiff was arrested was not void, although it was erroneous. *Tucker v. Davis*, 77 N. C. 330; *Carman v. Emerson*, supra; *Pol. Torts*, 148; *Bish. Noncont. Law*, § 211. This process, having been issued by a judicial officer, in the exercise of the judicial functions of his office, was not void (though erroneous), and was a justification for the plaintiff's arrest in this action.

It was stated by counsel on the argument of the case that it is said in the opinion of the court in *Stewart v. Bryan*, 121 N. C. 46, 28 S. E. 18, that the judgment on which the warrant was issued was void, and that the warrant of arrest was void. Upon reading that case with more care, they will find that they are mistaken in making these statements, but that it is said in that opinion that the judgment on the note is regular and final, and that there was no judgment at all on the count for embezzlement, and, as the warrant of arrest was not authorized, "that the defendant was illegally arrested." It is nowhere said in the opinion that the judgment was void, nor that the warrant of arrest was void. The judgment below is affirmed.

(123 N. C. 51)

GENERAL ELECTRIC CO. v. WILLIAMS.
(Supreme Court of North Carolina. Oct. 18, 1898.)

PLEADING—COUNTERCLAIM—JUSTICE'S COURT—JURISDICTIONAL AMOUNT.

1. Under Code, § 244, providing that counterclaims must arise out of the contract or transaction set forth in the complaint, or connected with the subject-matter of the action, in an action for goods sold and delivered a counterclaim for the value of part of the goods, sent plaintiff to be repaired, and failed to be returned by him, and damages for their detention, is sufficiently connected with the subject-matter.

2. Where defendant to a complaint in justice court demanding judgment for \$171 pleads a counterclaim of \$138 and a payment of \$33, and a second counterclaim of \$260, reduced by a remittitur to \$200, for which amount he asked judgment, such defense cannot be maintained, as the counterclaims exceed, in the aggregate, \$200, the extent of the jurisdiction of a justice of the peace.

Appeal from superior court, Craven county; Bryan, Judge.

Action by the General Electric Company against R. P. Williams. From a judgment

overruling a demurrer to defendant's answer, plaintiff appeals. Reversed.

C. R. Thomas, for appellant. W. W. Clark and O. H. Gulon, for appellee.

DOUGLAS, J. This case is before us on demurrer to a counterclaim. The action was originally brought before a justice of the peace, and subsequently heard on appeal in the superior court. The plaintiff sued for the sum of \$171.85, for goods sold and delivered. The defendant denied all the allegations of the complaint, and set up as "a further defense and counterclaim" that he had paid \$33 of the account, and had shipped to the plaintiff, to be repaired and returned, two arc lamps and one transformer, worth the sum of \$165.16, which the plaintiff had never returned. Of these two sums, amounting to \$198.16, the defendant remitted all in excess of the plaintiff's claim, and pleaded the remainder, \$171.85, as a set-off. From this it would appear that the defendant, in denying the allegations in the complaint, intended simply to deny the indebtedness, as he does not seek to recover this amount. He does, however, go on further, and set up as a second counterclaim that he had shipped to the plaintiff four additional transformers, worth \$180, which had never been returned, and that the damages caused by their detention amounted to \$80 in addition to their value. Of this sum of \$260 he remits all in excess of \$200, and prays judgment for that amount, with the costs of the action. The plaintiff demurred, insisting, among other things, that the answer did not show that the counterclaims existed at the time of the bringing of the action, that they did not arise out of the same cause of action, and that their total amount was in excess of the jurisdiction of the justice of the peace. The demurrer was overruled, and the plaintiff appealed.

We think that the subject-matter of the counterclaims is sufficiently connected with the subject of the action to be maintained under section 244 of the Code, as the transactions apparently all arise in the same general course of dealing. But we also think that the demurrer should have been sustained, inasmuch as the total amount of the unremitted counterclaims was in excess of \$200, and therefore beyond the jurisdiction of the justice of the peace. In this computation we have entirely eliminated the alleged payment of \$33, which is in no sense a counterclaim. The plea of payment is essentially different from set-off or counterclaim, in its nature, its origin, and its result. A payment *pro tanto* extinguishes the debt *eo instanti*, and is itself thereby extinguished, so that neither remains any longer the subject of an action. On the contrary, a counterclaim, which now includes a set-off, is the assertion by the defendant of an independent demand which might be maintained in an independent action. Payment was a good defense at com-

mon law, and from time immemorial was regarded as a valid plea in bar. Set-off, except in some few instances of equitable jurisdiction, rests purely upon statute, and was unknown to the common law, which could not conceive of the defendant ever being an actor. It originated in the bankrupt act of 4 & 5 Anne, c. 17, suggested perhaps by the compensatio of the civil law, but was given general application by the statutes of 2 Geo. II. c. 22, and 8 Geo. II. c. 24, which enact "that, where there are mutual debts between the plaintiff and defendant, one debt may be set against the other, and either pleaded in bar or given in evidence upon the general issue at the trial, which shall operate as payment, and extinguish so much of the plaintiff's demand." 3 Bl. Comm. 304. Payment extinguished the debt at the time of payment, while a set-off required mutual existing debts, and operated as payment only when pleaded, and by judgment of the court. The difference is thus stated by Judge Henderson in *McDowell v. Tate*, 12 N. C. 249, 251: "A payment is, by consent of the parties, either expressed or implied, appropriated to the discharge of a debt. A set-off is a mutual, independent claim, which still continues to exist as such, and one which the parties did not intend should be appropriated to the satisfaction of an existing demand, but that each should have mutual causes of action, and of course mutual actions, if they please, against each other." This distinction is of vital importance in the determination of the case at bar, as well as the proper understanding of the decisions of this court. The counterclaim is the creature of the Code, and is an extension of the set-off, enlarging the class of claims that may be pleaded, and enabling the defendant to obtain judgment for the excess. Code, § 244, provides that: "The counter-claim mentioned in the preceding section must be one existing in favor of a defendant and against a plaintiff, between whom a several judgment might be had in the action, and arising out of one of the following causes of action: (1) A cause of action arising out of the contract or transaction set forth in the complaint as the foundation of the plaintiff's claim, or connected with the subject of the action. (2) In an action arising on contract, any other cause of action arising also on contract, and existing at the commencement of the action." It is said in *Hurst v. Everett*, 91 N. C. 399, 403, that a counterclaim includes both set-off and recoupment, and in fact every defense to the action, except a demurrer, which does not amount to a plea in bar. It is true that recoupment and set-off are now both counterclaims, and yet they are essentially different from each other. We have seen that the set-off was of statutory origin, and applied only to mutual, independent claims; the defendant's claim necessarily arising out of a transaction extrinsic to the plaintiff's cause of action. On the contrary, recoupment always arises

out of the same cause of action, or matters directly connected therewith, and was recognized at common law. In fact, it was a defense going to lessen or defeat the plaintiff's recovery, by showing damages sustained by the defendant from a breach by the plaintiff himself of the very contract upon which his action was based, or fraudulent misrepresentations by which the defendant was induced to enter therein. As it was a pure defense, there could be no excess recovered by the defendant. It is now included in the first class of counterclaims allowed by the Code, and yet, as held in *Hurst v. Everett*, supra, it is still available in some cases as a pure defense. A true counterclaim, such as that at bar, to be capable of affirmative relief, must be one on which judgment might be had in the action, and must therefore come within the jurisdiction of the court wherein it is pleaded. Therefore it cannot exceed \$200 in a justice's court; and, where several counterclaims are pleaded in the same action, their aggregate sum will be taken as the jurisdictional amount. These principles are laid down in the leading text-books, and sustained by a long line of authorities, which it is impracticable to cite. It simply remains for us to ascertain whether the counterclaims in the case at bar exceed in the aggregate the sum of \$200, taking the allegations of the answer as true for the purposes of the demurrer. The plaintiff demanded the sum of \$171.85. Deducting the alleged payment of \$33, there remained only \$138.85, which was set off by the defendant's first counterclaim, remitted to that amount. The defendant's second counterclaim was for \$260, remitted to \$200, for which he demanded judgment. But, as he had already set off \$138.85, it was necessary to remit his second counterclaim to \$61.15, to bring it within the jurisdiction. This he did not do, and we cannot do it for him. The demurrer should therefore have been sustained.

Our decision here is not in conflict with that in *Heyser v. Gunter*, 118 N. C. 964, 24 S. E. 712, as the facts are essentially different. In that case it is distinctly stated on page 965, 118 N. C., and page 718, 24 S. E., that "the plaintiff sued for the \$200 advanced, and defendant pleaded payment, and also a counterclaim for \$200, waiving and releasing all in excess of \$200." There was only one counterclaim, as the plea of payment was in no sense a counterclaim. It is true, the plaintiff claimed a recoupment of \$125 for additional expense in excess of the contract price in moving the timber; but, as he owed the defendant a greater amount, his payment of the \$125 that should have been paid by the defendant was equivalent to a payment to the defendant, lessening his claim to that amount. This was admitted by the defendant, who remitted the additional sum of \$114.46 for jurisdictional purposes. The statement of account in the opinion of the court might appear as setting off independent

claims, but such was not the intention. It is simply the method usually employed by business men to arrive at the balance due. If a man were to deposit \$5,000 in bank, and draw divers checks thereon, amounting to \$4,900, at the end of the month he would receive a statement from the bank showing the deposit of \$5,000 on one side, and the amounts of the various checks on the other, resulting in a balance of \$100 due the depositor. If suit were brought for the balance before a justice of the peace, it could not be contended that the deposit and the different checks constituted mutual causes of action, upon which independent actions might be brought. In the case at bar the demurrer must be sustained, and the judgment is therefore reversed. Reversed.

(53 S. C. 478)

Ex parte SANDERS.

(Supreme Court of South Carolina. Oct. 23, 1898.)

PRIMARY ELECTIONS—REVIEW BY CERTIORARI—COUNTY COMMITTEES—NOTICE OF CONTEST—APPEALS—FINAL DECISIONS.

1. Act 1888, to protect primary elections and conventions of political parties, provides (section 1) that every political primary election for the purpose of choosing candidates for office shall be presided over and conducted in the manner prescribed by the rules of the political party holding such primary elections, by managers selected in the manner prescribed by such rules. Section 3 provides that every such primary election shall be held at the time and place and under requirements prescribed by the rules of the party, and the returns shall be made, and the result declared, as prescribed by such rules. *Held*, that the decisions of the state executive committee of a political party as to the validity of primary elections are of a judicial or quasi judicial nature, so as to be reviewable by certiorari.

2. A county executive committee of a political party acquires no jurisdiction to determine the rights of one protesting and contesting the nomination of a rival candidate, where no notice or grounds of contest are served on such rival nominee.

3. The state executive committee of a political party acquires no jurisdiction of an appeal from the county committee's decision in regard to a contested nomination, where no notice or grounds of appeal are served on the party whose nomination is contested.

4. The decision of the county Democratic executive committee is final in regard to contests and protests as to the nomination of county officers, since rule 7 of the Democratic party provides for a hearing by the state executive committee of contests only for United States senators and state officers.

At chambers.

C. W. Sanders sued out a writ of certiorari from the decision of the state Democratic executive committee in ordering another primary election, and obtained a restraining order. Motion to vacate the restraining order. Refused.

J. Hawkins Jenkins, for petitioner. H. A. M. Smith, for respondent.

McIVER, C. J. This was a motion to vacate and set aside the restraining order heretofore is-

sued in this cause. It appears from the pleadings that the petitioner, C. W. Sanders, and one J. B. Morrison were candidates for the Democratic nomination for sheriff of Berkeley county at the primary election held in that county on the 30th day of August, 1898. The county Democratic executive committee of Berkeley county met at the court house, as required by the rules of the party, and, after tabulating the returns of the votes cast, declared the petitioner the nominee, he having received a majority of the votes cast. Thereafter J. B. Morrison filed with the county chairman of Berkeley county certain grounds of protest and contest, but did not serve them on the said Sanders. At the next meeting of the county executive committee said Morrison called upon the county committee to hear his protest and contest, whereupon the petitioner, through his counsel, objected to such hearing upon the ground that no notice or grounds of protest or contest had been served upon him. The county committee sustained the objection, and again declared C. W. Sanders the nominee of the party, after which the said Morrison stated that he would appeal to the state executive committee. The next day, being Friday, September 16, 1898, the said Morrison appeared before the state executive committee in Columbia, and presented his appeal, whereupon that committee, in the absence of the petitioner, and although he had never been served with either notice or grounds of appeal, heard the same, and set aside the conclusion of the county committee, and ordered that committee to hear and determine Morrison's contest. On the 20th of September the county executive committee, against the protest of C. W. Sanders, and in compliance with the requirement of the state executive committee, heard the contest of the said Morrison, and, after fully considering the same, for the third time declared C. W. Sanders the nominee, and Morrison again stated that he would appeal, but served no notice or grounds of appeal, and accordingly appeared before the state executive committee in Columbia on the 23d of September, 1898, and, upon the matter being taken up by the state executive committee, the petitioner, through his counsel, objected to the hearing, for want of service of notice and grounds of appeal, etc. After taking the matter up, the state executive committee again set aside the findings and conclusions of the county executive committee, and ordered that committee to order another primary election, whereupon the petitioner sued out the writ in this proceeding, and obtained the restraining order now sought to be vacated.

The first question to be determined is whether or not the state Democratic executive committee is such a tribunal as is subject to the supervision of the courts. By section 1 of the act of 1888 entitled "An act to protect primary elections and conventions of political parties, and to punish frauds committed thereat," it is provided "that every

political primary election held by any political party * * * for the purpose of choosing candidates for office * * * shall be presided over and conducted in the manner prescribed by the rules of the political party * * * holding such primary elections, by managers selected in the manner prescribed by such rules." Section 8 provides that "every such primary election shall be held at the time, and place, and under the requirements prescribed by the rules of the party, * * * and the returns shall be made, and the result declared as prescribed by such rules." It is evident from the above extract that the legislature intended to give primary elections a legal status, and to place them, together with the entire party machinery, under the protection of the courts, not only for the purpose of punishing frauds, but also for the enforcement of rights acquired therein. If, then, the functions of the state Democratic executive committee are of a judicial or quasi judicial nature, it is clear that the court has the right, and in a proper case it is its duty, to review the proceedings of the state committee by certiorari. That the state executive committee does exercise judicial functions is evident, and I therefore hold that its proceedings are reviewable under the writ of certiorari.

It is claimed, and not denied, that no notice or grounds of contest nor of appeal were served upon the petitioner, O. W. Sanders, who had been declared the nominee. How, then, could the county executive committee acquire jurisdiction to hear such contest? the state executive committee the appeal? Service of notice is essential in all cases for the purpose of bringing the parties before the court or the tribunal before such court or tribunal can acquire jurisdiction of the matter. It is elementary that no tribunal can adjudicate rights until the parties have had proper notice, and have been properly brought before it; and, no notice or grounds of protest or contest having been served on the petitioner, the county executive committee was right in declining to hear such contest; and, no notice or grounds of appeal from such determination having been served upon petitioner, the state executive committee never acquired jurisdiction of the matter, and its order was a nullity.

But it is contended that the state executive committee has no appellate jurisdiction as to county officers, and as to such offices the findings and conclusions of the county Democratic executive committee are final. Rule 7 of the Democratic party provides that: "Protests and contests for county offices shall be filed within five days after the election with the chairman of the county executive committee, and said executive committee shall hear and determine the same. The state executive committee shall hear and decide protests and contests as to United States senators, state officers," etc. From the bare reading of this rule it is apparent

that the action of the county executive committee is final, for it says so in plain and unmistakable words. But it is contended that the constitution of the party gives the state executive committee appellate jurisdiction. An examination of the constitution, however, fails to justify this contention. It is perfectly clear that the section of the constitution which is supposed to confer this jurisdiction deals solely with state officers, United States senators, etc. Besides this, there is much force in the argument that the statute makes the "rules" the supreme law of the party, but I do not think it necessary to rest my conclusion upon that point, for, as I have already said, neither the constitution nor the rules give the state executive committee appellate jurisdiction as to county offices. It is clear, therefore, that this action of the county executive committee is final, and the state executive committee exceeded its jurisdiction when it undertook to hear Mr. Morrison's appeal. For these reasons the motion to set aside and vacate said restraining order is refused.

(53 S. C. 463)

GILREATH v. FURMAN.

(Supreme Court of South Carolina. Oct. 25, 1898.)

ADVERSE POSSESSION—PLEADING—DEMURRER—SUFFICIENCY.

Where a complaint for the recovery of land alleged that a testator seised thereof in 1849 willed the same to one of his daughters, providing that, if she died without issue, it was to go to his children surviving said daughter, and that the devisee died in 1897, and plaintiff was testator's only surviving child, and defendant was in possession of said land, a demurrer to an answer, setting up that defendant has been in adverse, continuous, uninterrupted, and peaceable possession long enough to entitle him to the land under the 10, 20, and 40 years statutes of limitations, cannot be sustained, where the complaint nowhere alleged that the devisee had ever been in possession.

Appeal from common pleas circuit court of Greenville county; James Aldrich, Judge.

Action by Martha L. Gilreath against Mary G. D. Furman. From an order overruling demurrers to defenses of the answer, the plaintiff appeals. Affirmed.

Perry & Heyward, for appellant. Wells, Ansel & Cothran, for respondent.

POPE, J. This appeal involves questions growing out of several demurrers to several causes of defense, and, in order to be considered, a reproduction of the complaint and answer will be necessary.

The complaint was as follows: "(1) That on the — day of July A. D. 1849, Pinckney Hawkins, late of the county (then district) of Greenville, in this state, died seised and possessed of a large estate, consisting of both real and personal property, part of which was a certain tract of land lying about three miles north of the present city of Greenville, in the

county and state aforesaid, containing about three hundred and forty acres, and known as the 'Dozier Tract,' upon which the said Pinckney Hawkins had been living up to the time of his death, as above set forth. (2) That the said Pinckney Hawkins left his last will and testament, duly executed, whereby he provided, inter alia, as follows: 'Fourth. I give unto my daughters Chloe Hawkins and Melinda Hawkins a negro woman named Susanne, and her two children, Butler and Peter, also a negro girl named Ann, together with their future increase; also one hundred acres, including dwelling house and improvements, of the Dozier tract, whereon I now live, to be divided as my executors think best; upon the marriage of either of them, and in the event of the death of either of them without issue, their portion at that time to go to my surviving children, share and share alike.' A copy of which will is hereto attached, and made a part of this complaint. (3) That on the — day of July, A. D. 1849, said will was duly proven in common form before the ordinary for Greenville district, and is now on file in the court of probate for the county of Greenville, state aforesaid. (4) That on the 13th day of January, 1897, the said Melinda Hawkins died, intestate and without issue. (5) That, at the time of the death of the said Melinda Hawkins, this plaintiff was the only surviving child of the said Pinckney Hawkins. (6) That the defendant, Mary G. D. Furman, is now in possession of said Dozier tract. Wherefore the plaintiff prays: (1) That a writ of partition do issue from this court, and that one hundred acres of the said land, including the dwelling house and improvements, be set off, fifty acres thereof to be delivered to this plaintiff. (2) For such other and further relief as may be just and proper, and for the costs of this action."

To this complaint the defendant offered the following answer: "For a first defense: (1) That she admits that she is in possession of a certain tract of land about three miles north of the city of Greenville, containing three hundred acres, more or less, but she alleges that said tract of land is known as 'Cherrydale.' (2) She admits the second and third paragraphs of the complaint. (3) She denies that she has any knowledge and information sufficient to form a belief as to the other allegations of the complaint not heretofore admitted. (4) She denies that the plaintiff had any interest or title in said lands, or is entitled to partition of any part thereof; but, on the contrary, alleges that she (the defendant) is owner in fee thereof. For a second defense: (1) She alleges that, after the death of Pinckney Hawkins, A. B. Crook, named as executor in said will, duly qualified as executor, and that he, with a full knowledge and consent of all the legatees and devisees under said will, professing to act in pursuance of its terms, sold and conveyed in fee the entire tract of land referred to in the first defense herein, unto T. T. Hopkins, and

received the proceeds of sale. (2) That the proceeds of sale of said lands were divided among the said legatees and devisees, and that the plaintiff herein received her part thereof, and all the other children and devisees and legatees received their part. (3) That the said T. T. Hopkins immediately went into possession of the said lands, claiming the same as his own, and that he and those who claimed under him, including this defendant, have ever since been in peaceable, uninterrupted, adverse possession thereof, claiming the same in fee simple. (4) That, by the act and conduct of the plaintiff as aforesaid, she is estopped from claiming any title or interest in the said premises. For a third defense: The defendant alleges: (1) That she has been prior to this action in the adverse, continuous, uninterrupted, and peaceable possession of said lands heretofore described in this answer, for the period of ten years, claiming the same as her own, and the defendant pleads such possession as a bar to this action under the statute. For a fourth defense: She alleges that she and those under whom she claims have been in the adverse, continuous, uninterrupted, and peaceable possession of the lands described herein for a full period of twenty years prior to the commencement of this action, and that in law this defendant, or those from whom she claims, will have been presumed to have received a deed of conveyance to said lands from all parties having an interest or claim therein. For a fifth defense: (1) This defendant alleges that this action is for the recovery of real property, or an interest therein. (2) That this defendant and those from whom she claims have been in possession of the said land under claim or title in fee simple by virtue of a written instrument for more than forty years prior to the commencement of this action, and she alleges that, under the statute of limitations, the said possession shall be deemed to have conferred a valid title against the world. (3) The defendant pleads and claims the benefit of all the presumptions arising from lapse of time."

Thereupon the plaintiff demurred separately to each of the five separate defenses interposed by defendant's answer, on the ground that each defense failed to state facts sufficient to constitute a defense to the plaintiff's cause of action set out in her complaint. When the hearing of said demurrers came on before his honor, Judge Aldrich, he passed an order overruling each one. From this order the plaintiff now appeals, and seeks to reverse the same only so far as the third, fourth, and fifth defenses set up in the answer are concerned; so that the first and second defenses are valid defenses, and remain for trial in the court below, unaffected by this appeal. The following are the grounds of appeal: (1) That his honor, the circuit judge, erred in overruling the demurrer to the third alleged defense set up in the answer, and should have ordered said alleged

defense to be stricken out, upon the ground that inasmuch as the cause of action set out in the complaint did not accrue to the plaintiff until the 13th day of January, A. D. 1897, there could be no possession adverse to the plaintiff's title previous to said date, and consequently the statute of limitations could not run against the plaintiff. (2) That his honor, the circuit judge, erred in overruling the demurrer to the fourth alleged defense set up in the answer, and should have ordered said alleged defense to be stricken out, upon the ground that inasmuch as the cause of action set out in the complaint did not accrue to the plaintiff until the 13th day of January, A. D. 1897, there could be no possession adverse to the plaintiff's title previous to said date, and consequently no presumption of a deed or grant could arise against the plaintiff. (3) That his honor, the circuit judge, erred in overruling the fifth alleged defense set up in the answer, and should have ordered said alleged defense to be stricken out, upon the ground that, inasmuch as the cause of action set out in the complaint did not accrue to the plaintiff until the 13th day of January, A. D. 1897, there could be no possession adverse to the plaintiff's title previous to that date, and consequently that the terms of section 109 of the Code of Civil Procedure of this state cannot apply to the plaintiff's case. (4) That it is submitted that said section 109 of the Code of Civil Procedure can apply to such rights only as could be enforced within 40 years limited therein, and that, in so far as it assumes to cut off the rights of a litigant without affording to such litigant an opportunity to assert his or her right in court (if said section be so construed), it is submitted that said section is unconstitutional."

The object of a demurrer is to test the sufficiency in law of a pleading by admitting the truth of all allegations of fact in said pleading so far as said facts are well pleaded, whether it be a complaint, an answer, or a reply. When an answer is demurred to, reference must necessarily be had to the cause of action as set up in the complaint. In passing upon the first ground of appeal, it will be necessary to bear in mind that the cause of action as set out in the complaint is that under the will of Pinckney Hawkins, in July, 1849, there passed unto Melinda Hawkins, under the fourth clause of his will, an estate, being a one-half interest in 100 acres of land whereon the dwelling house of said Pinckney Hawkins was located, as a part of his Doxler tract of land, and, in the event she died without issue, then to go to the testator's children who should survive the said Melinda Hawkins; and that Melinda Hawkins died on the 13th of January, 1897, without issue; and that the plaintiff is and was the only child of Pinckney Hawkins alive when Melinda Hawkins died; and that defendant is in possession of said land. It will be noticed that the plaintiff nowhere in her

complaint ever asserts as a fact that Melinda Hawkins ever was in possession of said land from the year 1849 to the date of her death, in 1897. There is also an entire absence of allegation in the complaint as to the manner of defendant's possession. We have no right to assume the existence of any facts which are not pleaded, and which may be necessary to the construction of the pleading demurred to, or, on the other hand, to assume the existence of any such necessary facts in the complaint itself. In other words, when a demurrer is interposed, the gates are shut as against all other facts save those set out in the complaint and in the answer and in the reply demurred to. The appellant may reply to this view that the defendant has not demurred to the complaint because there is a failure in its allegations of fact in stating a cause of action. We answer that the view suggested is quite true, and that, when the defendant interposed her answer, she thereby admitted all the facts alleged in the complaint which she did not deny. The plaintiff and defendant were at issue by their pleadings,—the complaint and answer. But the plaintiff was not content with this. She must needs interpose a demurrer to the defenses set out in defendant's answer. By so doing, she must, of necessity, have her complaint tested,—as much so as if the defendant had demurred thereto. The rule in the construction of a demurrer to any pleading subsequent to the complaint is that thereby the demurrer will reach back to defects in "that part of the previous pleading which the pleading demurred to purports to answer, or with which it is connected." 6 Enc. Pl. & Prac. 330. The demurrer to that defense in the answer which sets up that the plaintiff cannot recover this land of the defendant because the defendant has been for 10 years prior to this action in the adverse, continuous, and peaceable possession of the lands in question must, therefore, be taken in connection with the facts on this point alleged in the complaint. It will be noticed that the plaintiff nowhere alleges in her complaint, nor does the defendant in her answer admit, that the possession adverse to the plaintiff for 10 years by the defendant did not exist. If such possession was adverse to the plaintiff, it would of necessity require the existence, on the part of the plaintiff, of the right to such possession during the 10 years; for we cannot see how the defense of adverse possession could be made to apply to a person who, during the whole time of 10 years, did not have the right of possession. We may not be able to anticipate what facts will be proved by the defendant to support this defense of 10 years' adverse possession. Still, nevertheless, she has seen proper, in plain, laconic words, to set up as a fact 10 years' adverse possession; and, having thus pleaded the fact of adverse possession for the statutory period, it is not demurrable. Very ingeniously the plaintiff suggests that adverse possession is not a conclusion of fact,

but rather a conclusion of law. We cannot so regard it. It is a fact, and in many of our cases it will be found as an allegation of fact in just such cases as the present. The same views will hold as to the presumptions arising from 20 and 40 years' possession by the plaintiff, as far as plaintiff's demurrer applies thereto; for it must be remembered we are discussing these alleged facts in the light of demurrers thereto. We have no opinion and express no opinion as to any matters of fact. We must overrule each of the demurrers. It is the judgment of this court that the order of the circuit court appealed from be affirmed, and that the action be remanded to the circuit court for trial.

(53 S. C. 387)

DEVEREUX v. McCRADY et al.
(Supreme Court of South Carolina. Oct. 20, 1898.)

LAW OF THE CASE—ACCOUNTING—PROCEDURE.

1. Till the order of a circuit judge directing the manner in which an account shall be taken shall be reversed by proper authority, it cannot be directly or indirectly changed by another circuit judge.

2. On an accounting between an ordinary creditor and debtor, sustaining no fiduciary relation to each other, the proper procedure is for the creditor to prove his claims, and for the debtor to then prove any payments, discounts, or counterclaims.

Appeal from common pleas circuit court of Charleston county; R. C. Watts, Judge.

Action by John H. Devereux against Edward McCrady and another, executors of William McBurney, deceased. From an order sustaining exceptions to the report of the master, defendants appeal. Reversed.

The order of the court below and defendants' exceptions are as follows:

Order: "This cause having come on to be heard upon the master's report herein, filed October 27, 1897, and the exceptions thereto, and counsel on both sides having been heard, and it appearing to the court that under the decision of the supreme court in this cause, made the judgment in this court, the plaintiff has been adjudged entitled to an accounting, and it further appearing that the supreme court has adjudged that such accounting should be had in the form and manner provided by law, and it further appearing that the form and manner of accounting in this case is as established in the case of Duncan v. Tobin, Cheves, Eq. 143, it is, upon consideration of all the same, ordered that the exceptions to the said report of the master be sustained, and that the case be referred back to the master, to proceed with the accounting in the form and manner prescribed by law as aforesaid, and moved for by the plaintiff's attorneys before him. January 22, 1898."

Exceptions: "(1) Because his honor, Judge Watts, erred in construing the last decision of the supreme court in this case, affirming the order of Judge Townsend (49 S. C. 423, 27 S. E. 467), in that he construed the said

decision to be 'that the form and manner of accounting in this case' as provided by law 'is as established in the case of Duncan v. Tobin, Cheves, Eq. 143.' (2) Because his honor, Judge Watts, erred in deciding 'that the form and manner of accounting in this case is as established in the case of Duncan v. Tobin, Cheves, Eq. 143,' and that the said case of Duncan v. Tobin establishes the form and manner of accounting in cases such as this. (3) Because his honor, Judge Watts, erred in not holding that the form and manner of accounting in this case was *res judicata*, the same having been previously passed upon and decided by Judge Townsend in his said order, which was affirmed by the supreme court, and also because his honor, Judge Watts, was without authority or jurisdiction to review or modify the said order of his fellow circuit judge, the Honorable D. A. Townsend. (4) Because his honor, Judge Watts, erred in ordering 'that the exceptions to the said report of the master be sustained, and that the case be referred back to the master, to proceed with the accounting in the form and manner prescribed by law as aforesaid, and moved for by the plaintiff's attorneys before him.'"

T. W. Bacot and Louis De B. McCrady, for appellants. Mitchell & Smith, for respondent.

McIVER, C. J. This is the third appeal in this case; the two former appeals being reported in 46 S. C. 133, 24 S. E. 77, and 49 S. C. 423, 27 S. E. 467, to which reference must be had for a full statement of the case, and the proceedings therein up to the matters out of which the present appeal arose. It is sufficient to say now that after the judgment of this court had been rendered, adjudging that this was a proper case for accounting, Master Sass, to whom the case was originally referred "to take the testimony and report upon all matters of law and fact involved in the pleadings, with leave to report any special matter," made a report, bearing date the 4th of September, 1896, in which, among other things, he stated that at a reference held on the 3d of September, 1896, defendants' counsel announced that they would offer no evidence upon the preliminary question, whether the plaintiff was entitled to an accounting in equity, but would "reserve any and all evidence they may have, as well as any and all questions, until an accounting is duly ordered and entered upon." Thereupon counsel for plaintiff moved "that the master declare the testimony under the order of reference to him closed, and make his report to the court that the plaintiff is entitled to an accounting." The report then proceeds as follows: "I accordingly respectfully report that, under the testimony offered by the plaintiff in this case, he has established his right to the accounting prayed for, and the case is therefore respectfully reported to the court for its fur

ther order in the premises." To this report no exceptions were filed, and the report came before his honor, Judge Townsend, for his order in the premises. Thereupon the counsel for plaintiff proposed an order as follows: "(1) That an accounting be had between the plaintiff and defendants, and that it be referred to Master G. H. Sass to take the accounting, and to state the account between the parties, and to report the same to this court, together with the testimony and his conclusions on all issues on said accounting. (2) That for the purpose of said mutual accounting the plaintiff and defendants are hereby ordered and adjudged to severally bring in and file with said master their several respective reciprocal accounts, in the form of debit and credit accounts, to the date of the death of the said Wm. McBurney, deceased; and on the hearing before said master the affirmative of all entries propounded by either party, and not admitted by the other, shall rest upon the party propounding such entry." Judge Townsend declined to grant the order proposed by plaintiff's counsel, and instead thereof granted an order in which, after certain recitals not necessary to be repeated here, he ordered "that the said report of Master Sass be, and the same is hereby, confirmed; and, further, that it be referred to the same master, in order that an accounting may be had between the estate of the said William McBurney, deceased, and the plaintiff, of all amounts which can and shall be legally proved before said master, to be by each party respectively due and owing to the other, in accordance with the views announced by the said supreme court in its said decision, and that he, the said master, do take such account, and report the same to this court as speedily as possible; the effect of the statute of limitations pleaded by the defendants, and the interposing of the same by them, as they may be advised, to any such amounts, as well as the trial of all the issues that properly arise in the case, being hereby reserved for the court after the master shall have reported as above directed, and upon the coming in of his report." From this order plaintiff appealed upon the several grounds which are fully set out in the report of the case in 49 S. O., at pages 424, 425, 27 S. E. 467, 469, one of which was that judge erred in refusing the order proposed by plaintiff. The defendants also gave notice that they would move to sustain the order on the additional ground that it was not appealable. The court held that the order was not appealable, and rendered judgment in these words: "The appeal is therefore dismissed, and the said order affirmed." This cannot fairly be regarded as an adjudication of the questions raised by the exceptions, as it appears from the language immediately preceding that just quoted as the judgment of the court that the court was not to be regarded as having adjudicated any of the questions raised by the exceptions, but merely intend-

ed to announce the legal conclusion that the order must stand affirmed, just as though there had been no attempt to appeal from it. The language referred to is as follows: "Having reached the conclusion that the order is not appealable, no other question raised by the exceptions can be considered by this court." While this is so, yet we must say that some of the observations made by Mr. Justice Gary in the course of his opinion are quite instructive on the point of the alleged inconsistency in the order, indicating very clearly that there was no such inconsistency as that alleged in the exceptions. After the dismissal of the appeal from Judge Townsend's order just spoken of, the case went back to the master, when, at the request of counsel, he made still another report, bearing date the 27th of October, 1897, in which, after reciting the terms of Judge Townsend's order, he says: "Upon the reference before the master under said order, the plaintiff moved that the account be taken by requiring each party to file their accounts, in the form of debit and credit, accompanied by an affidavit containing a verification of the accuracy of the schedules in which are contained the details of the account, according to the rule laid down in the case of *Duncan v. Tobin*, Cheves, Eq. 146. After argument heard, the master refused to make this ruling, and directed the parties to proceed in the following manner, namely: That the plaintiff be required first to legally prove before the master any and all claims and demands which he may have against the estate of Wm. McBurney, and any and all amounts which may be due and owing by the estate of Wm. McBurney to him, and then that the defendants be required to legally prove before the master any and all claims and demands which their testator's estate may have against the plaintiff, and any and all amounts which may be due and owing to the said estate by the plaintiff." The remainder of this report need not be set out, as the exceptions to it filed by plaintiff practically impute error to the master in ruling as above stated, and in not ruling that the account should be taken in the manner proposed by plaintiff. This report, with plaintiff's exceptions thereto, came on for hearing before his honor, Judge Watts, who rendered judgment sustaining the exceptions, and referring the case back to the master, with instructions to take the account in the manner therein directed. From this judgment defendants appeal, upon the several exceptions set out in the record, which exceptions, together with the judgment appealed from, will be incorporated by the reporter in his report of the case.

In pursuance of previous notice to that effect, the plaintiff moved, on the call of the case, to dismiss the appeal "on the ground that the order appealed from is not appealable"; and that motion must first be disposed of. The defendants contend that this motion cannot prevail, for two reasons: (1)

Because plaintiff has waived his right to make such motion upon the ground that the matter appealed from is not appealable, by consenting to the case as prepared for the hearing of the supreme court, in which there is no mention of, or allusion made to, the fact that plaintiff intended to make this motion on the ground stated; (2) because the matter appealed from is appealable. It appears that this was an "agreed case," and at the end of the case we find the following agreement, signed by the counsel on both sides: "We hereby agree upon the foregoing statement of the case, as prepared by us for the hearing of the supreme court, and that a copy thereof, as and for the return, may be filed with the clerk of the supreme court on or before the 18th day of April, 1898." The case thus agreed upon on the 28th of March, 1898, contains no hint that at the hearing before the supreme court any other matter would be insisted upon before the court, except what appears in the case. But on the 19th of May, 1898, months after the case was agreed upon, and just a month and one day after the case as prepared for argument here was to be filed, and doubtless was filed, notice of this motion was given. While it is at least questionable whether this motion could be sustained, after the parties had agreed upon a case in which the supreme court was called upon to pass upon the questions therein presented, and not upon the question presented by this motion, based, as it is, upon the single ground that the matter appealed from is not appealable, and we are inclined to think that the proper practice would be to incorporate in the case agreed upon a notice that this court would be asked to sustain the order appealed from upon the ground that the order was not appealable, as was done on a former appeal in this case, yet we are not disposed to rest our conclusion upon this ground, inasmuch as we think the matter appealed from is appealable for reasons which will be apparent from what we shall say in disposing of the questions presented by the appeal; and therefore we prefer to base our conclusion to refuse the motion to dismiss the appeal upon the second ground taken by appellants.

Coming then to the merits of the case, it seems to us that the order of Judge Townsend must be regarded as the law of this case,—not, however, because it was adjudged by this court to be correct, but because it must be regarded as an order from which there was no appeal, inasmuch as the attempt to appeal therefrom was abortive. If so, then the master was clearly right in following the directions of that order as to the method of taking the account, and in refusing to adopt the method proposed by counsel for plaintiff, which was practically the same as that proposed in the order which Judge Townsend had refused to grant. When, therefore, Judge Watts sustained the exceptions to these rulings of the master,

and directed the account to be taken as suggested in the case of *Duncan v. Tobin*, Cheves, Eq. 146, he practically reversed the order of his predecessor, who had refused the order to that effect when asked for by plaintiff's counsel. That this was error, see *Warren v. Simon*, 16 S. C. 364, where it is said, "Nothing is better settled than that one circuit judge has no power to review and reverse the action of another circuit judge." It seems to us clear that the plaintiff, by the order appealed from, has obtained practically the same result which he sought to obtain by the order which he asked from Judge Townsend, and which that judge refused to grant. His action, whether right or wrong, must stand as the law of this case, until reversed by proper authority; and it certainly cannot be pretended that this has ever been done. But we are not prepared to say that there was any error in the action of Judge Townsend. While the rule suggested in the case of *Duncan v. Tobin*, supra, may be a very proper one when applied to a case like that in which the rule was suggested, it does not by any means follow that such rule is applicable to every case in which an accounting may be ordered by a court of equity. That was a case involving an accounting by an executor,—one who sustains a fiduciary relation to the parties entitled to demand an accounting, and who is required by law not only to keep an accurate account of his receipts and disbursements, but to file the same at stated periods in a public office appointed for that purpose. The obligation of his office requires him to show, whenever called upon by proper authority, what he has done with the assets of the estate committed to his charge; and, if he fails to show that he has made a proper disposition of the whole or any part of such assets, he becomes personally liable to make good the same to the parties entitled thereto. But where an accounting is ordered between parties sustaining no such fiduciary relation to each other, but occupying the positions merely of creditor and debtor, it seems to us that the rule, as to the mode of taking the account is, and ought to be, very different from that suggested in the case above stated, where an executor is called upon to account for the administration of the estate committed to his charge. When a creditor seeks to enforce by suit his claims against his debtor, the ordinary rule is for the creditor to state and prove his claims, and then the debtor is called upon to prove any payments, discounts, or counterclaims upon which he may rely; and we see no reason why the same rule should not apply in a case like the one under consideration, where an accounting has been ordered between persons sustaining another relation to each other than that of creditor and debtor. In such a case the debtor is under no obligation to show what he owes to the creditor, for that is the duty of the creditor; nor, on the other hand, is the creditor

under any obligation to show what he owes to the debtor, for that is the duty of the debtor. This was the view, as we understand it, taken by the master; and we sustain his ruling as stated by him in his report of the 27th of October, 1897. From this it follows that the circuit judge erred in sustaining the exceptions to the master's report of that date. The judgment of this court is that the judgment or order appealed from be reversed, and that the case be remanded to the circuit court, with instructions to send the case back to the master, in order that he may proceed to take the account in accordance with his ruling as stated in his report of the 27th of October, 1897.

(53 S. C. 382)

DASH v. INABNIET.

(Supreme Court of South Carolina. Oct. 20, 1898.)

PARENT AND CHILD—CONTRACT FOR SERVICES—EVIDENCE.

There is evidence to go to the jury on the question of contract of deceased to pay for services of his daughter as housekeeper, witnesses having testified that he told them that he had promised to pay her for waiting on him, and that he had promised to have papers in his desk so she would be sure of it, and was going to attend to it when he got better, and her husband having testified that when he objected to the way she was working for him he said she should be paid, and that on buying a piece of land he said he was going to give it to her, and that afterwards, when obliged to sell it on account of a mortgage, he said she would be paid.

Appeal from common pleas circuit court of Orangeburg county; R. C. Watts, Judge.

Action by Laura V. Dash against John H. Inabniet, administrator of John Inabniet, deceased. From a judgment of nonsuit, plaintiff appeals. Reversed.

Glaze & Herbert, for appellant. Raysor & Summers, for respondent.

MCIVER, C. J. This was an action brought by the plaintiff to recover the value of her services rendered the intestate during his lifetime. The testimony tended to show that the plaintiff was the daughter of the intestate, and upon her marriage, some 20-odd years ago, she, with her husband, at the urgent request of her father, continued to live with him up to the time of his death, which occurred on the 3d of December, 1894; that plaintiff cooked, ironed, scoured, sewed, and did all the housework and washing, and also cooked for the hands which her father sometimes hired to work on his farm; that her husband worked on the farm, furnishing one horse, and her father two or three horses; that her husband, at first, worked for wages, and afterwards for one-fifth of the crop; that she, her husband, and her four children and her father ate at a common table, the provisions being furnished partly by her father

and partly by her and her husband; that for five or six years before his death her father was afflicted, requiring to be waited on, and this was done by plaintiff and her children. When the plaintiff was asked as to whether there was any understanding or agreement with her father as to the compensation she was to receive for her services, her testimony as to this point was objected to as incompetent, under section 400 of the Code, and the objection was sustained. This was substantially the testimony of the plaintiff herself. The witness Whittaker testified that, in a conversation with intestate during his last illness, he told witness, among other things, speaking of the plaintiff and her husband, George: "If it had not been for them staying with him, and taking care of him, he did not know what would have become of him."

* * * Said he had promised to pay Laura for waiting on him, and had also promised to leave papers in his desk so she would be sure to get it; but he didn't say how much. He also said that they expected that the papers were fixed up already, but they were not. He said when he got better he would attend to it. * * * He said he couldn't do without George and Laura, and that George had threatened to leave him a time or two, but that he couldn't do without them." The witness George Dash, the husband of plaintiff, when asked what the intestate told him in regard to paying for the services of his wife, testified as follows: "He told me time and again, when he was making arrangements for the year, he would tell me what he would give me, and I would tell him that the way Laura was working for him did not suit me; and he said, 'You need not be afraid, she will be paid.' He said he wanted us to stay with him. He said he did not know what he would do without us." And, when this witness was asked whether intestate had made any offer to pay Mrs. Dash, he said that "at one time he bought a piece of land that he said he was going to give her." He further testified that the intestate, being unable to refund the money which he had borrowed to pay for this land, being pushed for it by the lender, had to sell the land; and "he told me when he was about to sell it that he had to sell it, but he would fix things so she would be paid." There was other testimony on the part of the plaintiff, but, as it seems to be merely cumulative, we have not deemed it necessary to set it out. At the close of the testimony on the part of the plaintiff a motion for nonsuit was made, which was granted by his honor, Judge Watts, upon the ground that there was no testimony to show any contract between the parties, and judgment was entered accordingly. From this judgment plaintiff appeals upon the several grounds set out in the record, which need not be repeated in detail here, as the only question presented for our decision is whether there was any testimony tending to show that there was a contract

between the parties for the payment to plaintiff of the value of her services.

In the case of *Ex parte Aycock*, 34 S. C., at page 257, 13 S. E. 451, the rule, in a case like this, is thus stated: "The true rule upon the subject is that, where a child renders service to his parents, the presumption is that such service was rendered in obedience to the promptings of natural affection, and not with a view to compensation, but that such presumption may be rebutted by positive and direct evidence that such is not the fact; and that loose declarations on the part of the parent that the child ought to be paid for his services, or that he intended or wished him to be paid, will not be sufficient to rebut the presumption. It must appear either that there was an express agreement between the parties providing for specific or reasonable compensation, or the circumstances should show clearly that the parent had not only intended to pay something, but had assumed a legal obligation to do so." It is not necessary, however, to show that the parties had agreed upon the amount of the compensation, for, if it is shown that the parent had to pay what would be a reasonable compensation for the services rendered, that would be sufficient, even though no specific amount should have been stated. Hence in the quotation above the language used is that the agreement must provide for "specific or reasonable compensation," and this view is supported by the cases cited in a note on page 339, 17 Am. & Eng. Enc. Law.

It will be observed that this case differs from the case of *Aycock*, above cited, in this respect: There the claim was presented under a proceeding in equity where the court was required to pass upon the sufficiency of the evidence to establish the claim, and accordingly it was said, at page 256, 34 S. C., and at page 451, 13 S. E.: "The testimony is all set out in the 'case,' and the only question is whether it is *sufficient* [italics ours] to establish any contract, either express or implied, on the part of the deceased to pay the appellant anything for her services." But here the question arises in a case at law, where this court has no jurisdiction to pass upon the sufficiency of the evidence, but our only inquiry is whether there was any testimony tending to establish the plaintiff's claim. In this case it is very apparent that there was no direct and positive testimony of any agreement between plaintiff and intestate as to compensating her for her services; for, when the plaintiff was asked whether there was any such understanding with her father, the question was objected to, and very properly ruled incompetent, under section 400 of the Code. The plaintiff was therefore forced to rely on such other circumstances as she was able to prove from which the jury might infer that there was an agreement for compensation. It will be observed that we use the word "might," and not the word "should"; for it is not for us

to say what inferences the jury should draw from the testimony, but only to determine whether there was any testimony from which the jury might infer that there was a contract.

Without discussing the testimony above stated, or indicating any views which might be taken of it, or suggesting any inferences that might be drawn from it, as that might prove prejudicial to one or the other of the parties, it is sufficient for us to say that there was some testimony from which the jury might infer that there was a contract; but whether the testimony was sufficient to warrant such an inference we have neither the power nor the disposition to say, and we must not be regarded as expressing, or even intimating, any opinion whatever as to the sufficiency of the evidence, as that is a matter exclusively for the jury. It seems to us, therefore, that there was error in granting the motion for a nonsuit. The judgment of this court is that the judgment of the circuit court be reversed, and that the case be remanded to that court for a new trial.

(53 S. C. 367)

TYLER et al. v. WILLIAMS et al.

(Supreme Court of South Carolina. Oct. 20, 1898.)

PARTITION—ISSUES—HARMLESS ERROR—EXECUTION—LEVY.

1. The issue of title to real estate which the jury are to try in a partition suit being sufficiently presented by the pleadings, there is no necessity for the court to frame an issue on the matter.

2. The pleadings, testimony, and specific instructions contained in a suit for partition being such as to clearly show that the real question was whether defendant, by a sheriff's sale and conveyances, acquired the interest and estate of T., an ancestor of plaintiffs, or merely the interest of their mother, which it was conceded he had obtained, plaintiffs could not be injured by refusal to amend the issue whether defendant was the owner in fee of the land by inserting the word "sale" before owner, or by adding the words "exclusively of any right of plaintiffs."

3. Any error in admission of assignment of judgment is harmless, the only material issue being whether the judgment had been satisfied before sale of land under execution thereon.

4. Balance for costs remaining due on a judgment authorizes sale under execution thereon.

5. The indorsement on an execution, "140 acres land Brown 12th," relied on as a levy from which satisfaction will be presumed, is insufficient, under Gen. St. § 2114, declaring that "the sheriff shall make a memorandum in writing of the date of every levy, and specify the property upon which such levy has been made on the process, or in a schedule thereunto annexed."

6. Whether the undisputed facts appearing from documentary evidence are sufficient to constitute a levy is a question for the court.

Appeal from common pleas circuit court of Orangeburg county; Ernest Gary, Judge.

Action by Warren V. Tyler and others against Braxton B. Williams and another.

Judgment for defendants. Plaintiffs appeal. Affirmed.

The charge of the court below is as follows:

"As you have gathered from the arguments in this case, this is a case for the equity side of the court. One of the defendants sets up as a defense that the estate should not be partitioned, by reason of the fact that the plaintiffs are not the owners of the land sought to be partitioned, but that B. B. Williams is the owner in fee of the land. That question of title must be passed upon by the jury, before the equitable issues can be passed upon by the court. You are to pass upon the question which has been submitted to you, which is as follows: Is B. B. Williams, the defendant, the owner in fee of the tract of land described in the complaint, and has B. B. Williams, the defendant, a good and valid title thereto? If the defendant Williams is the owner in fee, the land cannot be partitioned; but, if not, then the case goes on the equity side of the court, where the rights of the parties are to be determined by the court, and not by the jury. One is said to be owner in fee of land when he is the absolute owner of it. That question you are to pass upon. Both parties claim through a common source. They admit that it was originally the property of Mr. Thomas W. Tyler. They admit that at one time it was the absolute property of T. W. Tyler. Both claim through him. The plaintiffs claim that they are the heirs at law of Thomas W. Tyler, and that the land descended to them at his death under the statute of distributions. The defendant Williams claims that they can inherit none of that property, by reason of the fact that during his lifetime Thomas W. Tyler contracted a debt, which was executed, and, under that execution, all the right, title, and interest of T. W. Tyler was sold and purchased by his wife, and that she conveyed it to others, until it got into the hands of Williams by purchase. This issue depends on the validity of the sheriff's sale. If that sale was a valid sale, and conveyed the interest of Mr. Tyler, then his heirs could not inherit that property, because his interest had been sold under the sheriff's deed. Your inquiry will be then: Was that a valid sale? That is the basis of Mr. Williams' title, claiming under the sheriff's deed and claiming under successive sales until it comes to him.

"The plaintiffs' counsel request me to charge you the following propositions of law:

"(1) 'That if the jury believe from the evidence that W. H. Wroton had accepted \$500 from the judgment debtor, Thomas W. Tyler, in full settlement of judgment debt to him, any subsequent levy thereunder on property of Thomas W. Tyler would be void, and would not support a sheriff's deed.' I charge you that to be good law.

"(2) 'That the recital of levy in the sheriff's deed is not evidence of the fact, and it must be proved by other evidence.' That is the law.

"(3) 'That if the jury believe from the evi-

dence that there was a levy on the lands of Brown, under the execution in Williamson vs. Brown and others, that it would not be lawful for the sheriff to levy on other property of the judgment debtors in that case, unless it be made to appear that the levy was insufficient, or that the levy was otherwise disposed of, without satisfying the plaintiff's judgment.' I cannot charge you that, not because it is not a good proposition of law, but the question of fact is a matter of record. That is what is known as 'documentary evidence.' The court construes documentary evidence. The words, '140 acres land Brown 12th,' I charge you that that is not a levy. Where the levy has been made, it is entered upon the execution; and I charge you that that entry is not sufficient to establish the fact that a levy was made. So, I charge you that that proposition of law does not apply to this case.

"(4) 'That a levy is prima facie a satisfaction of an execution, and the burden is on the party endeavoring to sustain a second levy, to rebut that presumption.' That is a good proposition of law if the fact of the levy had been already established, but that entry is not sufficient to establish the levy. The sheriff speaks through his record. That indorsement would not be sufficient to support the fact that a levy was made. If you find that this judgment was paid, I charge you that a sale under a judgment that has been paid would convey no title. A judgment is the legal determination that a debt exists against the individual; and an execution is the process of the court to enforce the payment of that debt. It is therefore necessary that there should be a judgment to get a sheriff's sale. The execution is to enforce the payment of that debt. If, therefore, the debt was paid, there was nothing on which the execution could operate. A forced sale could not be had to pay that which was already paid. So, if there was no existing judgment, or if the execution had been satisfied, it would not support a sale. But I charge you, further, that if you find that there was a judgment and execution which was a lien on this property at the time, which was not paid or satisfied, although the sheriff undertook to sell under a paid execution, if at the time he undertook to make that sale there was in his office a valid execution not satisfied, the law would refer the sale back to the unsatisfied execution, and that would support the sale. Where the sheriff has a number of executions, and some are void, and others are not, and he sells under one that is void, and at the time there are others in his office that are not void, although the one he sold under would not support the sale, yet, if there were valid executions which were liens on the property at the time, the law would refer the sale to the valid execution, and that would support a good title to the purchaser. It mattered not under which execution the sheriff sold, if, at the time, there were valid executions which were liens on

the property existing at the time of the sale. Now, it matters not as to the amount. A judgment for \$50 or \$60 can create as binding a lien on real estate as a greater sum.

"You will see that your first inquiry would be, was there a sale? If you find that there was not at the time a binding execution against that property, then there could be no sale, because the execution is necessary to support the sale. It is a forced sale, and that is the authority by which the sheriff gets his right to sell. As I have already explained, it matters not under which execution he sells, if, at the time he sells, there is a valid, binding execution against the property.

"Where one comes into court to establish title to real estate,—and the defendant assumes that burden in this case,—the law requires him to make out a perfect claim of title, or he must show that he has been in open adverse possession for twenty years. In that case the law would presume that he had a grant. Or he must have held adversely and continuously for a period of ten years. That would give him a good title. Or he must go back to a common source, from which both parties claim title, and then you determine which has the better title. The presumption of a grant does not run against a minor. It takes the full twenty years after the minor has attained his majority before the presumption can run against a minor. The ten years' adverse possession must be continuous. If A. holds for five years, and sells to B., and B. holds for five years, those two cannot unite their possessions to make out the statutory period of ten years. The statutory period must be continuous. In the presumption of a grant the parties can link their possessions to make out the term of twenty years; but that presumption will not run against a minor, but must run for twenty years after his disability has ceased.

"The burden of proof is on the party who affirms title, B. B. Williams; and, if the testimony shows you that the party from whom he traces his title had a valid title at the sheriff's sale, then the deeds are sufficient in form to have conveyed that title to him. But if he did not get a title at the sheriff's sale, and has not held adversely and continuously for ten years since the majority of the youngest of the co-tenants, then his title could not accrue under adverse possession. That is the issue for you to determine. Is B. B. Williams, the defendant, the owner in fee of the tract of land described in the complaint, and has he a good and valid title thereto? If that sheriff's sale was a valid sale, then the deeds introduced are sufficient in form to have conveyed the interest of Mrs. Tyler, who claims to have bought the interest of her husband at that sheriff's sale. But if that sale was not under a valid judgment, or if there was not a binding execution at the time of the sale, then Mrs. Tyler would not have bought anything, and could not convey anything. But if the sheriff's sale was valid, and she bought

the interest of her husband at that sale, then the deeds she has made to other parties would be sufficient to convey that title to the defendant. If you find for the defendant B. B. Williams, you will answer the question submitted to you 'Yes.' If you find for the plaintiff, you will answer 'No.' "

S. Dibble and Moss & Lide, for appellants. Raysor & Summers and Izlar Bros., for respondents.

McIVER, C. J. This action was brought on for the partition of a certain tract of land situate in Orangeburg county, the plaintiffs alleging in their complaint that they and the defendant Williams are seised in fee, as tenants in common, of the said land, and that the defendant Gleaton claimed to hold a mortgage upon the interest of the said Williams in said land. The defendant Williams, in his answer, sets up several defenses: First. He admits that his co-defendant, Gleaton, holds certain mortgages on the real estate described in the complaint, and denies each and every other allegation contained in the complaint. Second. He alleges "that the plaintiffs were not at the commencement of this action the owners of the premises [as] alleged, or any part thereof, but that the defendant Braxton B. Williams was seised as the owner in fee simple and in the lawful possession of the said premises." Third. This defense need not be stated, as it is not pertinent to any question presented by this appeal, further than that it contains a denial of every allegation in the complaint "not hereinbefore specifically admitted." Fourth. The same may be said of this defense. Fifth. In this defense it is alleged, substantially, that the plaintiffs claim as heirs at law of their father, the late Thomas W. Tyler, who departed this life intestate, that the land in question was sold by the sheriff, after the death of the said Thomas W. Tyler, under executions to enforce the payment of judgments obtained against him during his lifetime, and bid off by his widow, the mother of the plaintiffs, for the sum of \$600, and she, having complied with the terms of sale, received titles for the land, which, by various intermediate conveyances, stated in detail, passed to, and vested in, the defendant Williams; "that the said plaintiffs have not, nor have either or any of them, any right, title, interest, or right of possession in or to said premises, or any part thereof, either as tenants in common with this defendant or otherwise"; but "that the right, title, interest, and estate of the said Thomas W. Tyler of, in, and to the said premises was duly conveyed to the predecessors and grantors of the defendant Braxton B. Williams, in fee, as heretofore set forth,"—and this defense concludes with a repetition of the general denial of each and every allegation in the complaint, except as hereinbefore specifically admitted. The answer of the defendant Gleaton admits that he is the holder of certain mortgages on the land in dispute.

of which he alleges that his co-defendant, Williams, is the owner, and denies each and every allegation in the complaint, except that which is specifically admitted. The other allegations in this answer need not be stated, as they are not pertinent to any question raised by this appeal. The plaintiffs filed a reply, admitting that both parties claim under Thomas W. Tyler as a common source of title, but deny the validity of the conveyances through which the defendant Williams traces his title from said Thomas W. Tyler. The following statement appears in the "case": "The case came on to be heard, at the May term, 1897, before his honor, Judge Ernest Gary, when the defendant's attorneys moved his honor to submit to a jury the following issue: 'Is B. B. Williams, the defendant, the owner in fee of the tract of land described in the complaint, and has he a good and valid title thereto?' The attorneys for the plaintiffs moved to amend the issue by inserting the word 'sole' before the words 'owner in fee,' or by adding the words 'exclusive of any right of the plaintiffs.' His honor refused both of these amendments, and granted the order moved by the defendants' attorneys, to which plaintiffs' attorneys duly excepted. The case was heard on said issue before his honor and a jury, his honor ruling that the defendants, having to maintain the affirmative of the issue, were entitled to the opening and reply." At the close of the testimony, which is set out in the "case," and after the argument of counsel, the circuit judge charged the jury as set out in the "case." A copy of his charge should be incorporated in the report of this case. Thereupon the jury returned a verdict responding to the inquiry submitted, in the affirmative. The plaintiffs moved for a new trial, which was refused; and the circuit judge rendered his decree, approving the finding of the jury, and directing that judgment be entered dismissing the complaint, with costs. Such judgment was accordingly entered, from which plaintiffs appeal, upon the several exceptions set out in the record.

The first two exceptions raise the question as to whether there was error in the manner in which the issue to be submitted to the jury was framed, and in refusing to amend the same as moved by the plaintiffs' counsel. These exceptions cannot be sustained. In the first place, there was no necessity to frame any issue, as the issue which the jury was called upon to try was sufficiently presented by the pleading; and it is for this reason that we have taken the pains to set out the pleadings more fully than would otherwise have been deemed necessary. As we understand it, the rule is that when, in an action for the partition of real estate, the defendant or defendants, as the case may be, in his or their answer, set up a claim of title, that presents an issue which must be tried by a jury, unless that mode of trial shall be waived; and there is no necessity for or propriety in fram-

ing and submitting an issue of fact to the jury, for the enlightenment of the judge's conscience, whose verdict may or may not be accepted by the trial judge; but, when the pleadings present an issue of title to real estate, that issue must be submitted to a jury, and the finding of the jury is final unless it be set aside. The issue which was framed and submitted to the jury, without objection except as to its phraseology, was, practically, nothing more than presenting to the jury the issue raised by the pleadings in a simple and concise form. Indeed, it was the same thing, in effect, as if the judge, in commencing his charge to the jury, had stated to them, in the same form, the issue they were called upon to try. In the second place, we do not see that the plaintiffs could have suffered any detriment by the refusal to amend the phraseology in which the issue was stated, in the manner asked for by the plaintiffs. In view of the allegations in the pleadings, the testimony in the case, and the specific instructions contained in the judge's charge, we do not see how the jury could fail to understand that the real question in the case was whether the defendant Williams had, by the sheriff's sale and the intermediate conveyances which were introduced in evidence, acquired the interest and estate of Thomas W. Tyler, the ancestor of the plaintiffs, or merely the interest of their mother, Ann C. Tyler; for it was conceded that the land originally belonged to Thomas W. Tyler, it was not denied that the plaintiffs were his heirs at law, and it was not denied that Mrs. Tyler had conveyed away her interest in the land, and that the same, by the intermediate conveyance, had become vested in defendant Williams. So that the only real question in the case was whether Mrs. Tyler acquired the interest and estate of Thomas W. Tyler in the land by her purchase at sheriff's sale, and that depended entirely upon the question whether the sheriff had any legal authority to make such sale.

The third exception imputes error to the circuit judge in allowing the assignment of the judgment in the case of Wroton against Thomas W. Tyler to be introduced in evidence, "without proof of the execution of the same." It appears that the defendants' attorneys offered in evidence the judgment roll in the case of Wroton against Tyler, to which no objection was interposed. The assignment in question was found in that judgment roll, marked, "Filed October 24th, 1868," signed by the clerk of the court; but when that assignment, which bore date 21st of August, 1868, and was executed in the presence of two subscribing witnesses, was offered in evidence, the plaintiffs objected to the introduction of that paper, "on the ground that it must be proved by one of the witnesses." The ruling of the circuit judge was as follows: "I have no right to say whether that paper ought to have been filed or not. It comes from a proper source, in a proper way, and I am not

to say how it got into the roll. Having been marked 'Filed' by the officer of the court, I have no authority to eliminate any part of the record. The effect of it comes up hereafter." We do not understand, therefore, that the judge made any ruling at that time as to the necessity for introducing one of the subscribing witnesses to prove the execution of the assignment, and nothing further was said about it during the development of the testimony, except that subsequently the plaintiffs proved by their own witness, W. H. Wroton, the plaintiff in that judgment, that he had transferred the judgment to E. B. Tyler, the son of the judgment debtor, Thomas W. Tyler, at the time or soon after Thomas W. Tyler had paid him \$500, upon which he had released Thomas W. Tyler from further liability to him. In view of all this, it is more than doubtful whether there was any error in receiving the assignment in evidence. But we need not discuss or decide that question, for, even if there was error, it was clearly harmless error. Whether the judgment had been assigned was a wholly immaterial issue in the case, the only material issue being whether that judgment had been satisfied before the land in question was levied on and sold by the sheriff, as the property of the said Thomas W. Tyler. For this reason, if there were no other, the third exception must be overruled.

The fourth exception presents what seems to be the real issue in the case, and that is whether the sheriff had any legal authority to make the sale of the land of Thomas W. Tyler, upon which defendants rely. The undisputed facts, as presented by the record in evidence in the case, are as follows: The land in question was levied on by the sheriff under an execution issued on the judgment in favor of W. H. Wroton against Thomas W. Tyler, and was offered for sale on the 5th of April, 1869, and bid off by Mrs. A. O. Tyler, the widow of said Thomas W. Tyler, for the sum of \$600. That she complied with the terms of sale, and received titles from the sheriff. At that time there was another execution in the sheriff's office, in the case of Barnabas Williamson against John Brown, S. B. Sawyer, and Thomas W. Tyler, upon which, among other indorsements, are the following: "July 1st, 1867. The sheriff will levy and raise the money on this execution by sales day next. It is for a cause of action arising since the war,"—signed by plaintiffs' attorneys; and also the following indorsement in pencil on the back of this execution: "140 acres land Brown 12th;" and also the following indorsement: "Satisfied April 5, 1869," signed by Sheriff Riggs. The plaintiffs contend that the sheriff could derive no authority to make the sale from the execution in the case of Wroton against Tyler, because, as they claim, the judgment in that case had been paid before the 5th of April, 1869, when the sheriff's sale took place; and for this purpose they rely on the testimony

of Wroton to the effect that, when Tyler transferred to him notes to the amount of \$500, he "agreed to release him, as he was surety on the bond" upon which the judgment was based, and that he accepted those notes "in full of all claims against T. W. Tyler on account of the bond and judgment." Assuming that this would operate as a satisfaction of the judgment so far as the debt and interest were concerned, it could not operate as satisfaction of the judgment so far as the costs were concerned; for, under the law as it then stood, Wroton had no authority to receive or release the costs due the attorneys and other officers of the court. Accordingly, we find from the record evidence, which is not and cannot be disputed, that when the sale was made, on the 5th of April, 1869, the sheriff applied so much of the proceeds of the sale as was necessary for the purpose, to wit, \$33.52, to the payment of the costs of that case. This balance remaining due and unpaid on the Wroton judgment was quite sufficient to authorize the sheriff to make the sale under the execution in that case. *Henderson v. Trimmer*, 32 S. C. 269, 11 S. E. 540. Now, as the jury were explicitly instructed that if there was no existing judgment, or if the execution had been satisfied, it would not support a sale, and there was no question as to the existence of the Wroton judgment, and as the record evidence above referred to showed unmistakably that the execution in that case had not been satisfied before the sale, but that the balance due thereon was paid out of the proceeds of the sale of the land, the jury might very well have concluded that the execution in the Wroton case afforded the sheriff sufficient authority to make the sale, and have based their verdict upon that conclusion. If so, then the question whether the execution in the case of Williamson against John Brown, S. B. Sawyer, and Thomas W. Tyler afforded the sheriff authority to make the sale would become immaterial. But, as we do not know and have no means of ascertaining upon what view the jury based their conclusion, it will be necessary to consider the question whether there was any error upon the part of the circuit judge in his charge with respect to that execution.

There is no controversy as to the two legal propositions submitted by the circuit judge to the jury: (1) That where a sheriff makes a sale of real estate nominally under an execution which has been satisfied or is void, and there is in his office at the time another valid execution, which would authorize him to make such sale, then the sale may be referred to such other valid execution, and the sale may be thereby supported. (2) That a levy indorsed upon an execution affords prima facie evidence of satisfaction, and, unless rebutted,—for example, by showing that such levy is insufficient or had been discharged,—the execution will afford no authority for the sale of property other than that levied on.

These propositions, being conceded by both parties, need not be further considered, and the only question is as to their application to the facts of this case. The record evidence shows that, at the time of the sale, there was another execution in the sheriff's office, in the case of Williamson against Brown, Sawyer, and Tyler, which was apparently open and unsatisfied, and that it was, in fact, satisfied out of the proceeds of the sale of the land in dispute, made by the sheriff on the 5th of April, 1869, under which defendants claim. But the plaintiffs contend that there was an indorsement on that execution which constituted a levy on the land of one of the defendants, and, there being no evidence that such alleged levy was insufficient or had been discharged or otherwise disposed of, the execution afforded no authority for the sale of the property of Tyler, one of the other defendants. The real inquiry, therefore, is whether the indorsement relied on was sufficient to constitute a levy on the land of Brown. That indorsement was made in pencil, in these words, "140 acres land Brown 12th." We agree with the circuit judge that such indorsement was altogether insufficient to constitute a levy. The statute (section 2114, Gen. St. 1893) provides that "the sheriff shall make a memorandum in writing of the date of every levy, and specify the property upon which such levy has been made on the process, or in a schedule thereunto annexed." To constitute a levy, therefore, four things must be done: (1) A memorandum in writing must be made by the sheriff; (2) this memorandum must contain the date of the levy; (3) it must specify the property levied on; (4) such memorandum must be made on the execution or in a schedule thereto annexed. It is very obvious that the indorsement relied on is lacking in three of these essential requirements. It is not signed by the sheriff; it is not shown to be in his handwriting; and, in fact, there is nothing to show that the sheriff made it. The fact that it appears on a record of his office amounts to nothing, as the indorsement immediately preceding was manifestly made by the plaintiffs' attorneys. Indeed, if we were at liberty to conjecture, we would be inclined to think that this pencil indorsement was made by those attorneys, as an indication of the property upon which they desired the sheriff to levy. It would hardly have been made in pursuance of the instructions of the attorneys, for those instructions in their most material part—to make the money by the next sales day—certainly were not complied with. Again, the date of the levy does not appear from the indorsement, for the figures and letters "12th" certainly are insufficient to show the date, the month as well as the year being wanting. Finally, it does not specify the property levied upon, for

there is nothing whatever to indicate where the land referred to lies, and nothing to indicate to whom the land belonged except the simple word "Brown," which, possibly, might have been regarded as sufficient but for the other defects pointed out.

The cases of *Bratton v. Garrison*, 2 Rich. Law, 146, *Sartor v. McJunkin*, 8 Rich. Law, 451, and *Manning v. Dove*, 10 Rich. Law, 395, cited by counsel for appellants to sustain the sufficiency of this indorsement to constitute a levy, have all been examined, and we do not think that any of them sustain appellants' contention. In all those cases it appears that there was something in the indorsement to indicate what land was levied on; as, for instance, "levied upon the land upon which the defendant resides," which, upon the maxim "*Id certum est quod certum reddi potest*," were held sufficient. Besides, in those cases the levy was sustained because rendered certain by the fuller description contained in the sheriff's deed. But no case has been cited, and we know of no case, where a question like the one now presented has arisen; that is, where there has been no sale, and no sheriff's deed, amplifying the terms of the levy, and the indorsement is relied upon as a levy sufficient to presume satisfaction.

But this exception also imputes error to the circuit judge in invading the province of the jury, by instructing them, as matter of fact, that no levy had been made. This does not correctly represent the charge of the judge, for he gave them no instruction as to a matter of fact, but simply instructed them, as matter of law, that the indorsement relied on was not sufficient to constitute a levy. What shall be sufficient to constitute a levy is certainly a matter of law, as the legislature has, by statute, directed what shall be done in order to constitute a levy. There may be cases in which the question would be, what has been done? in which cases there would be a question as to what has been done; but, when that is ascertained, the question of law arises whether what has been done is sufficient to constitute a levy. In this case there was no question of fact at all,—no question as to what has been done, as that appeared from the documentary evidence; and the only question was one of law as to whether what had been done was sufficient to constitute a levy; and as to that question it was not only the right, but the duty, of the judge to instruct the jury, and, as we have seen, there was no error in his instruction. The fourth exception is overruled. The fifth exception, being in violation of the rule, is not entitled to be considered; but we may say that, under the views hereinbefore presented, it cannot be sustained. The judgment of this court is that the judgment of the circuit court be affirmed.

(53 S. C. 483)

LATIMER v. LATIMER et al.

(Supreme Court of South Carolina. Oct. 29, 1898.)

PAROL EVIDENCE—CONSIDERATION OF DEED—FRAUDULENT CONVEYANCES.

1. Parol evidence is not admissible to show that a deed purporting to be based on a "good" consideration, and executed for a specified purpose, was in fact based on a "valuable" consideration, and executed for an entirely different purpose, where no fraud is alleged.

2. A conveyance to a wife, in consideration of a debt owing the husband, is such a fraud on the creditors of the husband that the grantor cannot avail himself of the conveyance as a defense to an action by the husband to recover the debt.

Appeal from common pleas circuit court of Greenville county; O. W. Buchanan, Judge.

Action by James H. Latimer against Joseph P. Latimer and another, as executors of Hewlett Sullivan, deceased. From a judgment for plaintiff, defendants appeal. Affirmed.

The deed from Hewlett Sullivan to M. Louisa Latimer, trustee, was as follows: "The State of South Carolina, County of Greenville. Know all men by these presents, that I, Hewlett Sullivan, of the state and county aforesaid, in consideration of the sum of five dollars to me paid in hand by M. Louisa Latimer, trustee, the receipt whereof is hereby acknowledged, and also in consideration of the love and affection I bear my nephew Jas. H. Latimer, of the state and county already mentioned, have given, granted, bargained, sold, and released, and by these presents do give, grant, bargain, sell, and release, and hereby convey, to the said M. Louisa Latimer: * * * To have and to hold all and singular the said premises before described unto the said M. Louisa Latimer, trustee, for the uses and purposes hereafter to be mentioned: (1) In trust to the said M. Louisa Latimer for the use and benefit of the said Jas. H. Latimer for and during the term of his natural life, to enjoy the rents and profits thereof, which are not to be levied for any debt which he, the said Jas. H. Latimer, may now owe or hereafter contract, but the said rents are to be applied for his own benefit and that of his wife and children; my object being in thus giving this property that my said nephew Jas. H. Latimer, his wife and children, shall always have a home and the means of a comfortable support. (2) That, after the death of the said cestui que trust, then the title to said real estate hereby conveyed to the said M. Louisa Latimer, as trustee, as aforesaid mentioned, shall vest in the heirs of the body of the said Jas. H. Latimer, the child or children of a deceased parent taking the share to which their ancestor would have been entitled to; and, further, the said M. Louisa Latimer, trustee, is fully authorized herein and hereby and empowered, if desired by the cestui que trust, to sell the said real estate, and reinvest the proceeds of sale in other real estate. And I do hereby bind myself,

heirs, executors, and administrators, to warrant and forever defend all and singular the said premises unto the said M. Louisa Latimer, her assigns, and unto the heirs of the said Jas. H. Latimer, against me, my heirs and assigns, and all other persons lawfully claiming the same or any part thereof. In witness whereof I have this day affixed my hand and seal this 12th day of August, 1886. Hewlett Sullivan. [L. S.]"

Shuman & Dean, for appellants. J. A. McCullough, L. W. Parker, and A. Blythe, for respondent.

McIVER, C. J. The plaintiff brought this action to recover damages for the breach of a covenant entered into by the testator, Hewlett Sullivan, under his hand and seal; and the defendants, in their answer, aver that the said Hewlett Sullivan, in his lifetime, conveyed a large tract of land to the wife of the plaintiff, upon certain trusts therein declared, in consideration whereof the plaintiff agreed to release, and did release, the said Hewlett Sullivan from all liability under the aforesaid covenant. No evidence was offered of any separate release of such liability, either in writing, sealed or unsealed, or by parol; but the contention was that the true consideration of said deed was the release of the said Hewlett Sullivan from his liability under the said covenant. The deed was offered in evidence by the defendants, and it proved to be a deed from Hewlett Sullivan to M. Louisa Latimer, bearing date the 12th of August, 1886, conveying the land therein described upon the certain trusts therein declared. A copy of this deed, as set out in the "case," omitting the description of the land, will be inserted by the reporter in his report of the case. Dr. Joseph P. Latimer, one of the defendants, was examined as a witness, who, after testifying that he wrote the deed above spoken of, was asked, "What was the consideration of that deed?" for the purpose, as declared by defendants' counsel, of showing "that this debt was paid by the execution and delivery of said deed; that said deed was executed and delivered in payment and discharge of the debt sued on here, and said consideration was agreed on by said Hewlett Sullivan and Jas. H. Latimer." The question was objected to by plaintiff's counsel, as an effort to vary the terms of the recitals contained in the deed by parol testimony. The objection was sustained, and defendants' counsel duly excepted. The trial proceeded, and resulted in a verdict for plaintiff, upon which judgment was duly entered; and from that judgment defendants appeal, upon the several grounds set out in the record, which need not be stated here in detail, as they practically raise the single question whether there was error in the ruling excepted to.

From an examination of the terms of the deed relied on by defendants, it will appear

that there was no limit or suggestion therein contained that it was executed in satisfaction of the claim upon which the plaintiff sued, or in consideration of a release of such claim, and nothing to show that such was its object or purpose. On the contrary, the consideration in the deed is natural love and affection,—a good consideration,—and there is nothing whatever in the deed which even tends to show that a valuable consideration was in the minds of the parties; and the declared object of the deed was "that my said nephew James H. Latimer, his wife and children, shall always have a home and the means of a comfortable support." We lay no great stress on the use of the words "give" and "giving," though those words are exactly in accordance with the consideration stated in the deed, and with the declared object of the conveyance. Again, it will be observed that the plaintiff is no party to this deed, and there is nothing in it tending to show that he was in any way bound to release Hewlett Sullivan from his liability on the covenant mentioned above, even if he accepted the supposed benefits which the deed was intended to confer upon him. The conveyance was to M. Louisa Latimer, who, as we understand, is the wife of the plaintiff, upon the following trusts: "(1) For the use and benefit of the said Jas. H. Latimer for and during the term of his natural life, to enjoy the rents and profits thereof, which are not to be levied for any debt which he, the said Jas. H. Latimer, may now owe or hereafter contract, but the said rents are to be applied for his own benefit, and that of his wife and children; by object being, in thus giving this property, that my said nephew Jas. H. Latimer, his wife and children, shall always have a home and the means of a comfortable support. (2) That, after the death of the said cestui que trust," then the said land shall vest in the heirs of the body of the said James H. Latimer, etc.

The question, therefore, is whether it is competent, by parol evidence, to convert this voluntary deed, based on a good consideration, the declared object of which was to bestow a bounty upon the nephew of the grantor, together with his wife and children, into a deed upon valuable consideration, executed for a totally different purpose, to wit, to secure a release of the grantor from the legal liability which he had incurred to his nephew. To the question thus stated we do not see how there can be any other answer than that given by the ruling of the circuit judge. There can be no doubt that the general rule is that parol evidence is not admissible to contradict or vary the terms of a valid written instrument. 1 Greenl. Ev. § 275. It is true that this rule, like most others, is subject to certain exceptions, one of which is that such evidence may be received to vary the amount of the consideration mentioned in the deed (1 Greenl. Ev. § 28, note 2); but, as is said

by the same distinguished author in section 285 of the same volume: "Evidence may also be given of a consideration not mentioned in a deed, provided it be not inconsistent with the consideration expressed in it." And again, in section 304: "A further consideration may also be proved by parol, if it is not of a different nature from that which is expressed in the deed." As was well said by that wise and able judge, Johnson, in *Garrett v. Stuart*, 1 McCord, at page 516: "Legitimate considerations are either good or valuable; and, after some attention to the subject, my mind inclines to the conclusion suggested by one of my brethren, that the distinction is that, where one of these is expressed, parol cannot at law be admitted to show the other, but it may be admitted to show a greater or less of the same character." While it is true that this was not the point decided in that case, yet it seems to us a correct expression of the rule, or, rather, the exception to the general rule, and we adopt it as such, with this qualification: that, where fraud is alleged, it is competent to show by parol that a deed purporting to be based upon good, and not valuable, consideration was a voluntary deed. Now, in this case, no fraud was alleged, and the evidence in question was offered to show that a deed purporting to be based upon good consideration, and executed for a specified purpose, was, in fact, based upon valuable consideration, and was executed for an entirely different purpose, and we think there was no error in excluding such evidence. All of the South Carolina cases cited by appellant except *Spencer v. Bedford*, 4 Strob. 96, in which fraud was alleged, were cases in which the parol evidence was offered to vary the amount of the consideration; one of them being an offer to show that the real consideration was the exchange of one negro for another, instead of the amount of money named in the instrument of writing,—a consideration of like nature, both being a valuable consideration. We do not think, therefore, that any of those cases are in conflict with the view which we have adopted.

Another view has been suggested by counsel for respondent, which would be fatal to this appeal. If the deed executed by Hewlett Sullivan to M. Louisa Latimer, as trustee for plaintiff and his children, was, in fact, based upon the consideration of a release of the plaintiff's claim against Hewlett Sullivan (which the verdict of the jury in this case shows was a valid legal claim), then such deed would operate as a fraud upon the creditors of the plaintiff; and neither Hewlett Sullivan nor his executors could avail themselves of a fraud in which he participated. See *Johnston v. Lewis, Rice*, Eq. 40; *Harvin v. Weeks*, 11 Rich. Law, 601; *Steele v. Atkinson*, 14 S. C. 154. The judgment of this court is that the judgment of the circuit court is affirmed.

(73 S. C. 295)

TURPIN v. SUDDUTH et al.

(Supreme Court of South Carolina. Oct. 3, 1898.)

For opinion, see 31 S. E. 245.

NOTE by McIVER, C. J. Since the filing of this opinion, the reporter has very properly and kindly called my attention to an inadvertent error into which I fell in saying that the third request to charge, as stated in the fourth exception, differed from the request as set out in the "case." While this error does not affect the result, inasmuch as the request to charge was considered in both aspects, and its refusal justified, whether the request was in the form stated in the exception, or in the form stated in the charge of the circuit judge, yet, as I am very anxious to avoid any injustice to counsel, I have requested the reporter to append this note to the case, as an acknowledgment of my inadvertent error. It resulted from taking the third request from the charge of the circuit judge, in which the word "after" was, no doubt inadvertently, omitted, whereas the request, as set out on page 26 of the "case," conforms to the request as stated in the fourth exception. I therefore take pleasure in withdrawing my remarks as to this supposed difference between the request as stated in the exception and the request as set forth in the "case," and as to the importance of framing exceptions in conformity to the facts stated in the "case," as inapplicable in this instance.

(53 S. C. 315)

WHITMIRE v. BOYD et al.

(Supreme Court of South Carolina. Oct. 5, 1898.)

VENDOR AND PURCHASER — RESCISSION — MORTGAGES — ESTOPPEL TO ASSERT TITLE — FRAUD — NOTICE — PLEADING — AMENDMENT — HARMLESS ERROR.

1. A., in possession under a land contract, conveyed to B., who executed a note and mortgage to A. for the unpaid price. On learning that A. had no title, B. went to plaintiff, the owner, who, with the consent of A., conveyed to B., taking in part payment an assignment of B.'s note and mortgage to A., on B.'s admission that the signature was his. In foreclosure of the mortgage, at close of the evidence before the master which showed the mortgage to be a forgery, plaintiff was permitted to amend his complaint so as to set up B.'s estoppel to deny the genuineness of the papers, and so as to allege plaintiff's purchase-money lien. *Held* not error, under Code, § 194, permitting amendment when it does not substantially change the claim.

2. Plaintiff told B., who had purchased land from A., that he had sold to A., but he was not asked by B. whether A. had paid for the land, or whether he had given A. a deed. A. and B. were brothers-in-law, and A. had misrepresented his title to B. B. did not become personally liable for a mortgage on the land. A payment made by B. to A. was by the latter turned over to plaintiff under a land contract from plaintiff to A., and this was credited on B.'s note to A. for the price. *Held*, that

where plaintiff conveyed to B., and took an assignment of B.'s note and mortgage on the land to A., which proved to be forgeries, plaintiff's statement that he had sold to A. did not estop him to claim as against B. an equity in the land for the unpaid price.

3. A., in possession under a land contract, conveyed to B., who executed a note under seal and mortgage to pay the unpaid price. Plaintiff, the owner, afterwards, at the request of A., conveyed to B., and took an assignment from A. of the note and mortgage, on B.'s admission that the signatures were his, and on A.'s representation that the papers were genuine. These, however, were forgeries, and A. assigned the genuine note to C. B. made a payment to A., which was turned over to plaintiff under the land contract, and was credited on B.'s genuine note, assigned to C. *Held*, that the legal title remained with plaintiff under the contract, and A. conveyed to B. the equitable title only, subject to the unpaid price, and B.'s mortgage covered only the equitable title, and plaintiff could declare the deed to B. void for fraud, as against B. and C. as well as A.

4. One setting up a deed from the vendor as a defense to an equitable claim by the vendor must show a valid conveyance of the legal title to entitle him to a rescission and return of payments made.

5. Where a vendor who had contracted to convey to A., and afterwards conveyed to A.'s alienee, sought to avoid the deed for fraud, and asserted his purchase-money lien, A.'s alienee could not prevent the rescission because a payment made by A. under the land contract had not been returned by the vendor.

6. The vendor holding the legal title is affected with notice, by the recordation of a mortgage on the land executed by the alienee of his vendee, of the fact only of the incumbrance of the equitable estate in the land.

7. Error in allowing an amendment during trial, setting up a different defense, is harmless, where the defense rested on an unfounded assumption that defendant had no estate in the land in controversy subject to mortgage, he having an equitable estate therein, and where the amendment was allowed only on a contingency that did not happen.

Appeal from common pleas circuit court of Greenville county; James Aldrich, Judge.

Suit by Thomas B. Whitmire against H. Y. Boyd and others. There was a decree for plaintiff and some of the defendants, and plaintiff and defendant H. Y. Boyd appeal. Modified.

Following is the decree of the court below, viz:

"This case comes before this court upon the pleadings; order of reference; orders made by the master; the testimony taken by him; his report, containing his conclusions upon the facts and the law; the exceptions of the plaintiff; and the exceptions of the defendants H. Y. Boyd, W. A. Hudson, and B. M. McGee. These exceptions are quite numerous and long, and, taken together, and so far as the parties excepting are concerned, practically reopen the case. I will, therefore, consider the case upon its merits, as far as it is necessary to do so, and my conclusions will dispose of the exceptions.

"To understand the issues, it will be necessary to get a correct view of the facts. Plaintiff instituted this action for the recovery of judgment upon a note, sealed, and the fore-

closure of a mortgage of real estate given to secure the payment of said note. The said note and mortgage are forgeries. The land described in said forged mortgage was, in 1894, the property of the plaintiff. During the year 1894 the plaintiff verbally agreed with A. R. Fowler, defendant above named, to sell the land in question to him. On May 22, 1895, a written contract, under seal, and witnessed by two witnesses, was executed by plaintiff and said A. R. Fowler. This written agreement is to the effect that A. R. Fowler is 'to have the use' of the land described in complaint during 1895, and for said 'use' said defendant agreed to pay to plaintiff, 'on or before December 1, 1895, one hundred and fifty dollars.' This instrument then concludes in these words: 'It is further agreed that if the said A. R. Fowler shall pay to the said T. B. Whitmire, on or before December 1, 1895, \$500.00, with interest from January 1, 1895, at 8 per cent. per annum, including the above \$150.00, and shall execute to the said T. B. Whitmire a mortgage for \$500.00, payable January 1, 1898, on said land, bearing interest from January 1, 1897, at 8 per cent. per annum, then the said T. B. Whitmire shall execute and deliver to the said A. R. Fowler a warrantee [warranty] deed to said 188 acres of land.' A. R. Fowler put the defendant H. Y. Boyd in possession of the land in the latter part of December, 1894, and thereafter he continued in possession of the same. Prior to his moving upon the place, said Boyd had made a bargain with A. R. Fowler to purchase the lands from him. Fowler represented to Boyd that he was the owner of the land; but Boyd, having heard that plaintiff was talking of renting the land, went to see plaintiff as to whether or not he had sold the land to Fowler. Plaintiff told him he had sold it to Fowler, and said nothing about Fowler owing him anything on the sale. Boyd did not know that A. R. Fowler owed plaintiff the purchase money of the land until after he had taken a deed for the land from A. R. Fowler and executed his note and mortgage to said Fowler. Said deed, note, and mortgage will be considered later on. After these transactions were completed, Boyd heard that A. R. Fowler owed plaintiff the purchase money of the land.

"The master states no conclusions upon these issues; but I think that the facts above stated are material, and that they throw a flood of light upon this cause and other issues raised therein. These facts or conclusions are fully substantiated by the direct, positive, and unequivocal statements in the testimony of the defendant Boyd. The statements of plaintiff, when directly questioned in reference to these facts, are uncertain, indefinite, and vague, and do not contradict the statements of Boyd, and the testimony of Boyd is in full accord with the established facts in the cause.

"On January 22, 1895, A. R. Fowler, by formal deed of conveyance, duly conveyed

the land in question to Boyd. This deed was duly made, executed, and delivered at the time stated. No doubt about that. The consideration therefor was that Boyd was to take the land subject to an old mortgage for \$1,000 held by one McDowell, and to give to Fowler a note for \$800, secured by a mortgage of the land. This Boyd did, for on the same day, to wit, January 22, 1895, he gave to said Fowler his note, which read as follows: '\$800. Fountain Inn, January 22d, 1895. On the first day of January, 1898, I promise to pay to the order of A. R. Fowler eight hundred (\$800.00) dollars, with interest at the rate of eight per cent. per annum from date till paid. Interest to be paid and computed annually. For value received, I agree to pay, in case this note is collected by suit, 10 per cent. attorney's fees. [Signed] H. Y. Boyd. [L. S.] Attest: W. A. Curry.' To secure this note, at the same time and place, Boyd executed and delivered to A. R. Fowler a mortgage of the aforesaid land. The said mortgage is in the usual form, and was duly recorded in the office of the register of meane conveyances of Greenville county on February 9, 1895. While it may not be material, it is proper to note that the mortgage undertakes to recite the terms and conditions of the note it was given to secure, but in these recitals nothing is said as to the attorney's fee. These transactions were all executed in good faith by Boyd, and he believed that they were honest and efficacious.

"As against A. R. Fowler, Boyd had a good title to the land. Fowler's deed conveyed all the right, title, and interest he had therein to Boyd. It also conveyed any right, title, or interest which Fowler might acquire in the land. Plaintiff said, in his testimony, and it is a fact in the case, that he made the bargain with Fowler evidenced by their written agreement of May 22, 1895, already stated, in 1894, or prior to the execution of the agreement. His exact words are: 'I did not have any written contract with Mr. Fowler for the sale till May, 1895. Prior to that I had agreed to sell to him, and he had made a partial payment on it.' There is no doubt but that the contract for sale between plaintiff and Fowler as to the sale of the land was made before the conveyance of Fowler to Boyd, and that the written agreement evidencing that contract was not executed until after Boyd's purchase, viz. in May, 1895.

"As against plaintiff, Boyd stood in the shoes of A. R. Fowler. By complying with the contract, Boyd could have forced plaintiff to make the titles to him. Plaintiff could stand upon said contract, and have refused to execute a title until that contract was complied with and duly carried out, either by A. R. Fowler, or H. Y. Boyd as the assignee of Fowler. Again, and this is important, plaintiff and Fowler, or plaintiff and Boyd, or all of them, could, by consent, change or modify the aforesaid contract, and complete the transactions upon these changed or mod-

ified terms. Did plaintiff and Fowler afterwards change or modify the terms of the contract, agree thereon, and execute same? This issue, to be considered further on, is important.

"So far in the discussion of this case we have dealt with real facts. I regret to say that criminal conduct, involving moral turpitude, seems, from this point onward, to enter the case. It is proper to say, and I take pleasure in stating, that A. R. Fowler alone, and no one else, a party to this action or otherwise, suggested, knew of, or connived at the crimes of said Fowler. Fowler, it is evident, was as smart and cunning as he was wicked and depraved. H. Y. Boyd seems to be an honest and good, but not specially bright, man, and was the brother-in-law of A. R. Fowler. In various ways he deceived Boyd, and, as we have seen, sold him the land mentioned. He took Boyd's note and mortgage, forged copies of same, or what were intended to be copies, and disposed of these forged papers to honest men, for value. Fowler is now, as was stated in argument, a convict in the Georgia penitentiary, undergoing sentence for crimes committed in that state.

"On February 19, 1895, A. R. Fowler placed, as collateral security, in the hands of the defendant B. M. McGee, the genuine note of Boyd to himself, hereinbefore set forth, and a forged copy of said mortgage. At the time stated, A. R. Fowler borrowed from Mr. McGee \$400, and, as collateral security, assigned to him the Boyd note and forged mortgage. Mr. McGee knew of the old McDowell mortgage on the land, and refused to lend him the money unless he would get J. D. Harris to sign the note also. A. R. Fowler induced J. D. Harris to sign a note with him, dated February 19, 1895, for \$400, payable to Mr. McGee on November 15, 1895, with interest after maturity at the rate of 3 per cent. per annum; also for 10 per cent. attorney's fees, if the note had to be collected by law. At the foot of said note, and as a part thereof, these words are written, 'and place as collateral security note and mortgage given me by H. Y. Boyd for \$800, as it appears.' This note is signed by A. R. Fowler and J. D. Harris. On the back of the genuine note of H. Y. Boyd to A. R. Fowler, the names, 'A. R. Fowler, M. J. Harris, J. D. Harris,' are indorsed. Mr. McGee took the notes above stated, and the forged mortgage, and let A. R. Fowler have the money. No part of it has been paid. While the aforesaid genuine note was in the possession of Mr. McGee, he allowed A. R. Fowler to write upon the back thereof as follows: 'Received on the within note (\$235.00) two hundred and thirty-five dollars, Nov. 6, 1895. A. R. Fowler.' Mr. McGee got no part of this money. Mr. McGee did not notify H. Y. Boyd that he held this note and mortgage until 'the last of July or the 1st August, 1895.'

"It is evident that Mr. McGee holds the genuine note of H. Y. Boyd, as the assignee

of A. R. Fowler. By the assignment of the note, he also became the assignee of the legal or genuine mortgage. 'The rule of law is well established that the assignment of the bond carries with it the mortgage, but the assignment of the mortgage does not necessarily carry with it the bond. The bond represents the debt, while the mortgage is a mere security for the payment of such debt. One is the principal, the other is the mere accessory; and, while the assignment of the principal carries with it the accessory, the assignment of the accessory does not carry with it the principal. *Cleveland v. Cohrs*, 10 S. C. 225, and the numerous authorities there cited; also *Walker v. Kee*, 14 S. C. 142; *Wilson v. Dean*, 21 S. C. 332.

"There is now due McGee \$400, with interest thereon from November 15, 1895, at 8 per cent. per annum, and 10 per cent. on that amount as attorney's fee, aggregating \$526.49.

"On February 9, 1895, A. R. Fowler signed a paper as follows: 'Received of W. A. Hudson, trustee, fifty dollars, and assign with him note and mortgage for eight hundred dollars on H. Y. Boyd due in 1898. If sold next week, say 16th February, agree to pay out of same 130 dollars to Y. A. Norwood. 100-dollar note, and twenty-dollar note due said Hudson, and said 50 dollars borrowed to-day. [Signed] A. R. Fowler.' At the foot of the above writing, on the same sheet, apparently written by the same person, these words occur: 'Received of W. A. Hudson one note and mortgage, 800 dollars, given by H. Y. Boyd, which I have assigned to said Hudson as collateral for 180 dollars due him on land papers. [Signed] A. R. Fowler.' This last paper is not dated. The alleged note of H. Y. Boyd is not his note; it is a forgery, pure and simple. The forgery attempts to reproduce Boyd's genuine note, and does so very well, except that it is not a literal copy. The mortgage spoken of is the genuine mortgage given by Boyd to A. R. Fowler. Mr. W. Hudson testified: 'He [Fowler] turned over the mortgage [the genuine mortgage] to me; that is, Fowler gave it to me, and I afterwards let Fowler have it for some purpose. I don't remember what.' So Fowler again has the genuine mortgage, and he again disposed of it; for on the back of the mortgage is written: 'I hereby transfer the within mortgage to D. H. Livermore as collateral security for one note for \$250.00, dated April 6, 1895. A. R. Fowler.' It will be noted that the assignment here is of the 'within mortgage,' and does not purport to assign any debt which it was given to secure. It is simply an assignment of the mortgage. Another assignment of said mortgage is written upon the back thereof, and is as follows: 'This mortgage having been transferred to me by above transfer, and later by a transfer in a note for \$1,000, dated Apl. 2, '95, I hereby transfer and assign this mortgage to J. B. Redwine, without recourse on me.

Aug. 13th, 1895. D. H. Livermore.' Glued to the mortgage is the following paper: 'Office of J. B. Redwine, Atlanta, Ga., Oct. 5, 1895. I do hereby transfer and assign to J. B. Redwine a certain mortgage, made by and given by H. Y. Boyd to me, and dated January 23, 1895, and recorded February 9, 1895, in Book KK, page 157, of the Greenville county, S. C., records. This mortgage is for \$800.00, and is transferred now, as above, for the purpose of securing a \$1,000.00 note made and given by me to said Redwine, for value received. This note is dated Oct. 2, 1895, and due in six months, and this transfer is made to secure any future renewal of said note, in whole or any part thereof. [Signed] A. R. Fowler.'

"Note, again, that in none of these transfers is there any attempt to transfer the note the mortgage was given to secure, and yet that very mortgage, in express terms, is given to secure that one debt. These transfers seem to negative the idea of the transfer of the debt. A. R. Fowler was a sharp man. Perhaps he had an idea that he could sell the note and mortgage, or assign them separately, and thus realize more from them, and was trying to work some such plan. At all events, we have a mortgage securing, in terms, one debt, being assigned to secure another debt.

"Mr. Hudson can take nothing on his assignment, for he gave the mortgage back to Fowler. Redwine can take nothing under the assignment to him, because he only took an assignment of the mortgage, while Mr. McGee was the assignee of the note it was given to secure, and, as assignee, was, and is, the legal holder of said mortgage. His right or title is derived from two sources: (1) A. R. Fowler assigned the mortgage to him at the time he assigned the genuine note to him. (2) Even if Fowler had not, by express contract, so assigned said mortgage, still the assignment of the note, as we have seen, carried the genuine mortgage with it. The same authorities already cited hold that the assignment of the mortgage does not carry with it the note, bond, or debt it was given to secure.

"On November 16, 1895, the plaintiff, T. B. Whitmire, by his deed, under seal, duly conveyed the land in dispute to the defendant H. Y. Boyd. The consideration is stated to be \$2,000. Plaintiff duly executed and conveyed this deed to Boyd. This consideration, according to plaintiff's view, was made up as follows: \$1,000 to go to the old McDowell mortgage. He had been paid \$235 by A. R. Fowler on November 16, 1895. H. Y. Boyd furnished the cash, and Fowler gave him credit for it, and indorsed it, as a payment, upon the genuine note of Boyd to himself, for \$800, dated January 22, 1895, while in the hands of Mr. McGee. There is no doubt that Boyd paid this money to Fowler upon his note, and that Fowler paid it to plaintiff. On November 16, 1895, W. P.

Fowler, a brother of A. R. Fowler, and H. Y. Boyd gave their joint sealed note, secured by a chattel mortgage, to plaintiff, for \$100. This was duly paid. It was taken by plaintiff in payment, in part, by A. R. Fowler of the purchase money of the land described in the complaint. It will be remembered that, under the agreement for the sale of the land, between plaintiff and Fowler, Fowler was to pay plaintiff \$500 on or before December 1, 1895, with interest from January 1, 1895, at 8 per cent. per annum. So that on November 16, 1895, plaintiff had received upon his said contract, either in cash, or by note and mortgage accepted as cash, \$365, raised by Boyd. Fowler had also paid plaintiff \$200 on the contract. Plaintiff and A. R. Fowler changed or modified their original contract; for, after receiving these payments, plaintiff, on the same day, gave a deed for the premises direct to H. Y. Boyd, and took from A. R. Fowler, as the consummation of the transaction, a sealed note and a mortgage of H. Y. Boyd to A. R. Fowler. This so-called note is an out and out forgery, and is as follows: 'Greenville, S. C., Nov. 16th, 1895. On or before January 1st, 1898, I promise to pay to the order of A. R. Fowler eight hundred (800.00) dollars, with interest from date at the rate of eight per cent. per annum till paid in full, interest to be computed and payable annually. I agree to pay ten per cent. attorney's fee in case this note is placed in the hands of an attorney for collection, and, should default be made in the payment of interest, the whole \$800.00 shall become due and payable. Witness my hand and seal the 16th day of November, 1895. [Signed] H. Y. Boyd.' The mortgage given to secure this forged note is in the usual form, covers the land described in the complaint, and purports to have been executed by H. Y. Boyd on November 16, 1895. It is a forgery also. This forged note and mortgage, as appears upon the back of the mortgage, were, on November 16, 1895, the date of their purported execution, assigned and transferred by A. R. Fowler to the plaintiff, as and for payment of the balance due on the purchase of said land. Plaintiff accepted them as such payment.

"These are the leading facts, but there are others material to the case, and, as I cannot concur with the master in some of his material conclusions upon the facts, it will be proper now to take up those issues. As matter of fact, the master finds as follows: 'Some time during the year 1895 the defendant Boyd found out that he had no title to the said premises, and, after considerable negotiations with the plaintiff, I find, as a matter of fact, that on the 16th day of November, 1895, the said Boyd paid to the plaintiff two hundred and thirty-five dollars, and gave him a chattel mortgage to secure a balance of one hundred dollars, which mortgage was afterwards paid, making a total of three hundred and thirty-five dollars in cash; and it was

agreed by and between the said Boyd, the said Fowler, and this plaintiff that the note and mortgage sued on by plaintiff should be assigned to him to secure the balance of six hundred dollars, which it was understood and agreed was due the plaintiff on account of the sale of said land.' The master in his report says: 'I further find, as a matter of fact, that before accepting the said note and mortgage the plaintiff inquired of the defendant Boyd if the said note and mortgage were genuine papers, and was assured by the said Boyd that they were, and the plaintiff was induced by the representations of the said Fowler and the said Boyd to part with his title, and receive the said papers as collateral security for the balance due him as aforesaid; that, therefore, and in consideration of the said three hundred and thirty-five dollars, and the assignment to him by the said Fowler, with the knowledge and consent of the defendant Boyd, of the note and mortgage sued on, to secure the sum of six hundred dollars, the balance due on account of the purchase of said land, the plaintiff executed and delivered to the said H. Y. Boyd a warranty title for the said premises.' Again, the master reports: 'I furthermore conclude, as a matter of law, that, as to plaintiff, the defendant Boyd and those claiming through him are estopped from disputing the validity of the note and mortgage sued on by reason of the facts which I have found above. He admitted to the plaintiff that said papers were genuine, and thereby induced him to part with his title, and accept them to secure the balance of the purchase money due him on account of the sale of the land. By so doing, in so far as the said Boyd is concerned and those claiming through him, the said mortgage is a genuine one, and entitled to rank as a purchase-money mortgage, which would cut off any of the equities which any of the other defendants might have in the premises in dispute.'

"Plaintiff testified: 'I have had conversations with Mr. Boyd in reference to his signature to the note and mortgage. It was the day the papers were executed, November 16, 1895, that I had a conversation with Mr. Boyd about it. It was in the People's Bank. I think Mr. E. B. Martin, A. R. Fowler, and H. Y. Boyd were present. I showed Mr. Boyd the signature, and asked him if it was his, and he said it was. That was before the transfer of the mortgage was made to me, but on the same occasion. When Mr. Boyd acknowledged that as his signature, I accepted the mortgage as security for the money that was due me, and Mr. Fowler assigned it to me. Mr. Fowler owed me six hundred dollars. * * * I conveyed it [the land] to Mr. H. Y. Boyd on the same day the mortgage was executed. * * * At the time Mr. Boyd acknowledged his signature in the People's Bank, the genuineness of Mr. Boyd's signature was not in question at all. * * * The paper shown me is the lease. It was after-

wards determined to convey the property to Mr. Boyd instead of Mr. Fowler. * * * I don't remember meeting Mr. Boyd on the street the 16th November, 1895, and telling him that for three hundred and thirty-five dollars I would give a good title to that property. * * * I carried the papers up, and delivered them in the bank. I am positive of that. I think the money was paid before I gave the deed to Boyd or Fowler. I can't say whether I questioned Mr. Boyd about the signature before I gave the deed or afterwards. I suppose it was before. I think Mr. E. B. Martin was present or near by. I showed Mr. Boyd the note and mortgage, and asked as to his signature. I did not have the mortgage folded so as to conceal all except the signature when I asked him about it. He said that was his signature. He did not say, "It looks like it;" but I won't be certain. He acknowledged the signature without qualification. If he had not done so, I would not have taken the papers. * * * A. R. Fowler delivered me the \$800 note and mortgage at the bank. I think Mr. Boyd was present. The \$800 note and mortgage in suit was part of the consideration for which I gave the deed to Mr. Boyd. Mr. Boyd executed the mortgage the same day I gave the deed to Boyd. I don't remember whether I executed the deed before I asked Boyd about his signature. I think that all of the papers were delivered in the bank. The delivery of the deed by me to Boyd and of the mortgage by Fowler was all about the same time. Mr. Beacham and Mr. McDavid were then and are now officers of the People's Bank.' On cross-examination plaintiff testified: 'The transaction as to this mortgage [the one in suit] took place in the People's Bank. We began some time in the afternoon and finished a short while before dark. I think the assignment took place a while before night. Mr. Fowler owed me \$800, and assigned me that mortgage in payment of the debt, and that is the reason why I claim \$800 and interest. I can't say whether we were in the People's Bank once, or more than once, during the p. m. I don't remember Mr. Boyd's suggesting that all old papers be destroyed and new ones given. I knew of the mortgage in Book KK, page 151, and knew it had been satisfied. I think Mr. Fowler told me that Boyd had executed that mortgage, but that it was worthless, as he had no title when the mortgage was given. I can't say whether it was before I took the mortgage or afterwards that he told me this. I never saw the note and mortgage recorded in Book KK, page 151, and never asked to see it. I think I asked Mr. Fowler to satisfy it, or perhaps he might have told me it was satisfied. At the time I took the note and mortgage at the bank I hardly think I knew of the mortgage in KK. I think I found it out afterwards, and asked him to satisfy it. I don't remember now who told me about that mortgage. I think I knew it before this transac-

tion. * * * I made no inquiries as to mortgages over the property, as I did not see how any one [could] give a mortgage over it without a deed to the property. * * * Between the time I bargained the property and November 16, 1895, I did not receive any other paper from Mr. Boyd as security for payment of the purchase money of that land. I think I knew that that mortgage had been marked "Satisfied" on the day I got the note and mortgage at the bank. * * * The \$225 was paid at the People's Bank. The deed I made to Boyd was drawn by me at the store, and executed and witnessed at the People's Bank. I did not agree to make Boyd the title for \$325. This, with what Fowler had paid, would about make up the cash payment. I was to get a mortgage for \$600 for the balance. * * * I didn't refuse to allow Mr. Boyd to have the paper in his hand. I explained the nature of the paper to him. They had come up to arrange the matter, and I explained to them the nature of the trade. It was agreed between Boyd, Fowler, and myself that this \$800 mortgage should stand as security to me for the \$600 balance due me on the land. The whole thing was closed in the People's Bank.' On cross-examination, when recalled, plaintiff said: 'I said yesterday that I could not recall the conversation with Mr. Boyd about selling him the property. I said yesterday that I could not remember the conversation with Mr. Boyd on the street. I said yesterday that I did not remember whether I gave Mr. Boyd the deed before or after I asked him about the mortgage. I explained to Mr. Boyd in the bank that there was \$600 due on the \$800 mortgage. I think we came down the street after I showed Boyd the mortgage for \$800, and got the blank, and drew the \$100 mortgage.'

"H. R. Boyd testified: 'I have received a deed from Mr. Whitmire for that land. I was to pay Mr. Fowler two thousand dollars for the land. I assumed the payment of the Kennedy [McDowell] mortgage, and gave my note and mortgage \$800.00 for the land. I next saw Mr. Whitmire in the fall of 1895. I told him that Mr. Peden had said that if I wanted to stay there I had better see him. Mr. Whitmire said that Fowler owed him \$500, and that if he didn't pay the \$500 I would have to pay rent. I saw him again, about ten days later, and asked him, if Fowler did not comply with the terms, if he would accept it from me. I asked him how much Fowler owed him. He said a thousand dollars. The next time I saw him was the 16th of November, 1895. I met him near Bentz's store, and asked him about the matter. He "stroked" his pocket, and said, "I have a chain of title here in my pocket," and upon the payment of \$335 I could get it. W. P. Fowler was present. I came up with A. R. Fowler that day, and we got here [Greenville] about 12 o'clock. I saw Mr. Whitmire again that day near the court house, and told him I

could pay him \$235 and a mortgage for \$100. He said if I would make it good he would do it. We then executed the mortgage marked "E," and W. P. Fowler and I went up to the People's Bank in front of Mr. Whitmire. I went to the National Bank, and got the \$235, and gave it to A. R. Fowler, and he went down the street, and came back with the papers marked "A" [deed of plaintiff to Boyd] and "B," and "M," "H," "O," and "P." When I got these papers we were just in the act of starting home. Mr. E. B. Martin, W. P. Fowler, and I were standing near the People's Bank, and Mr. Whitmire asked me to step in the bank, and took a paper from his pocket, and held it folded somewhat like this [indicating], and asked me if that was my signature, and I said, "It looks like it." He then said, "Do you know whether or not it is yours?" I said, "No, sir; but it looks like it." I have never had any conversation with Mr. Whitmire since then about that paper. * * * The note marked "L" [held by Mr. McGee] is genuine. I signed that note, and made the payment of \$235. It is the same money I paid Whitmire through Fowler. I have made no other payment on the note.' On cross-examination, Boyd said: 'I first found out that Mr. Whitmire claimed the money when he wrote me the letter asking for payment of the interest. This was after I had seen the note at McGee's. * * * I admit owing somebody something on this land. I admit the amount called for by the McGee note [the one held by him], less the credit. I thought that the paper which Mr. Whitmire showed me at the bank was in the form of a mortgage. It was under lamp-light, and he held it in his own hand, and I did not see anything but the name. He did not tell me that Mr. Fowler had assigned it to him. He made no explanation at all. I did not ask Mr. Whitmire anything about the paper, because I knew there were more papers out, and I did not propose to commit myself at that time. I asked to see the paper in my hand, and he refused that. * * * I didn't pay the \$100. It was not my money. It was borrowed on W. P. Fowler's and my note. He was principally responsible. I will lose the \$235 if I don't get credit for it.' On cross-examination by Mr. Sims, Boyd said: 'I did not know that Mr. Whitmire held any note and mortgage that I had signed. I did not answer Mr. Whitmire, because I had gotten letters from Mr. Redwine claiming the money, and had seen Mr. McGee's note.'

"H. Y. Boyd, cross-examined by Mr. Haynsworth, said: 'I think Will Fowler and Boyd went into the bank. When Mr. Whitmire showed me that mortgage, I had no reason to believe that Fowler had turned over a note and mortgage to Whitmire as part of the consideration of that deed. I thought the \$335 was an end of it. When we had the interview earlier in the day, Mr. Whitmire did

not tell me that Fowler had turned over any note and mortgage to him. Not a word was said about it.'

"W. P. Fowler testified: 'I was present when Mr. Boyd and Mr. Whitmire met in the street, in Greenville, and talked about these papers. I remember Mr. Whitmire said he had some papers, and that Mr. Boyd could get them by paying some sum of money. I signed the paper "E." I was at the bank when we all met there. I remember Mr. Whitmire showing Mr. Boyd some papers. We walked in the bank with Mr. Whitmire. Mr. Whitmire showed Mr. Boyd some papers, and asked him if it was his signature. Mr. Boyd said it looked very much like his. Mr. Whitmire asked a second time, and Mr. Boyd said: "I can't be certain; but it looks very much like it." Nothing further occurred between the parties to my knowledge.'

"E. B. Martin testified: 'I was present November 16, 1895, when this transaction took place. Mr. Boyd paid \$235 to Fowler. I was at the bank. When Mr. Whitmire came up, they went into the bank, and remained just a little while,—not long enough to prepare a deed. When Boyd came out, we went on out of town together. That was nearly night. * * * Mr. H. Y. Boyd, A. R. Fowler, W. P. Fowler, and I were in front of the bank. I can't say how long they stayed in the bank. Just a little while.'

"I have, at length, recited this testimony. From this, and all the testimony, I think, and so hold, that H. B. Boyd acted as follows: He, in good faith, took his deed of the land from A. R. Fowler, and gave his \$800 note and mortgage to A. R. Fowler. He then honestly believed that he owned the land, subject to the McDowell mortgage and the Fowler mortgage. Months afterwards he found out that his title was not perfect, and that plaintiff still held the legal title. He went to see plaintiff about it, and plaintiff told him, substantially, the status of the agreement between himself and Fowler. At that time Boyd contemplated complying with the agreement between plaintiff and A. R. Fowler,—even asked plaintiff could he complete it. While there is no direct evidence as to what, if anything, passed between Boyd and A. R. Fowler, it is reasonable to assume, and incidental statements made by witnesses support the assumption, that Boyd talked with A. R. Fowler about the matter. It is only natural that he should have done so. It is evident that A. R. Fowler saw and talked with plaintiff in reference to the matter. Plaintiff and Fowler, without the knowledge, much less the consent, of Boyd, changed the agreement. Plaintiff's own testimony, and the acts of himself and Fowler, show this. I cannot say what passed between plaintiff and A. R. Fowler, but I know what they did as a consequence of what passed between them.

"The written agreement was abandoned or modified. A. R. Fowler had paid plaintiff

\$200 on the agreement. On November 16th, A. R. Fowler paid to plaintiff the \$235 paid to him by Boyd, and he took the chattel mortgage for \$100, which was soon afterwards paid. So that he had, on that day, been paid in cash, and what he received as cash, \$535,—a sum equivalent to the first payment nominated in the written agreement. Plaintiff then made an absolute deed, in fee, of the land to Mr. Boyd. Instead of demanding from Boyd a mortgage of the land to secure the second payment of \$500 and interest, he took an assignment of a forged note and mortgage for \$800 from Boyd to A. R. Fowler. Why this was done, I don't know. Plaintiff, in one place in his testimony, seemed to have an idea that he owned the \$800 note and mortgage, and in another place that he held it as security for the balance due him on the land, to wit, \$600. How a balance of \$600 could, on November 16, 1895, be figured out upon the terms of the old agreement, after deducting the payment made, I can't see. While I must not be understood as intimating, even in the slightest degree, that plaintiff did wrong in changing the old agreement with Fowler, yet, inasmuch as the action actually taken was more beneficial to plaintiff than the old agreement was, it tends to show that plaintiff and Fowler did make a new agreement.

"But this \$800 note and mortgage were forgeries; hence all of this trouble. A. R. Fowler knew that they were forgeries, and it is pretty certain that he forged them. Plaintiff took these forged papers, believing them to be genuine, and upon this belief made the deed to Boyd. Boyd knew nothing of these papers. They were dated November 16, 1895, the very day that plaintiff made the deed to Boyd. Plaintiff saw that they purported to be executed on that day, for he speaks of their execution upon that day. According to the trend of the testimony, I think that A. R. Fowler fixed them up that day, and did it for the purpose of deceiving plaintiff, by falsely pretending to comply with the terms of the plaintiff. Plaintiff thought that the \$800 mortgage of Boyd to Fowler was worthless, because the legal title was not in Boyd when he made that mortgage. Plaintiff thought that said mortgage should be marked 'Satisfied' upon the record,—disposed of. Plaintiff, then, thought that if he made a deed to Boyd, which could put the legal title in Boyd, Boyd could make an \$800 note, secured by a valid mortgage of the land, to A. R. Fowler, and that Fowler could assign it to him. Now Fowler pretended to do all of these things, and his pretension deceived the plaintiff. But Boyd knew nothing of these changes, forged papers, etc., and they do not and cannot bind him. As to him they are worthless, and of no force or effect.

"It would be asking overmuch to assume that Boyd knew of these forgeries, was a party to a crime, or an accessory to the crim-

of Fowler. To convict him of either would require proof of the clearest and most convincing character. His testimony has not been impeached, and his character has not been assailed, in either of the methods known to the law. I cannot see how Boyd's reply to the question of plaintiff, if the signature to the mortgage he showed him (the forged mortgage) was his, can be tortured into an estoppel of conduct from denying its validity. The plaintiff did not act upon his answer, whatever it was. Boyd did not know that plaintiff owned the paper, or was negotiating for it. He was in the dark, and, as far as A. R. Fowler could go, he was kept there. Fowler was a smart man. He was perpetrating a crime, and would he permit one of his victims, Boyd, to know of it? Boyd had recognized the genuine note he gave to Fowler, and knew that it was in the hands of McGee; that he would have to pay it; and, as a sensible man, he would not have given a new note and mortgage, based upon the same consideration, and thereby obligate himself to pay one debt twice. That is what plaintiff contends he is.

"Plaintiff has, I think, testified honestly, and as he remembered transactions and conversations. True, his memory is at fault, not so much in what he said as it is as to the times he referred to. He has gotten his conversations with Boyd mixed together. Boyd's statement of what took place at the bank is, I think, sustained by the preponderance of the testimony. Boyd is not a pensman. His genuine signature is like that of a person who seldom writes, and an unformed hand. We naturally conclude that he is not well educated, and not conversant with written instruments. Fowler had skillfully forged his name to the forged mortgage. One of the most intelligent witnesses in this case, who holds a mortgage with H. Y. Boyd's name to it, forged, said that it was hard for him, even by close comparison of writings, to determine whether it was a forgery or not. I do not think that it would be just to hold a man responsible for a forgery, perpetrated in his name, simply because some one shows him the forged name, and suddenly asks, 'Is that your signature?' and he should say, 'Yes,' or, 'It looks like my name.' I think such a man should be, in some way, put upon notice, and the reason, as well as the importance of it, made known to him. For a man to assert that his name is forged is, indeed, a serious assertion, for it implies that some one has forged it, and he knows that he will have to make good the charge.

"I hold that Boyd did not induce plaintiff to make the deed to him; that Fowler induced him to make the deed; that Boyd honestly and faithfully complied with the new contract between plaintiff and Fowler, as told to him by plaintiff, by raising cash, or its equivalent, sufficient to satisfy the demand of plaintiff as made known to him by plaintiff;

that plaintiff's new contract with Fowler and the note and mortgage was known only to them, and not to Boyd; that Boyd got his title honestly by complying with his contract with A. R. Fowler, and by having Fowler to do all that plaintiff told him he required of Fowler. It is not disputed that Boyd complied with his contract with Fowler. He accepted his deed from him, and gave him the \$800 note and mortgage of January, 1895. When plaintiff said that \$335 would enable him to get plaintiff's deed, he raised that money for Fowler, who paid it to plaintiff, and plaintiff made his deed to Boyd. I think that Boyd has acted legally and honestly throughout, and he should not be mulcted to pay Fowler's debts, with which he had nothing to do. Mr. McGee holds Boyd's genuine note and mortgage,—lent his cash upon the belief that they were genuine. They are genuine. Plaintiff sold his land to Boyd, made a deed to him, and was moved to do so by his bargain with A. R. Fowler. Boyd took the deed, and complied with his every obligation, and with the contract, as between Fowler and plaintiff, according to plaintiff's statements of that contract made to him. Boyd is an honest and innocent purchaser. I hold that H. Y. Boyd's title to the land is valid; that the forged mortgage of November 16, 1895, is, as to him, of no force or effect, and all that he owes to any party to this action is the balance due on his \$800 note and mortgage of January, 1895, in favor of A. R. Fowler, now held as collateral by Mr. McGee:

Principal	\$800 00
Int. 8 per cent. from Jan. 22, '95, to Nov. 16, '95.....	47 35
	<hr/> \$847 35
Paid Nov. 16th, '95.....	235 00
	<hr/> \$612 35
Bal. due Nov. 16th, '95.....	120 41
Int. on bal. to date.....	732 76
	<hr/> 73 28
Ten per cent. thereon as atty.'s fee....	
	<hr/> \$806 02
Total due	
Eight hundred and six ⁰² / ₁₀₀ dollars.	

"H. Y. Boyd should pay, of this amount, to the defendant B. M. McGee, \$526.49, as heretofore stated. This leaves a balance of \$279.53 due to some one by H. Y. Boyd. To whom should it be paid? I think that it should be paid to the plaintiff. I lay no stress upon the fact that this is a part of the purchase money of the land. There is no such lien known to the law of this state as the vendor's lien for the purchase money. If he wants a lien, he must, by appropriate means, create one. This balance of \$279.53 belongs to A. R. Fowler. The forged mortgage of Boyd to Fowler, of November, 1895, while of no force as against Boyd, is, upon the doctrine of estoppel, good in plaintiff's hands as against Fowler. That forged mortgage purported to be a security upon the land to pay a debt which Fowler owed plaintiff. This balance of money, be-

longing to Fowler, may be regarded as the land he described in his forged mortgage. Considering, then, the money as the land, and that it belongs to Fowler, plaintiff has, as against Fowler, the right to regard the mortgage, though forged, as valid, and as covering the said balance.

"Can any other party to this action deny this claim of plaintiff? None of them have a lien upon this money, nor did they have a lien upon the land which it represents. Plaintiff has, in the manner indicated, a lien, equitable it may be, which entitles him to it.

"I need not consider the question as to how much A. R. Fowler owes to plaintiff; it is far more than the balance stated. The other parties to the action will get nothing in this cause.

"From my view of the case, the amendments allowed by the master are immaterial, and need not be discussed.

"I think that Mr. McGee should not be required to pay any costs, as he has gained his case. I do not think that Mr. Boyd should be made to pay the costs of all the parties, because this litigation was not due to any default of his. He has acknowledged his liability to pay what he owed all the while, and the real contest was as to which claimant should it go. Plaintiff instituted this action, and much of it is due to his effort to enforce a forged note and mortgage, which he believed to be true. I think that H. Y. Boyd should pay the costs and disbursements of Mr. McGee, his own costs, and one-half of the fees of the master; that plaintiff should pay one-half of the fees of the master and his own fees; and that each of the defendants, except Mr. McGee, should pay his own costs and disbursements:

"Wherefore it is ordered, adjudged, and decreed:

"(1) That H. Y. Boyd, defendant herein, do, on or before the 1st day of September next, pay to the defendant B. M. McGee the sum of \$526.49, with interest at the rate of seven per centum per annum from the date of this decree, up to the date of such judgment, together with the costs and disbursements of the said B. M. McGee in this action, to be taxed by the proper officer of this court.

"(2) That the defendant H. Y. Boyd do, on or before the 1st day of September next, pay to the plaintiff, Thomas B. Whitmire, the sum of \$279.53, with interest thereon at the rate of 7 per centum per annum from the date of this decree to the date of such payment.

"(3) That said defendant H. Y. Boyd do pay to the master of this court one-half of the fees due him, as such, for services rendered in this action, and that he do, also, pay his own costs and disbursements in this action.

"(4) That if either or all of the parties above named, and to whom money is directed to be paid, refuse to accept the same, then, and in that event, the said H. Y. Boyd

may pay such sum or sums so refused to the master of this court, who is hereby authorized and directed to receive the same, to be held for the purpose stated.

"(5) That upon payment by the said H. Y. Boyd of the sums aforesaid, to the parties aforesaid, or to the master, as above directed, that he be discharged from all further liability to each and all of the parties to this action, as to any and all of the claims herein mentioned and discussed; and that the register of mesne conveyances in and for the county of Greenville do mark as satisfied the mortgage of H. Y. Boyd to A. R. Fowler of date January 22, 1895, and that said register do mark as canceled any mortgage of H. Y. Boyd to A. R. Fowler purporting to be on the land described in the complaint herein, or mentioned and described in the opinion herein, and refer to this decree by memorandum upon the record.

"(6) That in the event of the failure of the defendant H. Y. Boyd to pay the sums of money aforesaid to the parties aforesaid by the 1st day of December next, including the fees and costs aforesaid, that the master of this court do, after due notice, as in sales for foreclosure, on the sales day in October next, or some convenient sales day thereafter, sell, at public auction, at the legal place and time, the real estate described in the complaint herein, for cash; that from the proceeds of sale he pay the costs and expenses of sale, any taxes accrued and due upon said land, and then, and in the order stated, the amounts hereinbefore ordered to be paid by the said H. Y. Boyd; that said master do, upon compliance, make to the purchaser at such sale a deed for said premises so sold; and that the purchaser be let into possession of the same upon the production of the master's deed and the order of this court confirming said sale.

"(7) That upon said sale, confirmed as aforesaid, all of the parties hereto, their heirs, executors, and administrators, and all persons claiming or to claim under or through them, or either of them, be forever barred of all right, title, interest, or equity of redemption in and to said premises so sold.

"(8) That the plaintiff herein, Thomas B. Whitmire, do pay to the master one-half of the fees of said master for his services rendered in this action, and also pay his own costs and disbursements in this action.

"(9) That the defendants Frank Hammond, W. P. Fowler, J. B. Redwine, and W. A. Hudson do each pay his own costs and disbursements in this action.

"(10) That any party to this action may apply in this court, in this action, for such further orders as may, from any cause, be necessary to carry out the terms and provisions of this decree.

"(11) That, except as herein modified or reversed, the report of the master herein be,

and hereby is, confirmed, and made the judgment of this court.

"James Aldrich, Presiding Judge."

Plaintiff's exceptions:

"Within due time thereafter the plaintiff, Thomas B. Whitmire, and the defendant H. Y. Boyd, gave notice of intention to appeal from the said decree, and the plaintiff will move to reverse the same upon the following grounds: His honor erred:

"(1) In holding as a matter of fact that the plaintiff and the said A. R. Fowler changed the terms of the written agreement entered into between them for the sale of the said land without the knowledge and consent of the said Boyd, it being respectfully submitted that the said finding is not sustained by the testimony in the case; but the testimony, on the other hand, shows that the plaintiff insisted upon the said Fowler and the said Boyd carrying out the said agreement, and they agreed thereto.

"(2) He erred in finding as a matter of fact that on the 16th day of November, 1895, Boyd paid \$225 on the McGee note to Fowler, and that Fowler paid it to the plaintiff; the testimony showing that the plaintiff agreed with the said Boyd and Fowler that they should pay to him the said sum of money on account of the original agreement entered into between himself and the said Fowler, and that the said money was paid by Boyd to the said plaintiff. In this connection, he erred in not holding that this \$335, together with what had already been paid plaintiff, would amount to what the original agreement called for.

"(3) He erred in holding that Boyd paid the plaintiff \$365 on account of the purchase of the said land; the testimony showing that Boyd paid only \$235, and the other \$100 was paid by W. P. Fowler.

"(4) He erred in holding that plaintiff accepted the note and mortgage sued on as 'payment' of the balance due on the purchase of the land, the testimony showing that the plaintiff used this language in the sense of 'collateral security,' and as a matter of fact the testimony shows that the said note and mortgage were accepted by him as such.

"(5) He erred in not holding that, at the time he accepted said note and mortgage, he explained fully the transaction to the defendant Boyd, and that the said Boyd admitted that the papers were genuine, and thereby induced the said plaintiff to part with his title; and, in this connection, he erred in not holding that the said Boyd is now estopped from disputing the validity of the same.

"(6) He erred in holding that the testimony of the said Boyd as to what passed between him and the plaintiff was sustained by the preponderance of the testimony, and, in this connection, he erred in overruling the conclusions of the master who was familiar with the witnesses, and saw their demeanor upon the stand with reference thereto.

"(7) He erred in concluding that the defend-

ant McGee loaned the said Fowler money on the faith of the security deposited with him by said Fowler, the said McGee testifying himself that he refused to advance the money on the faith of the said security, and required the said Fowler to obtain personal indorsement of the said note, which was done; and, in this connection, he erred in not adjudging that, the said McGee having a note secured by personal indorsements, which security this plaintiff did not have, he should be required to exhaust them before participating in the proceeds of this action.

"(8) He erred in decreeing that the defendant McGee should be paid \$526.49 before this plaintiff; it being respectfully submitted that, before Boyd's title could feed McGee's note or mortgage, Boyd would have to pay the plaintiff the balance due him on account of the purchase of the said land under the agreement between Fowler and this plaintiff.

"(9) He erred in adjudging that the plaintiff should be liable for any of the costs of this action, he having recovered judgment against the defendant Boyd, and the court having found that he was an innocent party, misled into taking the mortgage sued on through the fraud of another.

"(10) He erred in not holding that the defendant Boyd, by his conduct with reference to this matter, induced plaintiff to accept the note and mortgage sued on as collateral security for the balance due him on account of the purchase money of the said land, and acknowledged that the papers were genuine, after the transaction had been explained to him as testified to by the plaintiff, and as found by the master, and therefore would be estopped from disputing the validity of the plaintiff's mortgage, which as to him and all claiming through him would be genuine, and would cut off any prior incumbrances.

"(11) Having concluded that the mortgage was a forgery, and that the plaintiff when he took it was ignorant thereof, and that he accepted it in payment of the balance of the purchase money, he erred in not adjudging because of these facts that plaintiff's title was obtained from him through the fraud of Fowler at least, and he would be entitled to be paid the balance of the purchase money before his title would be good in Boyd's hands, or feed the McGee note and mortgage.

"(12) He erred in not holding that Fowler obtained the McGee note and mortgage through fraud, by representing that he was the owner of the property, and made the said Boyd a title thereto in consideration thereof, when in fact he had no title; that therefore the said note and mortgage would be nullities in the hands of Fowler, and the defendant McGee has no higher rights than he would have.

"(13) He erred in not sustaining the master as to his finding of fact, to wit: "That on the 16th day of November, 1895, the said Boyd paid to the plaintiff \$235, and gave him a chattel mortgage to secure a balance of \$100,

which mortgage was afterwards paid, making a total of \$335 in cash; and it was agreed, by and between the said Boyd, the said Fowler, and this plaintiff, that the note and mortgage sued on by plaintiff should be assigned to him to secure the balance of \$600 which it was understood and agreed was due the plaintiff on account of the sale of the land,—the said finding being sustained by the weight of the testimony.

"(14) He also erred in not sustaining the finding of fact on the part of the master, as follows: 'I further find as a matter of fact that, before accepting the said note and mortgage, the plaintiff inquired of the defendant Boyd if the said note and mortgage were genuine papers, and was assured by the said Boyd that they were, and the plaintiff was induced by the representations of the said Fowler and the said Boyd to part with his title and receive the said papers as collateral security for the balance due him as aforesaid; that thereupon, and in consideration of the said \$335, and the assignment to him by the said Fowler, with the knowledge and consent of the defendant Boyd, of the note and mortgage sued on to secure the sum of \$600, the balance due on account of the purchase of the said land, the plaintiff executed and delivered to the said H. Y. Boyd a warranty title for the said premises,'—the said finding being sustained by the weight of testimony.

"(15) He erred in not sustaining the conclusion of law on the part of the master as follows: (a) That the note held by the defendant McGee of date January 22, 1895, and the mortgage held by the defendant Redwine given to secure the same, are nonnegotiable, and the assignees thereof took the same subject to any equities existing between the said Boyd and the said Fowler. (b) That the consideration of the said papers was the purchase of the land described in the complaint; that at that time the said Fowler had no title thereto; that he falsely and fraudulently represented to the said Boyd that he did have such title, and if the said Fowler were before the court seeking to establish the said indebtedness as against Boyd, or as against this plaintiff, he could not recover. (c) That the defendant McGee, as assignee of Fowler, has no higher rights than he had, and therefore he cannot recover anything in this action,—all of the above propositions being sound law, applicable to the undisputed facts in the case, and therefore conclusive of the rights of the defendant McGee herein.

"(16) Upon the theory that plaintiff's note and mortgage are forgeries, he erred in not sustaining the conclusion of the master that in that event plaintiff's title was obtained from him through fraud, and before the other defendants could have any equity in the land, they ought to comply with the agreement between the plaintiff and said Fowler, the performance of which the defendant Boyd afterwards undertook, and that plaintiff's equities in the premises for the balance

of his purchase money under the said agreement would be superior to those of the other defendants.

"(17) He erred in not sustaining the conclusion of the master that Fowler held the land subject to the plaintiff's rights under the aforesaid agreement. The defendant Boyd acquired only Fowler's rights, and that their assignees occupied no higher position than they occupied. Boyd's right, therefore, would be the right to the title of the land upon the payment to the plaintiff of the balance of the purchase money due him, and the right of the defendant McGee rises no higher.

"(18) He erred in not sustaining plaintiff's exceptions to the master's report, to wit: (1) That he is entitled to \$600 and interest thereon from November 25, 1895, and 10 per cent. thereon as attorney's fees, being the amount due him as agreed upon by the parties at the time the mortgage sued on was assigned to him, as shown by the evidence. (2) Upon the theory that the mortgage sued on was a nullity, then the master erred in not holding that the amount due plaintiff was the amount called for by the original agreement between himself and Fowler, introduced in evidence, with interest thereon, less \$325 paid on November 25, 1895, which amount, under this view of the case, the master should have found due the plaintiff. (3) The master erred in not holding that plaintiff was entitled to 10 per cent. attorney's fees on the amount found to be due him."

Defendant H. Y. Boyd's exceptions:

"The defendant H. Y. Boyd excepts to the decree of his honor, James Aldrich, in the above-stated case, and will move the supreme court to reverse the same upon the following grounds:

"(1) Because his honor erred in holding the defendant liable for the payment of the note and mortgage which were assigned by A. R. Fowler to B. M. McGee, when he should have held that the defendant is liable only for the payment of \$465, with interest thereon from November 16, 1895, to date at 7 per cent.; the testimony showing (1) that there was no consideration for said note and mortgage; (2) that said note and mortgage had been obtained from defendant through false and fraudulent representations by the assignor of B. M. McGee; (3) that said note and mortgage were nonnegotiable, and, in the hands of B. M. McGee, were subject to the equities existing between the defendant and A. R. Fowler; (4) that defendant received his title directly from plaintiff on the 16th day of November, 1895, and paid through A. R. Fowler to plaintiff, on account of the purchase money, \$335.

"(2) Because, if the defendant is held liable at all on the note and mortgage assigned to B. M. McGee, his honor erred in holding that defendant is entitled to credit for \$235 on account thereof, when he should have held that defendant is entitled to a credit of \$335.

the testimony showing that such last-named sum was paid by the defendant to the plaintiff.

"(3) Because his honor erred in holding that the defendant is liable for the payment of 10 per cent. as attorney's fees to B. M. McGee, when he should have held, if the defendant was liable on said note and mortgage at all, that such additional payment is not authorized by the terms of the said note; the testimony showing no facts which would entitle B. M. McGee to attorney's fee.

"(4) Because his honor erred in holding that the defendant should pay one-half the costs of the plaintiff, when he should have held that such costs should have been borne by said plaintiff; the testimony showing that the action was instituted on a forged instrument, upon which defendant is in no wise liable.

"(5) Because his honor erred in holding that the defendant should pay the costs of B. M. McGee, when he should have held that said B. M. McGee should pay his own costs; the testimony showing that the note and mortgage sought to be enforced by said B. M. McGee were without consideration, and not binding on the defendant."

"The respondent B. M. McGee in due time gave notice that he would seek to sustain the decree of Judge Aldrich upon the following additional grounds:

"(1) That the judge's holding that the plaintiff was not entitled to a purchase-money lien for the balance due him by Fowler should be sustained on the further grounds: (1) The allegations of the amended complaint are insufficient to set up such a lien; and (2) the master erred in allowing the plaintiff, after the testimony had been closed, to amend his complaint by setting up a lien independent of the mortgage, it being submitted that this was the introduction of a new cause of action and a substantial change in the complaint.

"(2) The judge's holding that H. Y. Boyd was indebted to B. M. McGee on the note and mortgage set forth in McGee's answer should be supported on the additional ground that Boyd's original answer did not allege any failure of consideration as to this note and mortgage, and it is submitted that the master erred in allowing Boyd to amend his answer after the close of the testimony so as to set up such a defense, the change being substantial.

"(3) That Whitmire at the time of the assignment of the papers to him set forth in the complaint had notice of the prior note and mortgage, and that the latter was duly recorded. He was therefore charged in law with notice that said papers might have been transferred by Fowler to another, and that Fowler might be estopped from claiming that the said note and mortgage were not a first lien on the land, and Whitmire, in receiving the assignment of the papers from Fowler, took the same subject to all equities

and disabilities attaching thereto in Fowler's hands.

"(4) That Boyd, before completing the transaction with Fowler, in January, 1896, had inquired of Whitmire as to whether he had sold the land to Fowler, and, being assured that he had done so, Boyd closed the transaction with Fowler; and that Whitmire was thereby estopped, as against Boyd and his assignees, from saying that he had not conveyed the land to Fowler."

Jos. A. McCullough, for appellant Thomas B. Whitmire. Wm. G. Sims, for appellant H. Y. Boyd. Haynsworth, Parker & Patterson, for respondent B. M. McGee.

McIVER, C. J. The plaintiff, Whitmire, being the owner of the tract of land described in the complaint, subject, however, to a mortgage held by one McDowell, some time in the fall of 1894 entered into a verbal contract with one A. R. Fowler for the sale of the land, upon which Fowler paid to Whitmire the sum of \$200 on account of the purchase money, and went into possession of the land. In December, 1894, Fowler, representing himself to be the owner of the land, agreed to sell the land to the defendant H. Y. Boyd, and put him in possession. On the 22d of January, 1895, this agreement was consummated, and the said Fowler made a deed for the land to the said Boyd, for the consideration therein expressed of \$2,000, which was made up of the amount due on the McDowell mortgage (\$1,200) and the note under seal of Boyd to Fowler for \$800, secured by a mortgage on the land, which note and mortgage were, on the day last named, delivered by Boyd to Fowler. On the 19th of February, 1895, Fowler borrowed from the defendant McGee the sum of \$400, for which he gave his note, indorsed by M. J. Harris and J. D. Harris; and also transferred to and deposited with McGee, as collateral security for the payment of said notes, the \$800 note above mentioned, which Boyd had given to Fowler, together with a mortgage purporting to have been executed by Boyd to secure the payment of the said note for \$800, but which proved to be a forgery,—the said Fowler retaining the genuine mortgage, which he afterwards assigned to another party, whose claim thereunder has been rejected, and, as he does not appeal, nothing further in relation to that transfer need be stated. Matters remained in this condition until the 22d day of May, 1895, when the plaintiff and the said Fowler entered into the following written agreement in reference to the land described in the complaint: "This agreement, made between T. B. Whitmire and A. R. Fowler, whereby it is agreed that the said A. R. Fowler shall have the use of a certain tract of land belonging to said T. B. Whitmire during the year 1895 [here describing the land], and shall pay the said T. B. Whitmire, on or before December 1, 1895,

one hundred and fifty dollars for the use of the same; and the said A. R. Fowler shall have, as his own, all the tools left on said place belonging to said T. B. Whitmire. It is further agreed that if the said A. R. Fowler shall pay to the said T. B. Whitmire, on or before December 1, 1895, \$500, with interest from January 1, 1895, at eight per cent. per annum, including the above \$150, and shall execute to the said T. B. Whitmire a mortgage for \$500, payable January 1, 1898, on said land, bearing interest from January 1, 1897, at eight per cent. per annum, then the said T. B. Whitmire shall execute and deliver to the said A. R. Fowler a warranty deed to said 188 acres of land."

In the fall of 1895, Boyd, who was in possession of the land, discovering that Fowler had no title when he conveyed the land to him on the 22d of January, 1895, and being told that if he remained on the land he would have to pay rent for the same to the plaintiff, went to see plaintiff upon the subject, and as to what passed between them there is a conflict of testimony. The result, however, was that on the 16th of November, 1895, the parties (Boyd, Whitmire, and A. R. Fowler) met in the city of Greenville for an adjustment of the matter, when the following occurred: Boyd paid to Fowler \$235 in cash, and delivered to him a mortgage on some other property to secure the payment of \$100, accepted by plaintiff as cash, which was soon afterwards paid by another person, which money and mortgage was immediately turned over to plaintiff by Fowler; and at the same time Fowler transferred to the plaintiff a note and mortgage for \$800, purporting to have been executed by Boyd, but which were proved to be forgeries on the trial of this case, to secure to the plaintiff the balance of the purchase money of the land under the contract with Fowler, and thereupon the plaintiff, at the instance of Fowler, executed a deed to Boyd for the land. There was direct conflict of testimony as to what passed between the plaintiff and Boyd when this transaction was being consummated,—the plaintiff claiming that the said Boyd assured him that the note and mortgage transferred to plaintiff by Fowler were good and valid papers before he executed the deed to Boyd; while Boyd insisted that he knew nothing about those papers, but that, after the deed was executed, the plaintiff showed him a paper, so folded as to conceal everything but the signature, and asked him if that was his signature, to which he replied, "It looks like it;" and that plaintiff then asked, "Do you know whether or not it is yours?" to which he replied, "No, sir; but it looks like it." It appears that after this transaction took place, but at what particular time does not appear, the cash paid to Fowler by Boyd on the 16th of November, 1895 (\$235), was credited on the genuine note of Boyd to Fowler for \$800, which was then held by McGee, by his consent. The plaintiff having made several demands upon Boyd for

the payment of the interest on the \$800 note transferred to him on the 10th of November, 1895, which were not complied with by Boyd, this action was commenced on the 10th of September, 1897, to foreclose the mortgage to secure the payment of the note for \$800, which purported to have been executed by Boyd to Fowler on the 16th November, 1895, and by Fowler assigned to plaintiff on the same day.

The case was referred to the master, "to take the testimony and report his conclusions of law and fact, together with any special matter." At the close of the testimony, some of which tended to show that the note and mortgage which constituted the basis of the action were forgeries, the plaintiff moved to amend his complaint, by alleging that he accepted, in good faith, the note and mortgage as a part of the purchase money of the land conveyed by him to the defendant Boyd, with the knowledge and consent of said Boyd, and upon his assurance that said papers were genuine, and alleging that Boyd is thereby estopped from disputing the validity of the same. Further: "That, in any event, this plaintiff has an equity in the said land to the extent of the balance due him on account of the purchase money thereof, and he asks that the land be sold, if his debt is not otherwise paid, and that out of the proceeds of said sale that his debt and the costs of this action be paid first before any of the other parties are entitled to share in the distribution of the same, and the defendants be allowed to amend as they may be advised." These amendments were allowed by the master, to which counsel for the defendant McGee excepted. The defendant Boyd also moved to amend his answer, at the close of the testimony, by adding thereto the following allegations: "That he purchased the premises described in the complaint from one A. R. Fowler, who represented himself to be the owner thereof, and plaintiff also represented to defendant that the title to said premises was in said A. R. Fowler, and is thereby estopped from claiming any interest in the premises on account of the alleged default of said A. R. Fowler in paying the purchase money; that this defendant took possession of the said premises upon the representations made to him as aforesaid, and assumed incumbrances to the amount of twelve hundred dollars, and has since paid the sum of three hundred and thirty-five dollars to plaintiff, and received his conveyance or deed to said premises; that defendant stands ready and willing to pay into court the sum of four hundred and sixty-five dollars, with such interest as is now due, being the balance due by defendant in full on account of his said purchase. Defendant further alleges that, if it shall be held that he is liable on any papers except the genuine note, admitted by him to have been executed on the — day of January, 1895, that said papers are without consideration, and defendant prays that the same be de-

livered up to be canceled." These amendments were likewise allowed by the master, and his action therein was excepted to.

The case came before his honor, Judge Aldrich, for a hearing upon the report of the master and the exceptions thereto, and he rendered his decree, which is set out in the "case," and should be incorporated in the report of this case. To this decree the plaintiff and defendant Boyd filed numerous exceptions, and the defendant McGee gave notice of additional grounds upon which he would ask this court to sustain the decree. These exceptions and additional grounds should likewise be incorporated in the report of this case.

We do not propose to consider the exceptions *seriatim*, but rather to consider what we understand to be the controlling questions presented by the exceptions and these additional grounds.

The claims set up by those of the defendants who do not appeal from the circuit decree need not be stated or considered, as they have been eliminated from the case, having been finally disposed of by the decree of the circuit judge, from which those defendants have not appealed. Our inquiry, therefore, is only as to the rights of the plaintiff and the defendants Boyd and McGee.

In considering the rights of the plaintiff, it will first be necessary to determine whether there was error in allowing the amendment to the complaint above set forth, after the testimony was closed. The object of the action unquestionably was to obtain payment of the balance due on the purchase money of the land described in the complaint by subjecting the land to the payment thereof. The plaintiff, holding what he, undoubtedly, supposed to be the genuine note and mortgage of the person who had acquired possession of the premises from the original vendee, very naturally framed his complaint upon these evidences—the note and mortgage—of his claim; but when the testimony, for the first time, disclosed the fact to him that these supposed evidences of his claim were forgeries, and therefore nullities, he then asked leave to amend his complaint, not by changing his original claim, but by simply alleging other evidences of the same claim found in the terms of the original contract of sale. The Code makes liberal provisions for amendments of the pleadings so as to effect substantial justice, by allowing the insertion of other allegations material to the case, and the only limitation seems to be that such amendments will not be allowed during or after the trial, where such amendments "change substantially the claim or defense." See Code, § 184; *Hall v. Woodward*, 30 S. C. 564, 9 S. E. 684. Accordingly, we find that in *Tarrant v. Gittelson*, 16 S. C. 231, the plaintiff was allowed, during the trial, to amend his complaint, which was based upon a claim for work and labor, by inserting an allegation that the work and labor was done under a

special contract. So, in *Sibley v. Young*, 26 S. C. 415, 2 S. E. 314, a complaint based upon sealed notes, calling them promissory notes, was allowed to be amended by basing the claim upon an open account for which the notes were given, for the reason that there was no substantial change in the claim. The court in that case used this language: "It is the same debt, which is sought to be recovered by the same plaintiffs from the same defendants, and the only difference is in the ground upon which the liability is based." That case was recognized and followed in the subsequent case of *Moore v. Christian*, 31 S. C., at page 341, 9 S. E. 981. These authorities, with others that might be cited, clearly show that there was no error in allowing the amendment in question, for there was no change, certainly no substantial change, in the claim of the plaintiff. Especially was this so when, as in this case, the order allowing the amendment also allowed the defendants to amend their answers if so advised.

The relation between the plaintiff and Fowler must, therefore, be regarded as that of vendor and purchaser under an executory contract of sale upon which only a part of the purchase money has been paid, and such a relation is practically that of mortgagor and mortgagee (*Lynch v. Hancock*, 14 S. C., at page 86); that is to say, the vendor continues to hold the legal title as security for the payment of the balance of the purchase money, and the vendee, while he has no legal title, does acquire an equitable title subject to the payment of the balance due on the purchase money, which he may sell or mortgage, although it is not subject to the lien of a judgment. *Roddy v. Elam*, 12 Rich. Eq. 343, cited with approval in *Lake v. Shumate*, 20 S. C., at page 30; *Richards v. McKie*, Harp. Eq. 184. Hence, when Fowler conveyed the land to Boyd, he only conveyed this equitable title, subject to the McDowell mortgage, about which there seems to be no dispute, and also subject to the claim of the plaintiff for the balance of the purchase money; and, when Boyd mortgaged the land to Fowler, such mortgage only covered this equitable title subject to the same incumbrances; and, of course, when Fowler assigned this mortgage (for it cannot be questioned, under the authorities cited by the circuit judge, that the assignment of the note carried with it the mortgage given to secure its payment) to the defendant McGee, he took it subject to the same incumbrances.

While, under this view of the case, as it appears upon the face of the papers, there could be no doubt that plaintiff would have a prior equity to enforce the payment of the balance due him on the purchase money under the written agreement between himself and Fowler, yet it is claimed by Boyd, in his amended answer, that he was induced to buy the land, not only by the representations of Fowler, but also of the plaintiff, that the title to the land was in Fowler, and that upon

these representations he went into possession of the land, assumed incumbrances to the amount of \$1,200, has since paid to the plaintiff \$335, and received his conveyance of the premises, and that plaintiff is thereby estopped from making any claim upon the land. It will be observed that neither the plaintiff nor the defendant McGee excepted to so much of the order as allowed Boyd to amend his answer as above stated, though the defendant McGee did except to so much of the order as allowed Boyd to set up the claim that the note and mortgage transferred to McGee by Fowler was without consideration. So that Boyd's claim that the plaintiff is estopped set up by his amended answer is properly before us.

It seems to us, however, that the testimony fails to sustain the allegations upon which the claim of estoppel rests. Boyd's own testimony shows that he had bargained for the land with Fowler before he ever approached the plaintiff upon the subject, and was only induced to do so by a report that Whitmire, the plaintiff, was trying to rent the land; and all that Whitmire told him, according to his own version, was that he had sold the place to Fowler, and this was true. Whitmire, the plaintiff, was not asked by Boyd whether Fowler had paid for the land, or whether he had given him a deed, and we do not see that the plaintiff was under any obligation to volunteer information upon these points to Boyd. Indeed, it seems to us that the defendant, in buying the land from Fowler, who was his brother-in-law, relied entirely upon his representations, by which he seems to have been grossly deceived and defrauded; but we do not think that the testimony shows that the plaintiff in any way contributed to such deception and fraud. Nor does the evidence show that Boyd ever assumed the payment of the amount due on the McDowell mortgage in such a way as to make him personally liable for the payment of that debt, as it only shows that he knew that mortgage would have to be satisfied before he could obtain a title clear of that incumbrance. So, also, as to the cash payment of \$335 alleged in the amended answer. That money was paid by Boyd to Fowler, and by him turned over to plaintiff, on account of the first payment called for by Fowler's contract with plaintiff for the purchase of the land, and so much of that amount (\$235) as was furnished by Boyd individually was credited by Fowler on Boyd's genuine note to Fowler for \$800 then in the hands of McGee, at the request of Boyd. So that the claim of estoppel set up by Boyd's amended answer cannot be sustained.

Our next inquiry is as to the effect of the transaction of the 16th of November, 1895; for up to that date it is quite clear that the plaintiff had never parted with the legal title to the land, and had a right to retain the same as a security for the payment of the balance of the purchase money due under his written

contract with Fowler, hereinabove set out, in priority to the claims of any of the other parties to this action, he having done nothing, as we have seen, to impair or destroy his rights. Exactly what occurred on the 16th of November, 1895,—or, rather, all of what occurred,—is left in no little doubt and obscurity by the conflict of testimony. This much, however, is certain: that the plaintiff was induced to make a deed to Boyd, who was then in possession of the land by virtue of a previous purchase of Fowler's interest, for the said land, in consideration of the payment to him in cash, or what was received as cash, of the sum of \$335, which, with the amount previously paid by Fowler (\$200), was near about sufficient to satisfy the first payment called for by the written contract between plaintiff and Fowler, and the assignment by Fowler to plaintiff of a note for \$800, secured by a mortgage of the said land, purporting to have been executed by Boyd to Fowler, either as collateral security for the second payment called for by said written contract or in satisfaction thereof, about which there is some doubt; but, in the view which we shall take, it makes no difference whether the transfer was made as collateral security or in satisfaction of said second payment. These papers, thus transferred by Fowler to plaintiff, were represented by Fowler to be genuine, and so believed to be by plaintiff, but were, in fact, forgeries, and so known to be by Fowler at the time, as there is every reason to believe that he perpetrated the forgeries. From these unquestionable facts it is very clear that the plaintiff was induced to make this deed by the grossest fraud on the part of Fowler, at least; and if he were the party before the court, undertaking to set up such deed or claim any rights under it, there can be no doubt that a court of equity would unhesitatingly declare the deed null and void for fraud, and therefore insufficient to confer any rights whatever. If this be so, then those claiming under Fowler would be in no better position; and both of these defendants, Boyd and McGee, are in this position. Boyd is the alienee of Fowler, having purchased his interest in the land, and only in this way could he claim a conveyance from the plaintiff; and the deed was made to Boyd at the instance and by the request of Fowler, and he can claim no higher or greater rights than Fowler. The cash payment was made by Boyd, not to the plaintiff, but to Fowler, and the money was paid over by him to plaintiff, and Boyd received credit on his genuine note to Fowler for so much of the cash payment as he individually furnished. As to McGee, he is the assignee of unnegotiable securities transferred to him by Fowler, and certainly, as to these securities, he stands in no better position than Fowler.

Besides, while we do not think that the testimony is sufficient to show any guilty knowledge on the part of Boyd in the perpetration of the fraud by Fowler upon the plaintiff, whereby he obtained the deed upon which he relies, yet there is much in the testimony well

calculated to excite his suspicions, and prompt him to inquiry which he does not seem to have made. There is no doubt that Boyd knew that he had executed but one note and mortgage, and he also knew that such note had been transferred to McGee at least two months before the transaction which took place on the 16th of November, 1895; for he says he found out in the summer of 1895 that McGee held his note, and McGee says in his testimony: "I notified Mr. Boyd in July or August, 1895, that I had an assignment of this note. He never disputed his liability on the note and mortgage. He came in, and said that was the note he had given, and wanted the credit given,"—referring to the credit of \$235, which was entered on the \$800 note held by McGee, as above stated. He therefore knew, both before and after the 16th of November, 1895, that his genuine note—the only one he had ever given—was in the hands of McGee; and yet when he was shown a paper, on the 16th of November, 1895, which plaintiff testified was the forged mortgage, which that day was transferred to him by Fowler, and asked if that was his signature, his only reply was, "It looks like it;" and when again asked the question, "Do you know whether or not it is yours?" he replied, "No, sir; but it looks like it." Again, the plaintiff wrote several letters to Boyd, asking for payment of interest on the forged note, which had been transferred to plaintiff by Fowler, to only one of which he replied, as follows: "I received your letters, and should have answered promptly, but hardly knew what to say in reply. The note I gave A. R. Fowler is payable January 1st. Therefore I did not know the interest would be due before January 1st." When Boyd was on the stand, testifying in regard to this letter, he said: "I had seen the genuine note before I wrote the letter to Mr. Whitmire. I don't know why I did not inform Mr. Whitmire that the paper he held was a forgery." The plaintiff, on the other hand, testifies that he showed Boyd the note and mortgage transferred to him by Fowler, and asked him as to his signature: "I did not have the mortgage folded to as to conceal all except the signature when I asked him about it. He said that was his signature. He did not say, 'It looks like it, but I won't be certain.' He acknowledged his signature without qualification. If he had not done so, I would not have taken the papers." When the plaintiff was recalled as a witness, he said: "I did not refuse to allow Mr. Boyd to have the paper in his hands. I explained the nature of the paper to him."

For the reasons above stated, and in view of all the testimony in the case, we cannot hold that the deed of 16th of November, 1895, from the plaintiff to Boyd, divested the plaintiff of the legal title to the land, and he can, therefore, continue to hold the same as security for the payment of the balance of the purchase money, superior to the claims of the defendants.

It is contended, however, by one of the

counsel, that this result can only be attained by a rescission of the transaction of the 16th of November, 1895, involving the necessity for a return of the cash payment made on that day to the plaintiff, and that no case for the rescission of a contract is stated in the pleadings. We cannot accept that view. Here the deed from plaintiff to Boyd, of the 16th of November, 1895, is set up as a defense to the equitable claim of the plaintiff, and the burden of proof is upon the defendants to sustain such defense, and for this purpose they must show a valid conveyance of the legal title by the plaintiff; and this, as we have seen, they have failed to do, for the deed relied on has been shown to be void for fraud. So far as the necessity for a return of the cash payment is concerned, it is sufficient to say that this is a matter which concerns Fowler alone, as he made the cash payment to the plaintiff, and he is not a party to this case. Even if he were, it is not likely that a court of equity would pay much regard to the claims of a party whose gross and criminal frauds have given rise to this whole controversy.

Again, it is urged that, inasmuch as the genuine mortgage executed by Boyd to Fowler on the 22d January, 1895, to secure the note for \$800 of that date, now in the hands of McGee, was duly recorded, the plaintiff was thereby affected with notice of that mortgage. But notice of what? The plaintiff, knowing that he had not then, even formally, parted with the legal title, was thereby affected with notice only of the fact that Boyd had mortgaged the equitable estate in the land which he had acquired by his purchase from Fowler, which, as we have seen, was subordinate to the legal title which the plaintiff was entitled to hold as the first security for the payment of the balance of the purchase money. It was analogous to a case in which a senior mortgagee had received notice of a junior mortgage, and such a notice would in no way affect the lien of the senior mortgage.

The second additional ground upon which the defendant McGee asks this court to sustain the decree of the circuit judge is based upon the ground that there was error in allowing Boyd to amend his answer by setting up, as an additional defense to the claim of McGee, "failure of consideration" as to the note and mortgage held by McGee. It will be observed, however, that the amendment allowed was to permit the defendant Boyd to set up, as a defense to that note, not failure of consideration, but that this note, which is under seal, and mortgage, are "without consideration,"—a different defense from that of failure of consideration; for the one may be set up to an action based upon an instrument under seal, while the other cannot, as the seal, of itself, imports a consideration. But, waiving this, while we think there was error in allowing the amendment during the trial, inasmuch as it permitted a distinct and

separate defense to be set up, thereby substantially changing the defense set up in the original answer, yet such error was entirely harmless, for two reasons: (1) Because the defense rested upon the unfounded assumption that Boyd had no estate whatever in the land which could be the subject of mortgage, whereas, as has been shown above, Boyd did have an equitable estate in the land which was the subject of mortgage. (2) Because, by the express terms of the order allowing the amendment, it was allowed only upon the contingency that Boyd shall be held liable "on any papers except the genuine note," and this contingency has not occurred, for he is not held liable on any other papers.

The foregoing views render it necessary that the circuit decree, in respect to the costs of the plaintiff and the defendants Boyd and McGee, be modified as will hereinafter be directed.

Having thus disposed of the material questions presented by the several exceptions, and the additional grounds upon which this court is asked to sustain the circuit decree, it only remains for us to announce the practical result of our conclusions: (1) Subject to the lien of the McDowell mortgage, which no one seems to dispute, and as between the parties to this case, the plaintiff is entitled to the first lien upon the land described in the complaint, to secure the balance due him under the written contract between him and Fowler hereinabove set out, after deducting all payments made under that contract, to wit, the sum of \$535. (2) That, if this lien in favor of the plaintiff shall be extinguished by Boyd within a time to be prescribed for that purpose, then the defendant McGee is entitled to a lien on said land to secure the amount due him on the note of Boyd to Fowler for \$400, now held by the defendant McGee, and, if this lien shall be extinguished within a time to be prescribed for that purpose, then the defendant shall be entitled to hold said land free of all incumbrance except that of the McDowell mortgage. (3) If the above-mentioned liens in favor of the plaintiff and the defendant McGee shall not be extinguished within the time limited for that purpose, then that the land described in the complaint be sold by the proper officer, at such time and upon such terms as shall be prescribed by the order of the circuit court, and that the proceeds of the sale be applied—First, to the payment of the costs and expenses of such sale, together with any taxes that may be due on said land; next, to the payment of such balance as may be found due to plaintiff under his contract for the sale of the land above referred to; and next to the payment of the amount which may be found due to the defendant McGee on the note for \$400, now held by him, and above referred to; and, should there be any balance of the proceeds of the sale, let the same be held subject to the further order of the court. (4) That the defendant Boyd pay the costs of this case,

except those of the defendants Frank Hammond, W. A. Fowler (called W. P. Fowler in the circuit decree), J. B. Redwine, and W. A. Hudson, who are therein required to pay their own costs, respectively.

The judgment of this court is that the judgment of the circuit court be reversed, in so far as it conflicts with the views above presented, and that in other respects it be affirmed, and that the case be remanded to the circuit court for the purpose of having the views herein announced carried into effect.

GARY, A. J., did not sit.

(53 S. C. 259)

STEHMEYER v. CITY COUNCIL OF CHARLESTON.

CORNELIA REAL-ESTATE CO. et al. v. SAME et al.

(Supreme Court of South Carolina. Sept. 30, 1898.)

CITIES—WATER AND LIGHT—TAXATION.

1. A contract between a city and corporation that the latter shall construct a system of waterworks and an electric light plant, bond them for the cost thereof, and convey them to the city, subject only to such bonded debt, and that the city shall operate such plants, and shall yearly, for 30 years, or till the bonds are paid, pay \$48,000 for light and water for public purposes, and collect \$59,000 from owners of lots fronting on streets in which water mains are laid, so much a foot for the ground, with a certain addition in case of improvements, the same to be paid into a sinking fund to take care of the bonds, violates Const. art. 3, § 29, and article 8, § 6, requiring that taxation shall be on assessment of property according to its value, and that all the property, except such as is exempt, shall be taxed for payment of debts.

2. A city can acquire waterworks and light plant only as provided by Const. art. 8, § 5, declaring that "cities . . . may acquire, by construction or purchase, . . . waterworks systems and plants for furnishing lights: . . . provided, that no such construction or purchase shall be made except on majority vote of the electors."

Original proceedings for injunction,—one by Diedrich Stehmyer against the city council of Charleston; the other by the Cornelia Real-Estate Company and Queen Investment Company against said city council and the Charleston Water & Light Company. Writ granted.

McCrady & Bacot, Mordecai & Gadsden, and Mitchell & Smith, for petitioners. J. K. P. Bryan, W. C. Miller, and Geo. S. Legare, for defendants.

POPE, J. The two preceding causes, although separate and distinct, are brought before this court, in the exercise of its original jurisdiction, to obtain a perpetual injunction against the city council of Charleston carrying into effect a contract in writing made by it with the Charleston Water & Light Company, a corporation of this state, for the construction of a system of waterworks by which a stream of water taken from the Edisto river

shall be supplied to the city of Charleston, to contain not less than 7,000,000 gallons daily, and also said water and light company shall supply said city with electric lights, and, inasmuch as they involve substantially the same issues, they have been heard together. In order that we may pass upon these issues intelligibly, we will reproduce the contract in question in its entirety:

"State of South Carolina: This agreement, made and entered into this 10th day of May, A. D. eighteen hundred and ninety-eight, by and between the Charleston Water and Light Company, a corporation duly organized under the laws of the state of South Carolina, party of the first part, and the city council of Charleston, of the said state, party of the second part, witnesseth:

"First. That, in consideration of the promises and covenants of the party of the second part herein set forth, the said the Charleston Water and Light Company, party of the first part, hereby covenants and agrees:

"(1) That it will build and construct a system of waterworks complete and in all respects adequate to the needs and requirements of the said city of Charleston and its inhabitants, as follows, to wit: The source from which the supply of water shall be obtained shall be the Edisto river, to be taken therefrom at or near a point known as 'Givhan's Ferry.' The water shall be conveyed to the city by a suitable conduit, of sufficient size and capacity to deliver not less than seven million gallons of water per twenty-four hours, into a reservoir at some suitable point within the city limits. The reservoir capacity to be provided shall not be less than fifteen million gallons. The distribution system shall consist of not less than fifty miles of pipe lines, from four to twenty-four inches in diameter. It shall be standard cast-iron water pipe, of hub and spigot pattern, tested to three hundred pounds per square inch at the foundry where manufactured, coated with a preservative mixture, and in every detail of manufacture and quality to conform to standard practice. The laying of the pipe line shall be executed in a thorough and workmanlike manner, in accordance with best standard practice, all street surfaces over pipe ditches to be restored to their original conditions as near as practicable, and the laying of the mains to be done in a manner and method of least inconvenience to the traveling public in the legitimate uses of the streets. A stand pipe of sufficient height to maintain when full a pressure of forty pounds on the distribution mains in any and all parts of the city shall be erected and connected with the pipe system. Under the pipe distribution system, there shall be placed a full complement of gates, and not less than six hundred standard fire hydrants, so distributed as to render the greatest service. The pumping and power station shall be of suitable dimensions, and built as nearly fireproof as practicable. The machinery equipment shall consist of dupli-

cate steam plant and pumping machinery, of economic and modern design, with an aggregate capacity of not less than twelve million gallons per twenty-four hours. The water, before being delivered to the distributing pipes, shall undergo filtration by a modern and effective process.

"(2) That it will establish, erect, and install an electric street lighting system, complete, modern, and standard in all respects. The capacity of the plant shall be suitable for operating not less than four hundred 1,200 candle power arc lamps, or their equivalent in larger or smaller units, said lights to be so distributed throughout the city as to give the most effective service. The plan of distributing the electric current to the lamps shall be either 'overhead or pole line' construction, or the wires shall be strung in underground conduits, as may be elected by the said city council.

"(3) That both of said constructions shall and will be done by said party of the first part, under the supervision of the board of water and light commissioners hereinafter provided, and to the reasonable satisfaction of them, in accordance with the above specifications.

"(4) That, in so far as practicable, bids for work to be done thereon, or for materials to be furnished therefor, as well as for bonds to be financed, shall be invited through one or more daily papers published in the city of Charleston.

"(5) That for the costs and expenses incurred by the party of the first part, including a percentage of $\frac{1}{2}$ per cent. on all moneys expended hereunder, as profit to said party of the first part, with the approval of said board of water and light commissioners, in the erection of said plants and the financing of the bonds herein referred to, and in every other thing which may be required of it thereunder, it, the party of the first part, shall and will issue its bonds, payable thirty years after date, with interest thereon at the rate of 5 per cent. per annum, payable semiannually, with the privilege of retiring same at any time after fifteen years upon the insertion of a six-months notice to that effect in a daily paper published in Charleston, and the payment of the principal and accrued interest on same, or the deposit of this amount with the mortgage trustee. Each and every bond so issued shall be certified by the board of water and light commissioners hereinafter mentioned, under its seal, attested by its secretary, and registered as herein provided; said issue of bonds, however, not to exceed one million dollars.

"(6) That for the better security of said bonds, issued by the party of the first part, and certified by the said board of water and light commissioners, and registered as aforesaid, and for no other bonds, it, the said party of the first part, will execute a deed of trust to a trust company, approved by the party of the second part, covering all of its franchises and

property, both present and to be acquired, together with a subrogation of any and all rights and powers it may have under this contract.

"(7) That it, the party of the first part, will convey said plants when completed, in accordance with this agreement, in fee simple to the party of the second part, freed and discharged from any and every incumbrance, charge, or lien other than that above set forth.

"Second. That, in consideration of the promises and covenants of the party of the first part herein set forth, the said city council of Charleston, party of the second part, hereby covenants and agrees:

"(1) That it, the party of the second part, will operate said plants for the period of thirty years, or until all of the outstanding bonds above mentioned are retired, as hereinafter provided, should this occur prior to said period, keeping said plants in proper repair, and during said period shall use therefrom and supply itself therefrom and thereby with water for fire and public sanitary purposes, and with lights for the streets, alleys, public buildings, and grounds of the city of Charleston, and pay therefor such annual sums as the city council of the city of Charleston shall determine in each year: provided, that such sums shall not be less than the following, to wit: Three hundred and twenty dollars per mile of water to be laid as herein provided, with fifty dollars extra for each public drinking fountain that the said city may require, and seventy-five dollars for each of the 1,200 c. p. arc lamps erected as herein provided (and in like proportion for those of greater or less c. p.), and at the rate of eight cents per kilowatt for current supplied to incandescent lamps that the city shall require for lighting the public buildings or other purposes; said sums to be paid each year in two equal installments, into the hands of the city treasurer of Charleston, commissioner, as hereinafter provided, as a portion of the revenue and earning constituting the sinking fund hereinafter referred to in paragraph 4, next below.

"(2) That, during said period, it, the party of the second part, shall charge, require, demand, and collect per annum not less than the following water rates:

"On unimproved property fronting on a street in which water main is laid, \$3 per lot with frontage of 30 feet or less; \$4 per lot if more than 30 and not more than 50 feet frontage; \$5 per lot if more than 50 and not more than 75 feet frontage; \$6 per lot if more than 75 and not more than 150 feet frontage; \$8 per lot of more than 150 feet frontage. On unimproved lots on streets in which water main is laid for each dwelling or store, including kitchen or outhouses, \$3 shall be added to the above rates. These rates shall include the use of one hot and one cold water faucet in the kitchen, or one faucet in the lavatory or yard, and the use of water for all

domestic and sanitary purposes, when drawn from the faucet; also, the privilege of connecting with the sanitary sewer. For other fixtures and buildings other than ordinary stores and dwellings, the following additional charges shall be made to water takers:

For one water-closet in dwelling (self-acting)	\$ 3 00
For each water-closet in dwelling, additional	2 00
For one bathtub in dwelling	4 00
For two bathtubs in dwelling	6 50
For three bathtubs in dwelling	8 00
For each washbowl in dwelling	1 00
For one urinal in dwelling	1 50
For each urinal in dwelling, additional	1 00
For one laundry sink in dwelling	4 00
For each laundry sink in dwelling, additional	2 00
For each additional kitchen or pantry sink in dwelling	2 00
For yard hydrant without sprinkling privileges	5 00
For yard hydrant with sprinkling privileges	10 00
For wash pave	6 00
For stable hydrant (private) for all uses, including hose	10 00
For stable hydrant (private) for all uses, except hose	5 00

"For same fixtures in hotels and boarding houses, double the above rates whenever not arranged for the use of one bedchamber only. For other uses, rates to be special, but upon same comparative basis as above. To large consumers, meter rates may be given from ten cents per thousand gallons for average consumption of fifty thousand gallons per day, to fifty cents per thousand gallons for average consumption of one thousand gallons per day.

"(3) That, the administrative expenses of operating the said plants during said period, to be deducted from the revenues above mentioned, shall not exceed twenty-five hundred dollars per annum.

"(4) That it, the party of the second part, shall and will apply all of the revenues and earnings derived from the operation of said plants as aforesaid, less the expense of their operation and maintenance and repair, to a sinking fund for the purpose of paying the interest on the aforesaid bonds, and retiring same; and for the better protection of the party of the second part it is agreed that the said sinking fund shall be delivered to the city treasurer of Charleston, in trust, first, to pay therefrom the coupons on outstanding bonds issued as aforesaid as they become due, and then to purchase, retire, and cancel such of said bonds as it is possible to obtain for not more than the equivalent of placing the money so paid in an investment yielding $4\frac{1}{2}$ per cent. per annum, calculating the bonds as payable fifteen years from date of issue, and thereafter at not less than par; or, in the event of none being obtainable within said limit, to invest said proceeds in state of South Carolina $4\frac{1}{2}$ per cent. bonds, or other approved public security, until such time as the said bonds may be obtainable within said limit, or until the accumulation of a

sufficient fund to call in all outstanding bonds, under the terms thereof; then in trust to call in said outstanding bonds, canceling same for the party of the first part, and to deliver all canceled bonds and coupons, together with the amount necessary to pay all bonds not canceled, to the mortgage trustee herein referred to, returning any surplus there may be to the party of the second part.

"(5) That the party of the second part shall not be liable under this contract for the payment of any sum or sums other than the special fund, to wit, the net earnings or revenues, constituting the sinking fund hereinbefore provided.

"Third. It is mutually agreed that all bonds issued as aforesaid shall be registered by the sinking fund commissioner, who shall be the city treasurer of Charleston, as aforesaid; and it shall be his duty to register in a proper book kept for that purpose all bonds which may be presented to him, duly executed by the party of the first part thereunder, and certified to by the board of water and light commissioners, and to affix to said bonds his certificate of registration. It shall be the further duty of said city treasurer, as such sinking fund commissioner, to receive and collect the net revenues above mentioned, and apply same in accordance with the provisions of this agreement. It is further understood and agreed that for his services in this respect there shall be allowed him a compensation of three hundred dollars per annum, to be deducted by him from the said annual revenues.

"Fourth. It is further understood and agreed that the board of water and light commissioners hereinabove referred to shall consist of three citizens of Charleston selected by the said city council, and approved by the said party of the first part, and to hold office until the completion of the aforesaid work by the party of the first part, and of the issuance of the bonds above provided; and said commissioners shall organize as a board, with a chairman, secretary, and a seal, and shall faithfully, to the best of their abilities, perform the duties herein imposed upon them. In the event of a vacancy in said board for any cause, said vacancy shall be filled by the party of the second part, with the approval of the party of the first part.

"Fifth. It is further understood and agreed by and between the parties hereto that the plant and franchises of the present Charleston Waterworks Company may be purchased and incorporated in the system above mentioned, in so far as may be advantageously done, at such figure, not exceeding three hundred and fifty thousand dollars, as may hereafter be agreed upon by the party of the second part, to wit, the city council of Charleston, payable either in cash or in bonds: provided, same shall be concluded and arranged within fifteen days after notice shall be given by the party of the first part that the determination of this matter is desired.

"In witness whereof, the parties hereto

have caused these presents to be executed by their proper officials, the year and day first above mentioned.

"Chas. R. Valk, President.

"H. F. Bremer, Secretary and Treasurer.

"In the presence of:

"John B. White.

"W. O. Bissell."

The petitioners allege the corporate character of each defendant, the latter having been incorporated by the legislature of this state in February, 1898; but they insist that the Charleston Water & Light Company is practically without capital, and is really designed to represent the city of Charleston; that the contract assailed is unlawful, because in palpable disregard of the provisions of the act of the general assembly of this state approved 17th December, in 1881, whereby the city of Charleston was forbidden to create any new bonded debt except by a strict compliance with the provisions of said act; that the contract is void because the city of Charleston is thereby attempting to violate the provisions of section 7 of article 8 of the state constitution; that the contract is void because in violation of section 5 of article 8 of the state constitution. It is also void because violative of section 6 of article 8 and of section 5 of article 10 of the constitution of this state. The defendants first demur to the petitions, because they fail to state facts sufficient to constitute a cause of action, and, in the event their demurrers are overruled, then they answer to the merits, protesting that the Charleston Water & Light Company is a corporation under the laws of the state, having for its object providing the city of Charleston and its people with pure water to drink, and for a fire department, and for sanitary purposes, all of which, by their contract with said city, they will furnish in large quantities, and at a cheaper rate than there is now being furnished of either; that, by the system of waterworks, they propose that 50 miles of the streets of said city will be laid with pipes, whereas at present there are only 30 miles of said streets with pipes, to conduct the water; that the new system of waterworks will be more accessible for the purpose of putting out fires, as well as for drinking and sanitary purposes; and also that they propose to furnish 400 1,200-candle power arc lamps of electric lights for the streets and public buildings; that the only bonds to be issued are those issued by the Charleston Water & Light Company under the contract; that the city of Charleston is only liable for the sums provided in the contract for annual amounts for public water and light supply, and is not liable for the bonds issued by the company, and cannot be sued thereon; that, in the event that the water and light revenues may not be sufficient to pay interest on the bonds, the city would not be liable therefor; and that the bondholders would have the security of their mortgage on the water and light plants. The demurrer to each of the peti-

tions cannot be sustained, and our reasons for such conclusions will be given in the discussion of the cases on their merits.

We cannot fail to express at the outset our deep sympathy with the respondent the city of Charleston in its effort to secure that great blessing, pure water. We are not unmindful, as was suggested by one of respondents' counsel, "that Charleston occupies a stretch of low land but little above the level of the sea, and is surrounded by malarious swamps; that the city is one of the oldest in the country, is built up largely of wooden structures, with a large population of negroes; that, the surface of the land being perfectly flat, the city is without the natural drainage afforded by a rolling country; that there are no springs or wells in the city which furnish water suitable for drinking purposes, or adequate for the purposes of sanitation or fire protection." It is admitted the whole taxable property of the city of Charleston is a little more than \$18,000,000, and that its bonded indebtedness is now over \$3,000,000. It is admitted that the capital stock of the respondent the Charleston Water & Light Company is \$50,000, and that it may be organized upon the subscription of \$25,000, and also the payment of 20 per cent. of said \$25,000, which is \$5,000, and that this last-mentioned sum has been paid to its duly-appointed treasurer.

The first questions presented will necessarily be the organization and power of the respective contracting parties, the city of Charleston, on the one side, and the Charleston Water & Light Company, on the other side. There can be no doubt, in the light of the repeated adjudications of this court, that the city of Charleston had been duly chartered by the legislature of this state (see Act 1783, 7 St. at Large, p. 98; State v. Mayor, etc., of Charleston, 10 Rich. Law, 491; City Council of Charleston v. Wentworth St. Baptist Church, 4 Strob. 306); nor is it clothed by law with plenary powers, under its charter, to maintain, preserve, and care for, by its corporate action, the wants, necessities, and proper government of all persons and property within its territorial limits; and, on the other hand, that the legislature of this state has duly chartered the respondent the Charleston Water & Light Company (see 22 St. at Large, p. 935). The act incorporating the latter was a due exercise by the legislature of this state of the powers residing in the general assembly of this state. It is no part of the duty of this court to inquire into the reasons for its creation. Our sole duty would be an inquiry, if the same were necessary, into the exercise of this power lodged in the general assembly, to see if it was in conformity with the provisions of the federal and state constitutions; but there is no such question or questions presented to us for our determination in the cases at bar.

We are next brought to consider the agreement between these two corporations as it is embodied in the contract assailed. Before

we shall pursue this investigation, it may be well for us to consider what is the sphere of duty of a municipal corporation. Without endeavoring to reproduce the varied expression of law writers on this subject, it seems to us that Chief Justice Shaw, of the supreme court of the commonwealth of Massachusetts, in the case of *Spaulding v. City of Lowell*, 23 Pick. 71, 74, has well expressed the law on this subject, where he says: "They can exercise no powers but those which are conferred upon them by the act by which they are constituted,—such as are necessary to the exercise of their corporate powers, the performance of their corporate duties, and the accomplishment of the purposes of their associations. This principle is derived from the nature of corporations, the mode in which they are organized, and in which their affairs must be conducted. In aggregate corporations, as a general rule, the act and will of a majority are deemed in law the act and will of the whole,—as the act of the corporate body. The consequence is that a minority must be bound, not only without, but against, their consent. Such an obligation may extend to every onerous duty, to pay money to an unlimited amount, to perform services, to surrender lands, and the like. It is obvious, therefore, that, if this liability were to extend to unlimited and indefinite objects, the citizen, by being a member of a corporation, might be deprived of his most valuable personal rights and liberties. The security against this danger is in a steady adherence to the principle stated, viz. that corporations can only exercise these powers over their respective members for the accomplishment of limited and defined objects."

The contract between the respondents was executed on the 10th of May, 1898. Is it a valid contract? We observe, in the first place, that the contracting parties occupy a very close relation the one with the other. Very great stress is laid, in the report of the committee on municipal improvements, upon the fact that the friends in the city council to a system of waterworks have a close hold on the light and water company. Look at the facts: The committee on municipal improvements are in a large manner the incorporators of the light and water company. They are the holders of the stock subscribed, of which 20 per cent. has been paid to the treasurer. The corporators have only paid a little more than \$5,000 to the treasurer. The corporators of the light and water company are to be paid one-half of 1 per cent. on all moneys expended in the erection of the light and water plants. The corporators are to issue \$1,000,000 in bonds, the proceeds of which are to be negotiated to raise the money necessary to complete the light and water plants. This one-half of 1 per cent. on \$1,000,000 will reimburse such corporators for the \$5,000 subscribed and paid into the capital stock of the light and water company. These corporators have bound themselves to

execute a deed in fee simple for the two plants—light and water works—to the city of Charleston, as soon as said plants are completed, reserving only that the holders of the \$1,000,000 of light and water works bonds shall not be injuriously interfered with. The city of Charleston is to pay all the expenses of the operation of both plants. Another significant fact is that the city binds itself to operate both plants for 30 years, or until the bonds are paid. While it may not be sued on the bonds, it can be sued by the holders of these bonds, and be compelled to carry out its contract to operate these waterworks and light plants for full 30 years. Not only so, but the city binds itself for and during these 30 years to pay to the light and water company \$46,000 each year for public lights and public water, and also binds itself to collect from the owners of the lots of land, both improved and unimproved, lying on each side of the 50 miles of streets where the water mains are laid, the sum of \$59,000 during each year of the 30 years of the contract, or until the bonds are paid. That these are the facts, look at the exhibits made to respondents' return:

Exhibit A.

City of Charleston, S. C., May 26th, 1898.
Assessor's Office.

Improved Lots.

Wards	30 Feet and Under	30 to 50 Feet	50 to 75 Feet	75 to 150 Feet	150 Feet and Over	Totals
1.....	167	139	68	53	77	499
2.....	54	157	54	66	12	343
3.....	360	199	68	46	82	714
4.....	213	237	107	43	11	666
5.....	192	302	78	59	11	643
6.....	137	247	91	70	10	555
7.....	116	317	52	43	18	451
8.....	124	244	35	64	18	535
9.....	126	322	25	33	9	515
10.....	313	325	102	43	21	804
11.....	324	656	95	41	25	1141
12.....	169	430	39	24	11	722
Totals..	2,304	3,575	858	595	185	7,517

Unimproved Lots.

Wards	30 Feet and Under	30 to 50 Feet	50 to 75 Feet	75 to 150 Feet	150 Feet and Over	Totals
1.....	8	7	4	7	2	28
2.....	4	49	17	4	7	81
3.....	31	5	2	2	1	31
4.....	5	15	3	1	1	25
5.....	9	46	2	4	0	61
6.....	5	17	3	4	2	31
7.....	2	1	2	3	3	9
8.....	11	16	6	3	4	40
9.....	0	18	0	19	30	67
10.....	118	176	49	65	31	439
11.....	92	132	9	5	5	243
12.....	71	290	17	12	24	414
Totals..	346	772	114	127	116	1,475

I certify the above to be a true copy, as shown by the Ward Books, of the Improved and Unimproved Lots in the City of Charleston.

Total Improved lots.....7,517
Total unimproved lots.....1,475

Grand Total.....8,992

[Signed] D. L. Sinkler, City Assessor.

Recapitulation.

Improved Lots.

30 feet.....	2,304, at \$3.....	\$13,824 00
50 ".....	3,575, at \$7.....	25,025 00
75 ".....	858, at \$3.....	6,864 00
150 ".....	595, at \$3.....	5,355 00
Over.....	185, at \$11.....	2,035 00
7,517.....		\$53,103 00

Unimproved Lots.

30 feet.....	346, at \$3.....	\$1,038 00
50 ".....	772, at \$4.....	3,088 00
75 ".....	114, at \$5.....	570 00
150 ".....	127, at \$6.....	762 00
Over 150 f.....	116, at \$8.....	928 00
1,475.....		\$6,386 00

Total of improved and unimproved.....\$59,489 00
Cost of waterworks for public use.....16,000 00
Cost of 400 arc lights for public use.....30,000 00

Grand Total.....\$105,439 00

Consider also that the interest on the \$1,000,000, @ 5 per cent., is \$50,000; that the city obligated itself to deduct from the \$105,439 each year the sum of \$2,500 as operating expenses, \$300 to be paid therefrom to the city treasurer for his services: \$2,800, \$52,800.

When this \$52,000 is deducted from the \$105,439, there will be left in the hands of the city treasurer each year, for payment of the bonds, \$53,361. By the judicious management of this sum of \$53,361 each year, as contemplated by the contract, it is believed that in 15 years the whole \$1,000,000 of bonds issued by the light and water company will be fully paid; and, when this is done, the city of Charleston will own in fee simple, free from all debts therefor, the light and water plants in question.

In the year 1881, the city of Charleston, presumably to obtain a reduction in the amount of interest upon her funded bonded indebtedness, procured the general assembly of this state to pass the act found on page 582 of 17 St. at Large, whose title was "An act to prevent the city council of Charleston from increasing the debt of the city of Charleston except in the manner herein prescribed." By the provisions of this act, the city council of Charleston was forbidden to create any debt beyond the municipal income of the current year, or to indorse or guaranty the notes, bonds, or obligations, or to accept the drafts of any company, corporation, person, or persons for any purpose whatsoever, unless these terms and conditions were first observed and complied with: First, the city council shall, by resolution, declare its intention to create such indebtedness, specifying the amount thereof; such resolution to be passed at a regular meeting by a two-thirds vote of the whole body; second, that such action by the city council shall be submitted to the qualified voters of such city at an election to be held after 90 days' notice of such election, and, if two-thirds of the number of qualified voters who voted at the preceding municipal election vote affirmatively, the proposition shall then be submitted to the general assembly of this state for approval,

and upon such approval the city council shall be authorized to create the debt, or incur the liability. The petitioners claim that the contract of May 10, 1898, violates the provisions of this act. Respondents allege, however, that the present contract for lighting the city and furnishing water for public use is in excess of the \$46,000 which the city council, under the proposed contract, will expend for these purposes. It should be remembered that this \$46,000 is to be raised by taxation from the citizens of the municipality. But where does the \$59,439 come from? Is it not collected from the citizens of Charleston by means of the action of the city council, and in wringing this money every year for 30 years, it may be, which wringing process, the city council solemnly covenants with the light and water company (and, through the same, with the holders of the proposed issue of \$1,000,000 of bonds, whose interest, at 5 per cent., is payable in two installments each year, shall be continued every year for 30 years, or until the bonds are fully paid? It is true the bonds are not signed by the city council; but they are registered by its treasurer, and approved by its committee. But is it not true that it is by the city council's action that this enormous burden is placed upon the backs of the holders of these 8,992 lots of land, improved and unimproved, while all the other holders of lots of land, improved and unimproved, lying on the 13 miles of the streets of the city of Charleston, wherever no water mains are laid, together with the owners of personal property, are left untouched? Suppose there are 8,992 citizens who own these 8,992 lots of land; what reason can be assigned why these landowners should bear the burden of the other 53,000 citizens of Charleston? Is it because the provisions of the act of the legislature of 1881 are not infringed? We can sustain no such proposition.

It is contended, however, by the petitioners, that it is not alone the act of 1881 which the city council has disregarded, but that its contract is violative of the provisions of the state constitution in several particulars. Let us state these constitutional provisions. Article 1, § 5: "Nor shall any person be deprived of life, liberty, or property without due process of law, nor shall any person be denied the equal protection of the laws." Article 1, § 6: "All property subject to taxation shall be taxed in proportion to its value." Article 1, § 17: "Private property shall not be taken for private use without the consent of the owner, nor for public use without just compensation being first made therefor." Article 2, § 13: "In authorizing a special election in any incorporated city or town in this state for the purpose of bonding the same, the general assembly shall prescribe as a condition precedent to the holding of said election a petition from a majority of the freeholders of said city or town as shown by its tax books, and at such election all electors

of such city or town * * * shall be allowed to vote; and the vote of a majority of those voting in said election shall be necessary to authorize the issue of said bonds." Article 3, § 29: "All taxes upon property real and personal shall be laid upon the actual value of the property taxed, as the same shall be ascertained by an assessment made for the purpose of laying such tax." Article 8, § 3: "The general assembly shall restrict the power of cities and towns to levy taxes and assessments, to borrow money and to contract debts, and no tax or assessment shall be levied, or debt contracted except in pursuance of law, for public purposes specified by law." Article 8, § 5: "Cities and towns may acquire by construction or purchase, and may operate, waterworks systems and plants for furnishing lights, and may furnish water and lights to individuals, firms and private corporations for reasonable compensation: provided, that no such construction or purchase shall be made except upon a majority vote of the electors in said cities or towns who are qualified to vote on the bonded indebtedness of said cities or towns." Article 8, § 6: "The corporate authorities of cities and towns in this state shall be vested with the power to assess and collect taxes for corporate purposes, said taxes to be uniform in respect to persons and property within the jurisdiction of the body composing the same; and all the property, except such as is exempt by law, within the limits of cities and towns shall be taxed for the payment of debts contracted under authority of law. License or privileged taxes imposed shall be graduated so as to secure a just imposition of such tax upon the classes subject thereto." Article 8, § 7: "No city or town shall hereafter incur any bonded debt which, including existing bonded indebtedness, shall exceed eight per centum of the assessed value of the taxable property therein, and no such debt shall be created without submitting the question as to the creation thereof to the qualified electors of such city or town as provided in this constitution for such special elections; and unless a majority of such electors voting on the question shall be in favor of creating such further bonded debt, none shall be created: provided, that this section shall not be construed to prevent the issuing of certificates of indebtedness in anticipation of the collection of taxes for amounts actually contained or to be contained in the taxes for the year when such certificates are issued and payable out of such taxes: and provided further, that such cities and towns shall on the issuing of such bonds create a sinking fund for the redemption thereof at maturity." Article 10, § 5: "The corporate authorities of counties, townships, school districts, cities, towns and villages may be vested with the power to assess and collect taxes for corporate purposes; such taxes to be uniform in respect to persons and property within the jurisdiction of the body imposing the same."

It is proper that, before going further, we should admit that the citation in this opinion of article 1, § 17, relating, as it does, to the restriction of the legislature in taking private property for private or public use, and also article 8, § 7, relating to the limit to bonded indebtedness, cannot affect the questions here involved; for, confessedly, the city of Charleston has long since reached her constitutional limit as to a bonded indebtedness. The remaining citations of such constitutional provisions are made in the language of the constitution, and practically show (1) that taxation of persons and property must be uniform, and based upon an assessment of property already made; (2) that taxes must be laid upon all the property within the territory of municipal corporations according to its value; (3) that taxes can only be levied by municipal corporations for public or corporate purposes; (4) that methods for increasing the public debt of municipal corporations are prescribed; (5) that a method is laid down by which municipal corporations may acquire, by purchase or construction, water and light plants.

The police power is invoked to justify the action of the city council of Charleston in laying the burden of payment for the water mains upon the owners of lots which are on each side of the 50 miles of the streets of said city wherein the said water mains are laid. The declared purpose of said water mains is to furnish pure water taken from the Edisto river, for drinking purposes for the whole city, and also the public purposes of furnishing an abundant supply of water to be used by the fire department of the city, and for the flushing of the public sewers of said city for sanitary purposes. Then, also, such water so furnished is to be used by the said owners of lots both for drinking purposes and for flushing the pipes on the said lots of said private persons, which pipes are allowed to be connected with the public sewers of said city. This proposition demands an examination of this police power. What is it? If, in our efforts to answer this question, we turn to the utterances of judges and text writers on this subject, we are met by a disclaimer on their part of an ability to lay down any exact definition of the police power. The most that such writers do is to indicate the direction it takes, and some restrictions as to its exercise. For instance, Chief Justice Taney, of the United States supreme court, in the License Cases, 5 How. 583, says: "But what are the police powers of a state? They are nothing more or less than the powers of government inherent in every sovereignty to the extent of its dominions." Then Chief Justice Shaw, of the Massachusetts supreme court, in *Com. v. Alger*, 7 Cush. 53, says: "The power we allude to is rather the police power: the power vested in the legislature by the constitution to make, ordain, and establish all manner of wholesome and reasonable laws, statutes, and or-

dinances, either with penalties or without, not repugnant to the constitution, as they shall judge to be for the good and welfare of the commonwealth, and of the subjects of the same. It is much easier to perceive and realize the existence and sources of this power than to make its boundaries or prescribe limits to its exercise." So, also, Chief Justice Redfield in *Thorpe v. Rutland & B. R. R. Co.*, 27 Vt. 140, says: "This police power of the state extends to the protection of the lives, limbs, health, comfort, and quiet of all persons, and the protection of all property within the state. According to the maxim, 'Sic utere tuo ut alienum non lædas,' which being of universal application, it must, of course, be within the range of legislative action to define the mode and manner in which every one may so use his own as not to injure others." Mr. Cooley, in his work on Constitutional Limitations (6th Ed.), at page 704 says: "The police of a state, in a comprehensive sense, embraces its whole system of internal regulation, by which the state seeks not only to preserve the public order, and to prevent offenses against the state, but also to establish for the intercourse of citizens with citizens those rules of good manners and good neighborhood which are calculated to prevent a conflict of rights, and to insure to each the uninterrupted enjoyment of his own so far as is reasonably consistent with a like enjoyment of rights by others." And the same author, at page 710, says: "The maxim, 'Sic utere tuo ut alienum non lædas,' is that which lies at the foundation of the power." Mr. Dillon, in his work on Municipal Corporations, at page 210 of volume 1 (2d Ed.), says: "Laws and ordinances relating to the comfort, health, convenience, good order, and general welfare of the inhabitants are comprehensively styled 'Police Laws or Regulations.' * * * These regulations rest upon the maxim, 'Salus populi suprema est lex.' This power to restrain a private injurious use of property is very different from the right of eminent domain. It is not a taking of private property for public use, but a salutary restraint on a noxious use by the owner, contrary to the maxim, 'Sic utere tuo ut alienum non lædas.'" Mr. Black, in his work on Intoxicating Liquors (section 24), says: "It cannot be doubted, however, that the origin of this power must be sought in the very purpose and framework of organized society. It is fundamental and essential to government. It is a necessary and inherent attribute of sovereignty. It antedates all laws, and may be described as the assumption on which constitutions rest; for the state, whether we regard it as an association of individuals or as a moral organism, must have the right of self-protection, and the power to preserve its own existence in safety and prosperity, else it could neither fill the law of its being, nor discharge its duties to the individual. And to this end it is necessarily invested with power to enact such measures as are adapted

to secure its own authority and peace, and preserve its constituent members in health, safety, and morality. * * *

In *Stone v. Mississippi*, 101 U. S. 814, the supreme court of the United States declined to define the power, adopting the views of Chief Justice Shaw in *Com. v. Alger*, supra. Our own supreme court, in *City Council v. Werner*, 38 S. C. 488, 17 S. E. 33, has quoted with approval this language of the supreme court of the United States. And in *McCandless v. Railroad Co.*, 38 S. C. 103, 16 S. E. 429, this court adopted the action of the supreme court of the United States in the three cases cited in 115 U. S. (*Louisville Gas Co. v. Citizens' Gaslight Co.*, 115 U. S. 683, 6 Sup. Ct. 265; *New Orleans Gaslight Co. v. Louisiana Light & Heat Producing & Manufacturing Co.*, 115 U. S. 650, 6 Sup. Ct. 252; *Waterworks Co. v. Rivers*, 115 U. S. 674, 6 Sup. Ct. 273), where the police power was under discussion, confining its operation to the three subjects of the public health, the public morals, and the public safety. The care taken in this opinion to reproduce these judicial opinions and observations of text writers in discussing this police power has been induced by a desire to discuss intelligibly this subject, being well aware of the divergence of views in making application of the police power in the many cases reported in the books of decisions, which it is believed has arisen from an incorrect apprehension of the police power. It can be correctly stated, and it should be done, but it is only possible to do so by reaching the basic principle upon which the police power rests. May not the following observations tend to show this principle as recognized in this state? When the people who live within the territorial limits of the state formed the constitution under which they now live, such provisions as would preserve the lives, liberties, and property of the people of the state were inserted. Among these provisions was that in section 5 of article 1: "Nor shall any person be deprived of life, liberty or property without due process of law." A similar provision was in the constitution of 1790, as well as that adopted in 1868. All legislative power was vested in the house of representatives and senate, except such as was denied by the federal and state constitutions. Among the powers of legislation is recognized that of providing for the police power. This police power, belonging, as it does, to the legislature of the state, must be understood as requiring that its exercise shall be in subordination to the provisions of the constitution. To hold otherwise would involve the exercise by a governmental agency, created by the constitution, of power beyond that constitution. But the decisions of the courts of last resort in this state have not left this matter in doubt. Chief Justice McIver, in *State v. Berlin*, 21 S. C. 296, declared that its exercise by the legislature was in subordination to the state constitution. It was so declared in *McCandless v. Railroad*

Co., supra. So, in Massachusetts, Chief Justice Shaw, in *Com. v. Alger*, supra, so declared. And this doctrine has been held by the supreme court of the United States. And so Mr. Cooley, in his work on *Constitutional Limitations*, has so held. This police power must be exercised by the legislature, therefore, in subordination to the provisions of our state constitution. The police power operates upon persons and property within the state. Hence care must always be taken to provide in such police regulations that there shall be no invasion of life, liberty, or property without due process of law. What is the meaning that is affixed to the term "without due process of law"? Happily, this meaning is settled in the cases of *Zylstra v. Corporation of Charleston*, 1 Bay, 384; *White v. Kendrick*, 1 Brev. 471; *State v. Maxcy*, 1 McMul. 502; *State v. Simons*, 2 Speer, 761; *Faust v. Bailey*, 5 Rich. Law, 115; *Berney v. Tax Collector*, 2 Bailey, 677; *City Council of Charleston v. Stelges*, 10 Rich. Law, 440. Chief Justice O'Neill, in *State v. Simons*, supra, said: "There can be no hesitation in saying that these words mean the common law and the statute law existing in this state at the adoption of our constitution. Altogether they constitute the body of the law prescribing the course of justice to which a free man is to be considered amenable in all times to come."

A little reflection will suggest that this is true. How do the courts deprive a man of life for the crimes of murder and rape, for example? There is no provision in the constitution demanding that murder and rape shall be so punished. Nor has the legislature, since the constitution was adopted, so declared by legislative enactment; and yet such is the law with us. So, too, in all other crimes and misdemeanors. They are not mentioned or defined in the constitution, yet they are punished by imprisonment in many cases. Thus, both life and liberty are interfered with. These laws look to the public safety. So, also, as to property. We find no specific direction in the constitution that a man shall so use his own that his neighbors may not be injured thereby; and yet it may be noticed that a man is required to fill up a lot so that the health of the neighborhood may not be injured; also, that one cannot sell liquors without a license, and yet he is not so allowed to do; nor can he run a gambling den; nor can he buy or sell seed cotton in the nighttime. None of these matters are provided in the constitution. How are they dealt with legally? Is it not under the constitutional provision vesting the legislature with the police power, and having it exercised under the "due process of the law"? It is true, the police power operates on persons and property; but it is not confined in its operation to requiring persons to so use their own as not to injure the rights of others. A man may be required, under this police power, to surrender his property in the management of which by himself

there is no fault. For instance, if a man's land is needed to lay pipes to conduct pure water to a public fountain, it is perfectly legitimate to so appropriate it. Other illustrations might be multiplied. So, too, the money with which to pay for those things essential to public health, public morals, or public safety must be raised. This is done by taxation, being for a public purpose. Great pains are taken by some writers, in discussing the police power, to state that it is not the taxing power; it is not the right of eminent domain. This is admitted. But under what principle of law can you justify taking private lands of an individual for the laying of water pipes through it, except the law of eminent domain? And also how will you justify a special tax to raise the money to pay for some public work connected with the public health except upon the power of taxation? Then, is it not evident that, while the police power is not the taxing power nor the right of eminent domain, in its exercise under regulations prescribed by the lawmaking department of the government both of them may be used? With deference, we submit that this seems the embodied meaning in the words "police power,"—that attribute of sovereignty in a state by which it clothes the legislature with power to regulate persons, natural and artificial, and property in accordance with the provisions of the state constitution, in all matters relating to the public health, the public morals, and the public safety. The legislature may delegate the power to such municipal corporations within the state limits.

Having defined the police power, and it being admitted that the supplying the city of Charleston was a public purpose (for it is twice so declared in the act of the legislature chartering the Charleston Water & Light Company), we are now prepared to pass upon the constitutional questions raised by the petitioners: Is the burden to be placed on the property of the petitioners in the manner provided for in the contract to be considered as taxation? The property of these landowners, abutting on the streets through which the water mains are to be laid, is proposed to be assessed under the contract in question certainly, uniformly, generally, but not in accordance with its value, and for a public purpose, and also, notwithstanding such declaration by the legislature of this public purpose, inasmuch as this is to result in benefit to the landowners whose lands abut on the streets, therefore it is legitimate for the city council to place this arbitrary tax or assessment—call it what you please—upon such property only. It is admitted (and we might almost say it is admitted with sorrow) that some states have recognized this method of laying taxes; for that it is taxation, hear what Mr. Cooley, in his work on Taxation, at page 623, says on this subject: "That these assessments are an exercise of the taxing power has, over and over again,

been affirmed, until the controversy must be regarded as closed,"—citing 20 cases in support of this declaration. The friends of these special assessment taxes bottom their adhesion to such an illogical distinction on the matter of taxation to the special benefits accruing to these lot owners by reason of such an improvement of the property affected. The courts of this state have repudiated any such doctrine,—*State v. City Council of Charleston*, 12 Rich. Law, 702; *Mauldin v. City Council of Greenville*, 42 S. C. 303, 20 S. E. 842,—and we uphold those decisions on this point. But, apart from these decisions, look at the facts that underlie this contention. Here is a city with some 62,000 inhabitants. Of these, 8,900 are landowners. Here is a city of 62 miles of streets, with only 50 of such miles of streets where the water mains are laid, and where alone the landowners are assessed, leaving the landowners of 12 miles of the streets unassessed, although they can use the water for drinking purposes, and the fire department is supplied thereby with water to extinguish any fire which may originate on their property or be communicated thereto. The whole real estate of the city, in round numbers, is valued at \$12,000,000, and the personal property in said city at \$8,000,000 in round numbers; and yet, with these facts staring one in the face, it is proposed to tax the owners of five-sixths of the real estate in the city, to furnish lights and water for all the other real-estate owners, as well as the owners of one-third of the whole taxable property of the city (the personal property), and the latter to pay no part of such taxes. To say that such a system of special assessment is taxation, under the constitution, which requires that taxation shall be upon the assessment of property according to its value (that is, uniform), and that such taxes shall be laid upon all the property, real and personal, except such as is especially exempted from taxation by the constitution itself (that is, general), is to lay down a proposition unsupported by reason or authority. It may be admitted that in those states where the benefit rule obtains in the matter of special assessments the proposition advanced might receive some color of support. Such a doctrine is repudiated in this state, both by our constitution builders and our courts, in giving effect to its salutary safeguards. This assessment, being made in violation of the limitations imposed upon the general assembly in clothing municipal corporations with the right to tax persons and property within their territorial limits, must be arrested. Again, we are inclined to hold that inasmuch as the constitution of this state contains a method to be adopted by municipal corporations within this state for acquiring a system of waterworks and a light plant, either by construction or purchase, every municipal corporation must adjust itself to that plan, upon the theory that, where the constitution has pointed out the method to obtain these things, it excludes any other method.

We are not insensible of the fact that there is a tendency everywhere apparent to check the contraction of debt by state agencies, such as townships, cities, and towns; and where the constitution of our state, adopted at the close of the year 1895, contains provisions well calculated to check or lessen this danger, we will be mindful of the lesson intended to be inculcated.

It is therefore the judgment of this court that the writ of injunction as prayed for by such of the petitioners do issue from this court, directed to each of the respondents, restraining them perpetually from issuing the bonds in question, or in any other manner carrying out the contract between the city council of Charleston and the Charleston Water & Light Company, touching the said light plant and waterworks for the city of Charleston, under the contract of 10th May, 1889.

(53 S. C. 489)

LANAHAN et al. v. BAILEY.

(Supreme Court of South Carolina. Oct. 29, 1898.)

ATTACHMENT—PROPERTY SUBJECT—LIQUORS ILLEGALLY KEPT.

1. Alcoholic liquors kept contrary to the dispensary act (Acts 1896, p. 123) are not subject to attachment, since it would defeat the state's right of forfeiture, provided in cases of violation of the act.

2. Alcoholic liquors kept contrary to the dispensary act (Acts 1896, p. 123) cannot be attached, as the attachment can only be made effectual by a sale, which the act prohibits.

Appeal from common pleas circuit court of Greenville county; James Aldrich, Judge.

Action by William C. Lanahan & Sons against Emma E. Bailey, trading under the name of the Bailey Liquor Company. From an order overruling a motion to dissolve an attachment, defendant appeals. Reversed.

Jos. A. McCullough, for appellant. Wells, Ansel & Cothran, for respondents.

GARY, A. J. The "case" contains the following statement of facts: This is an action commenced November 8, 1897, upon an open account for liquors sold by plaintiffs, citizens of Maryland, to defendant, a citizen of Georgia; amount of account, \$1,575. The action was commenced by attachment upon certain stocks of liquor in the possession of J. E. Payne and F. M. Simmons, Greenville, and Cobb & Morris, in Abbeville. In August, 1897, the defendant, who was a large wholesale dealer in liquor in Atlanta, entered into several agreements with the said Payne, Simmons, and Cobb & Morris by which each of them became the agent of said defendant for the sale of liquor in original packages in said localities. The defendant shipped large quantities of liquor to her said agents in original packages, and said agents conducted business for her under the protection of the interstate commerce law and the decisions of the United States court sustaining the same.

That at the time said liquors were attached they were in the possession, respectively, of the said Payne, Simmons, and Cobb & Morris, in the original form in which they were imported into this state, and had not been distributed to purchasers within the state. The defendant within due time answered the plaintiffs' complaint, and the case was placed on calendar 1 for trial by jury. Before the court convened, to wit, February 23, 1898, the defendant served upon the attorneys for the plaintiffs a notice of a motion to be heard by his honor, Judge James Aldrich, at his chambers, for an order vacating the attachment in the said cause, upon the ground that the said liquors attached were exempt from sale, under the dispensary law of this state, by any officer of the court under mesne or final process, and therefore exempt from attachment. The motion was heard by his honor, Judge James Aldrich. The attorney for the defendant stated that he would rest the entire motion upon the ground above stated. Argument was therefore directed to the issue thus made. After argument, the presiding judge overruled the motion by the following order: "This is a motion by defendant to dissolve the attachment herein upon several grounds, all of which were abandoned at the hearing, except the one that the property attached was intoxicating liquors, which the sheriff, under the dispensary law, had not the authority to sell, and therefore could not attach it. The goods were imported by the defendant to be sold under the practice and custom of original package houses. They were in the hands of the defendant's agents, for the purpose stated, when attached. The sheriff is the legally constituted and appointed agent of the judgment debtor, and the purchaser from the sheriff takes his title, not mediately but immediately, from the judgment debtor. *McKnight v. Gordon*, 13 Rich. Eq. 222. And all kinds of personal property which can be made the subject of a voluntary transfer of title by the debtor can, by execution, be made the subject of an involuntary transfer. *Freem. Ex'ns*, § 110. If the defendant could sell the liquor by her agents, then the sheriff, under the circumstances, is her legally constituted agent, and as such can sell the same. The motion to dissolve the attachment is refused." The defendant appealed from said order upon three exceptions, but it will not be necessary to consider them in detail, as they raise practically the single question whether the said property could be attached. Section 1 of the dispensary act, of force at the time of said attachment, contains the following provisions: "That the manufacture sale, barter or exchange, receipt or acceptance, for unlawful use, delivery, storing, and keeping in possession, within this state, of any spirituous, malt, vinous, fermented, brewed (whether lager or rice beer), or other liquor, any compound or mixture thereof, by whatever name called or known, which con-

tains alcohol and is used as a beverage, by any person, firm or corporation; the transportation, removal, the taking from the depot or other place by consignee or other person, or the payment of freight or express or other charges by any person, firm, association or corporation upon any spirituous, malt, vinous, fermented, brewed (whether lager, rice or other beer) or other liquor, or any compound or mixture thereof, by whatever name called or known, which contains alcohol and is used as a beverage, * * * is prohibited under a penalty of not less than three (3) nor more than twelve (12) months at hard labor in the state penitentiary or pay a fine of not less than one hundred dollars nor more than five hundred dollars, or both fine and imprisonment, in the discretion of the court, for each offense." Acts 1896, p. 123. It is not contended that there was a compliance with the requirements of the dispensary act, so as to make the possession of said liquors lawful under said act. On the contrary, it is not denied that the purpose for which the said liquors were shipped into this state has been declared by the supreme court of the United States, in the case of *Vance v. W. A. Vandercook Co.*, 18 Sup. Ct. 674, to be unlawful. Section 25 is as follows: "That any of the liquors set forth in section 1 of this act, which are contraband, may be seized and taken without warrant by any constable, sheriff or policeman while in transit or after arrival, whether in possession of a common carrier, depot agent, express agent, private person, firm, corporation or association, and reported to the state commissioner at once, who shall dispose of the same as hereinafter provided. * * *" Section 26 is as follows: "That the possession of said illicit liquors is hereby prohibited and declared unlawful, and any obligation, note of indebtedness, contracted in their sale or transportation is declared to be absolutely null and void, nor shall any action or suit for the recovery of the same be entertained in any court in this state." Section 33 contains the following provision: "All liquors in this state except dispensary liquors, and those passing through this state, consigned to points beyond this state shall be deemed contraband, and may be seized in transit without warrant." The following provision is contained in section 35: "All alcoholic liquors, other than domestic wine, which do not have on the packages in which they are contained the label and certificates going to show that they have been tested by the chemist and purchased from a state officer authorized to sell them are hereby declared contraband, and on seizure will be forfeited to the state, as provided in section 31: provided, that this section shall not apply to liquor held by the owners of registered stills in bonded warehouses. Persons having liquor which they wish to keep for their own use may throw the protection of the law around the same by furnishing an inventory of the quantity and kinds to the state com-

missioner and applying for certificates to affix thereto."

We have quoted from these sections of the act for the purpose of showing that the use and possession of the liquor, under the circumstances set forth in the "case," are forbidden by law as against public policy; that it was contraband; and that the intention of the statute was to destroy the right of property therein by subjecting it to seizure without warrant, and to forfeiture to the state. The statute, in its efforts to prevent the mischief arising from the illegal use and possession as aforesaid, has even gone to the extent of declaring null and void all obligations contracted in the sale thereof. For the court to allow the use of its process in making the liquor liable to the payment of debts would be to lend its aid in thwarting the provisions of the act, and deprive the state of its rights arising from forfeiture. This distinction between statutes merely prohibiting the sale of liquor and those that destroy the right of property therein and declare the ownership illegal under penalty is clearly pointed out by Mr. Justice Little, who, in delivering the opinion of the court in the case of *Fears v. State* (Ga.) 29 S. E. 463, uses the following language: "The object of this act was, as its caption recites, to prevent the evils of intemperance; and the means of preventing such evils was to prohibit the selling or giving away of the liquors enumerated. Further than this the act does not go. It is a valid and constitutional act of the general assembly, and is entitled to have full force and effect; and in construing such acts the spirit as well as the letter of the law will be regarded to accomplish the object sought. It will be noted, however, that the inhibition under this act extends only to the sale, barter, furnishing, or giving away of spirituous liquors. There is no attempt under the act to destroy the right of property in liquors, nor is there anything deducible from any of its provisions which declares the ownership of such liquors illegal. The mandate of the law is that they shall not be sold, they shall not be given away, they shall not be bartered, they shall not be furnished. Under the provisions of the act they may be held, kept, owned, and used in counties where its provisions apply. If they can be so kept and owned, then they are property. Property, in its appropriate sense, means that dominion or indefinite right of user and disposition which one may lawfully exercise over particular things or subjects, and generally to the exclusion of all others. * * * In all of the states, so far as we know, police control over the sale of intoxicating liquors is exercised, because of the evils attending their misuse or excessive use; and, while this is true, it does not follow that they are incapable of being lawfully held in possession, or that they are not subjects over which ownership can be exercised. On the contrary, such liquors, when not held under circumstances which

constitute a misuse or a penal offense, are entitled to protection as other property. *Brown v. Perkins*, 12 Gray, 89." The attachment proceedings cannot be made effective except by a sale of liquors, and a sale in this manner is not permitted by the statute, but a penalty is imposed for such infraction of the law. So that, if the court should order a sale under these circumstances, it would be a violation of the law, which not only prohibits such act, but imposes a penalty for so doing. *Fairly v. Wappoo Mills*, 44 S. C. 254, 22 S. E. 108. It was well said in *Bank v. Owens*, 2 Pet. 539: "No court of justice can, in its nature, be made the handmaid of iniquity. * * * How can they, then, become auxiliary to the consummation of violations of law? * * * There can be no civil right where there can be no legal remedy, and there can be no legal remedy for that which is itself illegal." There was therefore error on the part of the circuit judge in refusing to dissolve the attachment, and it is the judgment of this court that the order appealed from be reversed.

JONES, J. I concur in reversing the judgment of the circuit court on the ground that intoxicating liquors are, in this state, exempt from attachment for debt. Section 256 of the Code of Procedure relating to attachments provides that "all property in this state of such defendant, except that exempt from attachment by the constitution, shall be liable to be attached and levied upon and sold to satisfy the judgment and execution." The exemption here referred to is doubtless the homestead exemption. But the dispensary law, a later enactment, prohibits under penalty the sale of intoxicating liquors by anybody and in any way, except as provided for in that act, and it is nowhere in that or any subsequent act provided that an officer may sell intoxicating liquors under attachment or execution. The terms of the dispensary act are broad enough to forbid public sale by auction as well as private sales. Since the object of an attachment is to hold for sale under the judgment that may be obtained, and since the public sale of intoxicating liquors under meane or final process is clearly within the prohibition of the dispensary law, by necessary implication intoxicating liquors are exempt from attachment for debt. I am not prepared to rest this case to any extent on the ground that the dispensary law destroys the owner's right of property in intoxicating liquors, even where kept for an unlawful purpose. Until actual confiscation by the state, the "owner" has property therein, but subject to law; otherwise such property could not be subject of larceny. The owner could not maintain an action to recover the same against a trespasser. Nor could he claim the restoration of the same by dissolution of an attachment. The defendant's right to a dissolution of the attachment rests on the trespass of the sheriff in seizing property exempt from attachment. The following au-

thorities sustain the judgment of the court. *Drake*, Attachm. § 244c; *Shinn*, Attachm. § 28; *Black*, Intox. Liq. § 246; *Kiff v. Railroad Co.*, 117 Mass. 591, which follows *Ingalls v. Baker*, 13 Allen, 449; *Barron v. Arnold*, 16 R. I. 22, 11 Atl. 298; *Nichols v. Valentine*, 36 Me. 322.

(53 S. C. 448)

GARRICK v. FLORIDA CENT. & P. R. CO.
(Supreme Court of South Carolina. Oct. 25. 1898.)

APPEAL — HARMLESS ERROR — EXCEPTIONS — INSTRUCTIONS — DEATH BY WRONGFUL ACT — PUNITIVE DAMAGES.

1. Error in admitting statements of the foreman not made in the course of his agency is harmless where the same facts are established by other testimony.

2. An exception that the court "erred in making the qualifications to his charges on requests 1, 2, and 3 of appellant's counsel, whereas he should have granted said requests without qualification," is too general, and will not be considered by the appellate court.

3. Under the constitutional provision forbidding a charge on the facts, the court cannot charge that a given state of facts constitutes negligence, since that is for the jury.

4. An exception is not too general, as being based on an extract from the charge, where the charge abstracted states a distinct legal proposition, as applicable to the case.

5. Where the charge was that, "if there was gross recklessness, the jury might give exemplary damages," there is no presumption that the jury could not have considered the question of exemplary damages; and hence, if the law does not allow such damages, the charge is erroneous.

6. Under Rev. St. 1893, §§ 2315-2318 (12 St. at Large, p. 825), entitled "An act to provide for compensation in damages to the family of persons killed by the fault of others," and providing that, where the death of a person is caused by the fault of another, his heirs may recover such damages as are proportioned to the injury resulting to them from such death, exemplary damages cannot be recovered; and this, though the statute requires the fault to be such as would entitle the person injured to recover himself if death had not ensued, he being entitled to recover exemplary damages for his own injury.

Gary, A. J., dissenting.

Appeal from common pleas circuit court of Orangeburg county; O. W. Buchanan, Judge.

Action by Julia H. Garrick, as administratrix of the estate of Jacob Garrick, deceased, against the Florida Central & Peninsular Railroad Company. There was a judgment for plaintiff, and defendant appeals. Reversed.

C. J. C. Hutson, S. Dibble, and W. H. Lyles, for appellant. Raysor & Summers and James F. Izlar, for respondent.

McIVER, C. J. The plaintiff, as administratrix of her deceased husband, brought this action to recover damages, from the defendant company, for the killing of her said husband by the negligence of said defendant. It appears that the deceased was in the employ of the defendant company, work-

ing on the bridges and trestles of said railroad, under the direction of one Renfroe, who was charged with the duty of keeping said bridges and trestles in proper repair; that on Friday evening, the 3d September, 1897, the deceased, when they quit work for the day, started to go back up the road to see his wife, who was in a delicate situation, using a velocipede for the purpose, and going in a northerly direction towards Norway, a station on the road. Before reaching that point, he was struck by a material train, moving backward, in a southerly direction, and thrown from the track, sustaining serious injuries, from which he died on the following Monday. In the course of the testimony on behalf of the plaintiff, a witness (Brown) was asked if he knew how the deceased came from South Ediston, the place where he was working that evening, to which the reply was: "He started from there on foot. Mr. Renfroe told me so." To this defendant objected, and the objection being overruled, to which exception was taken, the witness proceeded to say: "Mr. Renfroe told me on Saturday morning that Garrick started from there on foot, and he called him back, and told him to take the wheels [meaning the velocipede]. Mr. Renfroe said he thought he was doing the poor boy a favor." Another witness on the part of the plaintiff was asked if he knew how Garrick came to use the velocipede that night, to which he replied: "I don't know positively. I had a conversation on that subject with Mr. Renfroe afterwards. (Objected to. Objection overruled. Ruling excepted to by the defense.) I heard Mr. Renfroe say that, the night that Mr. Garrick was hurt, Mr. Garrick started home on foot, and he called him back, and told him to go home on the velocipede, and Mr. Garrick came back, and started home on it." The jury returned a verdict in favor of the plaintiff for the sum of \$1,995,—the whole amount claimed in the complaint; and, judgment having been entered thereon, defendant appeals upon the several exceptions set out in the record.

The first exception complains of error in allowing the testimony above stated to be received over the objection of defendant. It seems to us that these declarations of Renfroe, made after the event, were no part of the *res gestæ*, and were not made in the course of his agency, and were therefore inadmissible, under the case of *Petrie v. Railway Co.*, 27 S. C. 63, 2 S. E. 337. But, while there was error in the ruling of the circuit judge as to the admissibility of the testimony above referred to and stated, yet such error was rendered entirely harmless by reason of the fact that the testimony of J. Lee Nease and S. B. Sawyer, Jr., received without objection, was quite sufficient to prove the same fact which the declarations objected to tended to prove. This exception must therefore be overruled.

Exception 2 is in the following form: "Be-

cause his honor, the circuit judge, erred in making the qualifications in his charges upon the requests 1, 2, and 3 of the defendant's counsel, whereas he should have granted said requests without qualification." This exception is entirely too general to entitle it to any consideration on our part, under the well-settled rule, which has been so often applied as to supersede the necessity for any citation of authority. Indeed, it is difficult to conceive how an exception could have been made more general than this. We may add, however, that the circuit judge could not have charged either the first or second requests to charge without violation of the constitutional provision forbidding a charge on the facts. He could not instruct the jury that any given state of facts would constitute negligence, either contributory or otherwise, for that was a question for the jury to determine under all the facts and circumstances of the case. *China v. City of Sumter* (S. C.) 29 S. E. 206. As to the fourth request, that was distinctly charged, and all that the circuit judge did was simply to go on and explain the nature of the contributory negligence on the part of the plaintiff, which would relieve the defendant from liability; and in this there was no error.

The third exception is in these words: "Because his honor, the circuit judge, erred in his charge to the jury in stating as follows: 'If there was gross carelessness or recklessness or willfulness, then you may give what is known as punitive or smart-money damages. So, it is for you to say what damages should be awarded to her, if you find she is entitled to recover.'" This exception raises the main question in the case, and is the one to which the argument was principally directed. It is an entirely novel question,—in this state at least,—and its solution depends upon the proper construction of the statute, under which alone can such an action as this be maintained. Before proceeding, however, to consider this question, it will be necessary to dispose of two preliminary objections which have been raised by counsel for respondent: (1) That the exception is too general; (2) that the jury could not have considered the question of exemplary damages in making up their verdict.

As to the first objection, while there are cases which condemn the practice of framing exceptions by basing them upon mere extracts from the judge's charge, in which no distinct legal proposition is stated, yet this case does not come under such an objection. Here the circuit judge, in his charge, has stated a distinct and separate legal proposition, as applicable to this case; and, if there is error in such statement of the legal proposition, then such error is sufficiently pointed by the exception. The first objection is not tenable.

As to the second objection, we do not see how it is possible for this court to ascertain what elements of damages the jury consider-

ed in making up their verdict. All that we can possibly know is that the jury were explicitly instructed that "if there was gross carelessness or recklessness or willfulness," then that they might give exemplary damages; and, if the law does not allow such damages in a case like this, then there was error of law in the charge; and we have no right to conjecture or speculate as to what effect such erroneous instruction may have had upon the minds of the jury. But it is said in the argument here that "exemplary damages were not insisted upon, neither was any proof offered respecting such damages." We can only say that the "case" does not disclose the fact that exemplary damages were not insisted upon; and it is from that source alone that we are liberty to ascertain what occurred in the court below. But we do learn from the "case" that plaintiff offered evidence tending to show that the defendants, by their agents, were running a heavy material train, in the nighttime, backward, without lights, over a road on which it was reasonable to expect that some one of the employés of the company might be passing on the velocipede, which plaintiff's testimony tended to show was habitually used by the employés in passing from their work, just about the time the disaster occurred. If this was not testimony tending to show "gross carelessness," if not "recklessness," it is difficult to say what was its intention. The second objection is not tenable.

We come, then, to the consideration of the question presented by the third exception: Is a plaintiff in a case like this entitled to recover exemplary damages,—sometimes called vindictive or punitive damages,—or is he limited to the damages expressly provided for in the statute, to wit, such damages as the jury "may think proportioned to the injury resulting from such death to the parties respectively for whom and for whose benefit such action shall be brought?" It is not, and cannot be, denied that, prior to the passage of the act of 1859 (12 St. at Large, p. 825), an action of this kind could not have been maintained at all, and no damages of any kind could have been recovered by any person. It is obvious, therefore, that the plaintiff in this case derives her right to bring this action solely from the provisions of the statute above referred to, and the extent and measure of her rights must be determined by a proper construction of those provisions. The title of that act is as follows: "An act to provide for compensation in damages to the families of persons killed by the fault of others." The first section of the act reads as follows: "That whenever, after the passing of this act, the death of a person shall be caused by the wrongful act, neglect, or default of another, and the act, neglect, or default is such as would, if death had not ensued, have entitled the party injured to maintain an action and recover damages in respect thereof, then,

and in every such case, the person or corporation who would have been liable, if death had not ensued, shall be liable to an action for damages, notwithstanding the death of the person injured, although the death shall have been caused under such circumstances as make the killing in law a felony." The second section reads as follows: "That every such action shall be for the benefit of the wife, husband, parent, and children of the person whose death shall have been so caused, and shall be brought by, or in the name of, the executor or administrator of such person, and, in every such action, the jury may give such damages as they may think proportioned to the injury resulting from such death to the parties respectively for whom and for whose benefit such action shall be brought, and the amount so recovered shall be divided among the before-mentioned parties in such shares as they would have been entitled to if the deceased had died intestate, and the amount recovered had been personal assets of his or her estate," etc. The balance of this section need not be quoted, as we do not deem it pertinent to the question presented by this appeal. The third section need not be copied, as its sole purpose seems to be to prevent a double recovery for the same injury, as was said in the case of *Price v. Railway Co.*, 33 S. C. 561, 12 S. E. 413. This act of 1859 was incorporated in the General Statutes of 1882 as sections 2183-2186, inclusive, in substantially the same terms, and has here lately been incorporated in the Revised Statutes of 1893 as sections 2315-2318, inclusive, in like terms, except for the insertion of the amendment made by the act of 1893 (21 St. at Large, p. 523), which amendment does not affect the present inquiry. So that the law now stands precisely as it did upon the passage of the act of 1859, with the single addition made by the amendment of 1893, to the clause providing for the benefit of what persons the action shall be brought, which amendment, manifestly, does not in any way affect the present inquiry.

Looking at the title of the act of 1859, it is very manifest that the intention of the legislature was "to provide for compensation in damages to the families of persons killed by the fault of others," for it is so expressly declared in the title. Now, while it is true that in England it was held that the title was no part of the statute, and therefore could not afford any light in the construction of the statute, for the reason that, under the practice there, it was usually framed by the clerk of the house in which it first passes, after the passage of the bill, yet even there authorities may be found holding that "the title to an act, though no part of an act, is not to be wholly disregarded in putting a construction upon the statute. The object of the legislature is very often avowed in the title to an act, as well as in the preamble." *Pott Dwar. St. 103*. But, as shown by the notes, the rule

is otherwise in this country, where the whole statute, including the title as well as the preamble (if any), is all before the legislature when the act is upon its passage, and where, we may add, the title is not unfrequently amended before the bill passes its final reading. So, also, it is said, in *End. Interp. St. § 58*, after stating the rule in England: "In this country, whilst the title of a statute is not, in general, regarded as a part of the same, it is, nevertheless, regarded as a legitimate aid in ascertaining the intention of the legislature when the language and provisions in the body of the act are ambiguous and of doubtful meaning and application." But we need not pursue the discussion of this point, as it has been conclusively determined by one of our own decisions,—*State v. Stephenson*, 2 Bailey, 334, where it was distinctly held that the title of a statute may be resorted to, as well as the preamble, to aid the interpretation, even in the case of a penal statute.

We have, therefore, here, first, the title of the act, in which the avowed object of the statute was to provide compensation in damages for the families of persons killed by the fault of others; and next we have, in the second section of the act, language by which it is distinctly declared what kind of damages the jury may give in such cases,—“such damages as they may think proportioned to the injury resulting from such death to the parties respectively for whom and for whose benefit such action shall be brought”; and this necessarily implies compensatory damages, and not exemplary or punitive damages, for it is impossible to conceive how exemplary or punitive damages could be “proportioned” to the injury resulting to the parties intended to be benefited, while it is very easy to see how compensatory damages could be measured and proportioned to the injury sustained by the parties intended to be benefited. Compensatory damages and exemplary or punitive damages are of an entirely different nature, and rest upon wholly different principles. The former is intended to provide a recompense for injuries sustained, while the latter is intended only as a punishment to the wrongdoer, and to furnish an example to him and other wrongdoers of the danger attending such wrongdoing. Hence it is very natural to find that the legislature, after having distinctly declared, in the title of the act, that their intention was to provide for compensatory damages, has, in the body of the act, carried out such intention by declaring what kind of damages the jury might give in those cases in which, for the first time, a right of action was provided for. It seems to us very clear, therefore, that the legislature, in providing for a right of action which never before existed, has manifested, in unmistakable terms, its intention to provide that, in such new action, compensatory damages may be recovered, and has made no provision for the recovery of any

other kind of damages; and that no court has the power to amend the act by adding to the expressly declared intention of the legislature a further provision that in such an action damages other than compensatory may be recovered. The legislature having said that the object of the act was to enable the sufferers to recover compensation in damages, the courts are not at liberty to say that another kind of damages, intended as a punishment for the wrongdoer, may also be recovered. The legislature having said that its object was compensation, the courts have no authority to say that its object was punishment also. If the legislature had intended to authorize the recovery of any kind of damages in this new action there, for the first time, authorized, it would have been very easy and most natural to have said so. But the legislature did not so say. On the contrary, after providing, in the first section, that in a case like this “an action for damages” might be brought, it proceeds, in the next section, to provide what kind of damages may be recovered,—precisely in accordance with the object of the act as expressly declared in the title. If the legislature had made no further provision than that contained in the first section of the act,—authorizing “an action for damages,”—then, possibly, it might have been inferred that the intention was (though contrary to the avowed object declared in the title) to confer the right to recover any kind of damages recoverable in other actions of a similar character. But when, in the second section, the legislature proceeded to prescribe what kind of damages might be recovered, precisely in accordance with the avowed object of the act, as expressly declared in the title, there is no room for any such inference.

It is quite true, as has been held in *Petrie v. Railway Co.*, 29 S. C. 303, 7 S. E. 515, and affirmed in *Strother v. Railway Co.*, 47 S. C. 375, 25 S. E. 272, and now again affirmed in this case, that the measure of damages is not the pecuniary loss alone of the beneficiaries in a case like this, but the jury may give such damages as they may think proportioned to the injury, whether pecuniary or otherwise, sustained by the beneficiaries; for it is obvious that such injury may be far beyond any mere pecuniary loss. But what this has to do with the question which we are called upon to decide, we are unable to perceive. The fact that the jury, in determining what amount of damages will be proportioned to the injury resulting to the beneficiaries from the death of their relative, are not confined to the consideration of the pecuniary loss sustained, but may and should consider any other injury, whatever may be the character, in ascertaining the proportion contemplated by the statute, throws no light whatever upon the question whether the jury have been authorized to give, in addition to the damages of the character just spoken of,

exemplary damages as a punishment to the wrongdoer, or as an example of the danger attending such wrongdoing.

We have not deemed it necessary to consider the cases cited from other states, for the reason that they are not authority here, and for the further and more important reason that such decisions were made under statutes differing from ours, and therefore afford no light in the construction of the language of our own statute, from which alone are we at liberty to ascertain the intention of our legislature. Take, for instance, the Virginia statute, by which the jury is authorized to "award such damages as to it may seem fair and just." The court there construed that language as authorizing the jury to award exemplary or punitive damages. It is very easy to conceive of a case in which a jury might be fully warranted in considering it "fair and just" that exemplary or punitive damages should be awarded, for there may be a case in which the killing was attended with such circumstances of wanton cruelty as would render it eminently "fair and just" that the slayer should be mulcted in very heavy punitive damages, while, perhaps, the injury resulting from his death to the beneficiaries might be comparatively small. But our statute contains no such language, and, on the contrary, as we have seen, its language necessarily implied that compensatory, and not punitive, damages may be awarded.

Again, it is contended for the respondent that the right of action conferred upon the executor or administrator for the benefit of certain relatives of the deceased is but a continuation of the same cause of action which deceased would have had if death had not ensued; and two cases have been cited in support of this view,—*Hooper v. Railway Co.*, 21 S. C., at pages 545, 546, and *Price v. Railway Co.*, 33 S. C., at page 562, 12 S. E. 413. Neither of these cases, however, decides the point, and this, we understand, was conceded by the distinguished counsel who cited them, but he relies upon certain language which he quotes from them as indicating a view in accordance with that for which he contends. Whatever may be the tendency of the language quoted from these cases, which it would be unprofitable now to discuss, it is enough to say that such language is not authoritative, as the question here presented was not raised or considered in either of those cases; and, indeed, in the *Price* case it was expressly stated that it was deemed unnecessary to consider the question, "for our conclusion is drawn from the terms of the statute, as evidencing the true intent of the legislature." But without going into this question, which has been much discussed elsewhere, and variously decided, and assuming, without deciding, however, that the right of action conferred by the statute is but a continuation of the same cause of action which the deceased would have had if death had not

ensued, it by no means follows that the legislature intended, by conferring this right of action on the executor or administrator of the deceased, for the benefit of the persons specified, to give such executor or administrator the right to recover the same kind of damages which the deceased would have had, especially in view of the fact that the statute has, in terms, prescribed what kind of damages may be recovered; for it cannot be doubted that the legislature, if so minded, might have limited the amount of damages recoverable in such an action, as has been done in several of the states, and, if so, no reason is perceived why the legislature might not place any other limit upon the damages authorized to be recovered. The same may be said of the case of *Reed v. Railway Co.*, 37 S. C. 42, 16 S. E. 289, for the sole question, so far as this matter is concerned, which was either considered or decided in that case, was whether an action could be maintained by the administrator of one who had been instantaneously killed; and we are unable to find anything in the language used by Mr. Justice Pope, in vindicating the conclusion of the court, which indicates even that his mind was ever turned to the question which we are now called upon to decide. He was not called upon to express or even indicate any opinion upon the question before us, and he did not express or even intimate any opinion as to such question.

After a very careful consideration and study of this case, we are of opinion that the circuit judge erred, as matter of law, in instructing the jury that, "if there was gross carelessness or recklessness or willfulness, then you may give what is known as punitive or smart-money damages"; as the statute which alone authorizes the bringing of this action does not contemplate or permit damages of that character to be awarded in such a case as this. The judgment of this court is that the judgment of the circuit court be reversed, and that the case be remanded to that court for a new trial.

GARY, A. J. (dissenting). I cannot concur in the opinion of Mr. Chief Justice McIVER, as it seems to me it was the intention of the statute under which this action was brought that the representatives of a person killed by the wrongful act, neglect, or default of another should have the right to recover any kind of damages which could have been recovered if death had not resulted from the wrongful act.

(53 S. C. 471)

BAUM BROS. v. BOWEN et al.
(Supreme Court of South Carolina. Oct. 27, 1898.)

EJECTMENT—OUSTER—QUESTION FOR JURY—WILL.

1. Where, in an action to recover realty, there was evidence that defendant was in exclusive possession, refusing to treat with plaintiffs, and repudiating any rights of theirs, it

was a case for the jury on the question of ouster, and this though the parties proved to be tenants in common.

2. A testator devised his lands to his sons, if they were disposed to take them on the following terms: The lands to be divided into as many shares as there were children, and appraised; the parts belonging to his daughters, "my will is that it be paid over to them by my sons; if the sons do not feel disposed to comply with such terms, the whole may be sold, and divided share and share alike. Another clause provided that all the property of the daughters "is hereby given and bequeathed to them, my said daughters, and at their respective deaths to the issue of their bodies." The sons decided to take the land, and pay the daughters in money, but, as they had not sufficient money for such purpose, a piece of the land was given to one of the daughters "in lieu of her part of the estate." *Held*, that the question whether the daughter took such portion as payment from the sons of her share, or as realty, subject to the terms of the will, was for the jury.

Appeal from common pleas circuit court of Kershaw county; J. C. Klugh, Judge.

Action by Baum Bros. against A. H. Bowen and others. There was a judgment for defendants, and plaintiffs appeal. Reversed.

Thos. J. Kirkland, for appellants. J. T. Hay, for respondents.

JONES, J. This is an action to recover the possession of real estate. The appeal is from an order of nonsuit, and involves the construction of the will of Charles Bailey, under whom all parties claim. The relevant clauses of the will are as follows: "And it is my will that, upon my said wife ceasing to be my widow, either by death or marriage, whichever shall first happen, the lands or plantation shall belong to my male children if they are disposed to take it on the following terms; that is to say: It is to be valued by three impartial, disinterested men, who are good judges, which the said amount of valuation so decided on by the three men it is my will that it be divided into as many shares as I have children, and the parts or shares that belong to my female children my will is that it be paid over to them by my male children; but, if my male children don't feel disposed to comply with the above terms, they may sell the whole, and divide the whole between them, share and share alike; and I do hereby give the same to them after happening of either of those events,—to all my children." By a subsequent clause of the will the interests of the daughters in his estate were limited as follows: "All the property which each of my daughters shall at any time receive from my estate shall be binding to them, respectively, for and during the term of their natural or respective lives, and not subject or liable to the debts, contracts, or incumbrances of their husbands, and the same is hereby given and bequeathed to them, my said daughters, and at their respective deaths to the issue of their respective bodies." The testimony offered by plaintiffs bearing upon the will was as follows: "The estate of Charles Bailey was divided in pursuance of

will of Charles Bailey. The division was made by appraisers,—Mr. James Team, W. D. Hogan, and J. S. Cloud. The boys, under the provisions of the will, decided to take the land, and pay the girls their share in money. The land was then divided among the boys. But the boys could not pay the girls, and gave them part of the land as their share, and paid them in money the balance due them. The boys settled with some of the girls entirely in land. The land was sold to them at the appraised value. The 150 acres of land now in question in this case was a portion we (the boys) sold, and gave my sister Lavinia Bowen in lieu of her part of the estate." Judge Klugh's ruling on the motion for nonsuit was as follows: "It is considered by the court that the plaintiffs do claim title through the said Lavinia Bowen; that she did not take the lands in controversy under the will of her father, Charles Bailey, but that whatever title she had was derived from her brothers, who elected to take the land, and pay their sisters as directed by the will, and who, as appears from the testimony offered by plaintiffs, did pay their sisters partly in money and partly in land; that the land therefore stands as if Lavinia Bowen had invested her money in it; that, the money being personalty, the limitations of it under the will, which would have created an estate in fee conditional in her as to lands, vested in her an absolute estate in personalty; and the land, standing as the money invested in it, passed, upon her death, to her distributees, under the statute; and A. H. Bowen, defendant, being her husband, would be entitled to an interest of one-third therein. It is therefore adjudged that upon the plaintiffs' evidence they are tenants in common in the land in controversy with A. H. Bowen, defendant, and therefore cannot maintain an action in this form against the defendants, and the motion for a nonsuit is granted."

Appellants contend that the court erred in holding, under the will and testimony adduced, that Mrs. Lavinia Bowen took her share of land as personalty, and in not holding that the limitation was to the issue of the daughters as purchasers. The testimony showed that Mrs. Bowen was in possession of the land in question at her death, and that she left surviving her as her heirs at law her husband, A. H. Bowen, and four children, Elliott, Earle, Eva, and Eunice. The testimony further showed that plaintiffs has acquired all the interest of the four children in said land. Under appellants' view that the four children took the whole land as purchasers under the will, plaintiffs were entitled to recover the whole land; under the view of the circuit court, plaintiffs were tenants in common with the defendant Bowen, and could not maintain this action. We think the nonsuit was improper, even if the circuit court's construction of the will is correct, since, under that view, there was evidence which entitled plaintiffs to go to the jury. The answer of de-

endants was a general denial, the statute of limitations, and the presumption from 20 years' possession. There was evidence tending to show that defendant Bowen was in exclusive possession of the land, that he refused to treat with plaintiffs in reference to the land, and repudiated any rights therein on the part of plaintiffs. This tended to show ouster. A tenant in common may bring a possessory action for land against her co-tenant in case of an ouster. This rule is recognized in *Martin v. Quattlebam*, 3 McCord, 205, cited by respondents to sustain the ruling of the circuit court. See, also, *Taylor v. Stockdale*, Id. 302; *Harvin v. Hodge*, Dud. (S. C.) 23. In such case, of course, the recovery is for the undivided share of the ousted co-tenant. But we also think the nonsuit was improper because there was some evidence tending to show that Mrs. Lavinia Bowen received the land in question as her share of the land devised, in which case the limitation to the issue of her body would apply. The testimony was not so wholly one way as to warrant the conclusion, on a motion for nonsuit, that Mrs. Bowen bought the land from the sons of the testator, and paid for it with money coming to her under the will. It should have been left to the jury to determine, under proper instructions, whether Mrs. Bowen really bought the land from the sons of the testator, or whether she merely received it under the will as her share of the devised land. If the former, plaintiffs, on proof of ouster, would be entitled to recover their undivided two-thirds interest in the land as tenants in common with the defendant Bowen; if the latter, plaintiffs, otherwise establishing their case, would be entitled to recover the whole land. Under our construction of the will, the land of the testator was devised to all his children, share and share alike, with the right of election to the sons to take the whole land on certain specified terms or conditions, viz. to cause an appointment thereof by disinterested and competent men, and to pay over to the daughters their share of the appraised value in money. This, we think, is clear from the language of the will, which we again quote. The words in brackets and the italics are ours, put in to indicate our construction: " * * * The lands or plantation shall belong to my male children if they are disposed to take it on the following terms: [Then follow the terms,—impartial appraisement, and payment over to the daughters of their share of the appraised value]; But, if my male children don't feel disposed to comply with the above terms, they may sell the whole, and divide the whole [land, or its proceeds if sold] between them [all the children] share and share alike; and I do hereby give the same [the whole land] to them [all the children] after the happening of either of those events [the death or marriage of the testator's wife],—to all my children." The words, "they may sell the whole, and divide the whole," do not indicate a be-

quest of money to the daughters, but a partition of the land in kind, or its proceeds if sold. The last clause above quoted clearly shows a devise of the whole land to all the children on the death or marriage of the testator's wife, and may be properly read as preceding the clause providing the terms upon which the sons might take the whole land. These terms clearly were not a mere disposition to take the whole land, and to pay the daughters their share of the appraised value in money if they could, but meant an unchanged election to take the whole land, and also the payment to the daughters of their share of the appraised value. Whether, then, the daughters took money instead of land, under the will, depends upon whether the evidence shows a compliance by the sons with the terms and conditions upon which the sons had the option of taking the whole land. To warrant the circuit judge, on a motion for nonsuit, to say that those terms have been complied with, the evidence should not admit of any other view. Now, it is true there was evidence that the boys decided to take the whole land, and pay the girls their share in money, and that the sons divided the land among themselves, but there was also evidence tending to show that this plan fell through, as the boys were unable to pay the girls their share in money. So far as Mrs. Bowen is concerned, the testimony was that the land in question was a portion sold or given to her "in lieu of her part of the estate." There was no evidence that Mrs. Bowen took any deed of conveyance from the sons, which would seem to have been proper and natural if the parties regarded the title to the whole land as having vested in the sons under the will. It may be conceded that, if the sons elected to take the whole land, and the daughters really accepted the sons as their debtors to the amount of their share of the appraised value, and then took as purchasers from the sons a part of the devised lands in payment of this indebtedness, then there was practically a compliance by the sons with the terms upon which title to the whole land should belong to them. But the evidence to this end was not so conclusive as to take the case from the jury by nonsuit. The judgment of nonsuit is reversed, and the case remanded for trial.

POPE, J. I concur in the result.

GARY, A. J. I concur in the result, as there being some evidence of ouster, the case should have been submitted to the jury.

McIVER, C. J. I concur in the result only. See separate opinion herewith filed.

McIVER, C. J. I concur in the result, because there was some evidence from which the jury might infer that there was ouster. But I am not prepared to assent to the view presented as to the construction of the will of

Charles Bailey. It seems to me that Lavinia Bowen did not take her title to the land in dispute under Bailey's will, but that she took such title practically by purchase from her brothers. The sons certainly elected to take the land, as they were allowed by the will to do, at a valuation to be made by appraisers, and to pay their sisters their shares, in money, of such valuation, for the undisputed testimony is: "The boys, under the provisions of the will, decided to take the land, and pay the girls their shares in money. *The land was then divided among the boys.*" (Italics mine.) What, therefore, Mrs. Bowen took under the will was money, not land; and, if so, it is conceded that she took the money as her absolute property, not subject to any limitations over to her children. Hence the land which she acquired from her brothers in payment of their debt to her she held as her absolute estate, which, upon her death intestate, descended to her heirs at law, of whom her husband was one. The fact that the sons, after their election to take the land, —after the land was divided among the boys, —found that they were unable to pay the amount due their sisters in money, and were compelled to pay them, in whole or in part, in land, cannot affect the question, for, practically, it was the same as if the sons had sold to a third person so much land as was necessary to raise the amount due their sisters, and paid the proceeds of such sale to their sisters in money; and that the sisters chose to accept payment of what was due them in land instead of money cannot affect the question, as it would be the same, in effect, as if the sisters had been paid in money, and invested such money in the land. According to my view of the terms of the will, there was no devise of land to the daughters in any event. The testator manifestly intended that his sons should have the whole of the land if they were willing to take the same at a valuation to be fixed by appraisers, and that the amount of such valuation should be equally divided among all of his children; the sons paying to the daughters their shares in money. But if the sons did not choose so to take the land, then the sons were empowered to sell the same,—that is, the land,—and the proceeds of such sale were to be divided among all the children, daughters as well as sons, share and share alike. So that in no event was there any devise of land to the daughters.

(54 S. C. 127)

GARRETT et al. v. WEINBERG et al.¹
(Supreme Court of South Carolina. Oct. 29, 1898.)

PARTITION—TITLE—EVIDENCE—SECONDARY EVIDENCE—ADVERSE POSSESSION—DEEDS—IMPRACHMENT—JURORS—QUALIFICATIONS—OBJECTIONS.

1. Where an order appointing a guardian ad litem is shown to have been signed by the clerk, with the seal of the court attached, and there is testimony tending to show that a pe-

¹ Rehearing pending.

tition had been filed, although, after search, it could not be found, the order is admissible in evidence.

2. Objections to evidence on the grounds of incompetency cannot be raised for the first time on the third trial of the case.

3. A stenographer's notes of the testimony at a former trial is not the best evidence, so as to exclude the testimony of an attorney in the case as to what witnesses since deceased had testified.

4. Incompetent testimony offered at a new trial should be ruled out on objection, although it was received at the former trial without objection.

5. A grantor, after conveying land with full covenant of warranty, cannot impeach the title conveyed by testimony that he had title to only one-third interest in the land.

6. As statements in the certificate to a deed, to the effect that the wife, who joins with her husband in its execution, releases her rights of dower and of inheritance as widow of a former husband in the land conveyed, cannot limit the express words of the deed purporting to convey the entire title in fee to the land described, such certificate is insufficient to show that she acquired the land from her former husband.

7. Where plaintiffs sue to establish their title to an interest in land by showing adverse possession by their ancestor, and also by showing that both plaintiffs and defendants claim from the same common title, an order excluding evidence tending to show that there had been no notorious adverse possession, is harmless error, where the judge indicated, in refusing a new trial, that the adverse possession had not been established, and that, if that was the only ground for plaintiffs' claim, defendants would have been granted a new trial.

8. Plaintiffs, claiming title to land through their ancestor, introduced a deed showing an absolute conveyance between other parties. Plaintiffs made no claim under such deed, and it did not show how the grantors therein obtained title. *Held* that, as such deed did not show that such grantors' title was superior to plaintiffs', they did not thereby prove title out of themselves, so as to entitle defendant to an order of nonsuit.

9. Right to serve as a juror is not a vested right, and therefore Const. art. 5, § 22, and Id. art. 2, § 6, providing that persons convicted of larceny shall be disqualified, applies to persons convicted before the constitution was passed.

10. Under Rev. St. 1893, §§ 2377, 2379, providing that all people entitled to vote shall be liable to jury service except that, where the name of a person convicted of "any scandalous crime is placed in the jury box, it shall be withdrawn and not returned as a juror," one convicted of larceny is disqualified.

11. A verdict rendered by a jury, one of whom is disqualified to serve on account of having been convicted of larceny, is void.

12. Under Rev. St. 1893, § 2406, which provides that, if any party knows of any objection to a juror in season to propose it before trial, and omits to do so, he shall not afterwards be permitted to do so unless by leave of court, an objection that a juror is disqualified because convicted of larceny may be made after verdict, if not discovered before, although Rev. St. 1893, § 2407, provides that "no irregularity in any writ of venire facias, or in drawing, summoning, returning or empanelling of juries shall be sufficient to set aside the verdict, unless the party making the objection was injured by the irregularity or unless the objection was made before the returning of the verdict."

Appeal from common pleas circuit court of Sumter county; I. D. Witherspoon, Judge.

Bill for partition by John A. Garrett and others against Rosa Weinberg and another. Judgment for plaintiffs, and defendants appeal. Reversed.

Lee & Moise, for appellants. A. Brooks Stuckey and Thomas S. Moorman, for respondents.

McIVER, C. J. This case having been before this court on three previous occasions, it is not deemed necessary to make any full statement of the case, as that may be obtained from the former appeals, which will be found reported in 43 S. C. 36, 20 S. E. 756; 48 S. C. 28, 26 S. E. 8; and 50 S. C. 310, 27 S. E. 770. It is only necessary now to state that the plaintiffs, recognizing the title of the defendants to one undivided half of the land in dispute, which is now in the possession of the defendants, claim title to the other undivided half, and seek by this action to establish such title for the purpose of obtaining partition of the land. The plaintiffs base their claim of title upon the allegation that the land in question originally belonged to one Thomas Garrett, who died intestate on the — day of November, 1865, leaving as his heirs at law his widow, Elizabeth, who subsequently intermarried with one John S. Moore, and his children named in the complaint; and the plaintiffs are the children who survived at the time of the commencement of this action, together with the descendants of those who had previously died. The plaintiffs did not undertake to trace their title back to a grant from the state, but endeavored to establish their title by offering evidence to show that their ancestor, Thomas Garrett, for more than 20 years prior to his death, had been in notorious adverse possession of the land, from which they claimed that a grant from the state would be presumed; second, by undertaking to show that both plaintiffs and defendants claimed from Thomas Garrett as a common source of title, which superseded the necessity for going back to a grant from the state. This question of title was tried before his honor, Judge Witherspoon, and a jury, who rendered a verdict in favor of plaintiffs. A motion of new trial was made on the minutes, upon grounds which will be hereinafter stated, which, being refused, judgment was entered upon the verdict. From this judgment, as well as from the order refusing a new trial, defendants appeal upon the several grounds set out in the record. The exceptions impute error to the circuit judge—First, in his rulings as to the admissibility of testimony; second, in refusing the motion for a nonsuit; third, in his charge to the jury; fourth, in refusing the motion for a new trial.

The first specification of error as to the admissibility of testimony is in receiving in evidence the order of Graham, clerk, appointing a guardian ad litem for one of the infant plaintiffs, when it did not appear that any pe-

tilion had ever been filed or recorded. The order in question was shown to have been signed by the clerk with the seal of the court attached, and there was testimony tending to show that the petition had been filed, though, after search, it could not be found. This, we think, was sufficient, in view of the testimony, as to the condition of the office. Besides, it seems to us that this objection, made for the first time after several trials of the case, came too late. The first exception is overruled.

The next specification of error is in allowing A. B. Stuckey, Esq., to testify as to what two deceased witnesses testified at a former trial; the claim being that the stenographer's notes were the best evidence. This matter is disposed of by what was said in *Brice v. Miller*, 85 S. C., at page 549, 15 S. E. 272. But while we hold that there was no error in allowing Mr. Stuckey, who was one of the counsel for plaintiffs, and therefore to be presumed to have taken particular notice of what occurred, to testify as to what deceased witness had testified to at a former trial, provided such testimony is competent, yet we cannot hold that incompetent testimony can thus be injected into a case. If Mrs. Moore, for example, had been alive at the trial which is now under review, and had offered to testify as Mr. Stuckey says she did, and her testimony had been ruled out as incompetent, surely there would be error in allowing Mr. Stuckey to reproduce this incompetent testimony, whether such testimony had been objected to or not; for, when a new trial is ordered in a case, it must be treated as if there had been no previous trial, so far as this matter is concerned; and hence, if incompetent testimony is offered upon the new trial, it must be ruled out, if objected to, even though it had been received without objection at the previous trial. But as a matter of fact it seems that Mr. Stuckey admits that this testimony of Mrs. Moore was objected to at the former trial, and, though let in by the circuit court, the question of its competency was never passed upon by the supreme court, for the obvious reason that the previous judgment was in favor of defendants, and hence there was no occasion for them to appeal. So that the question as to the competency of the testimony of Mrs. Moore, as reproduced by Mr. Stuckey, is for the first time presented for the consideration of this court. In view of the fact that the plaintiffs introduced a deed from John S. Moore and Elizabeth Moore to E. W. Moise, Esq., conveying to him the whole of the land, with full covenant of warranty, without anything whatever on the face of the deed indicating that anything less than the entire interest in the land was intended to be conveyed, and Mr. Moise had gone into possession under that deed, it surely would not be competent for either John S. Moore or Elizabeth Moore, after they had thus parted with the title to and the possession of the land, to give evidence in dispar-

agement of the title which they had conveyed to Moise. The rule is well settled that the declarations of a grantor, made after he has parted with the possession of the thing sold, in disparagement of his title, are not competent against his grantee, or those claiming under him. *Kittles v. Kittles*, 4 Rich. Law, 422; *Renwick v. Renwick*, 9 Rich. Law, 50; *Hobbs v. Beard*, 43 S. C. 370, 21 S. E. 305. Upon the same principle, a grantor, after conveying land with full covenant warranty, should not be heard as a witness to impeach, disparage, or restrict the title which he has, by his solemn deed, conveyed. It seems to us, therefore, that there was error on the part of the circuit judge in receiving the testimony of John S. Moore tending to contradict his deed, by showing that, while he had conveyed the entire interest in the land to Mr. Moise, he was only entitled to, and only had a right to convey, an undivided one-third interest. For a similar reason the testimony of Mrs. Moore to the same effect as reproduced by Mr. Stuckey was likewise incompetent. If it should be said that the certificates indorsed on the deed, whereby Mrs. Moore purported to release her dower and her estate of inheritance, were sufficient to show that she acquired her interest in the land as the widow and heir at law of Thomas Garrett, the answer will be found in what was well said by Mr. Justice Gary in determining the former appeal in this case (48 S. C., at page 42, 28 S. E. 17), "The certificates aforesaid cannot have the effect of contradicting the plain, express words of the deed." The exceptions complaining of error in admitting the testimony of John S. Moore, and that of Mrs. Moore as reproduced by Mr. Stuckey, above referred to, must be sustained.

The next specification of error in the rulings of the circuit judge as to the admissibility of evidence is in refusing to allow the witnesses Tindall and Winkles to testify as to the common reputation in the neighborhood as to whether Thomas Garrett was holding any property as his own at the time of his death. Inasmuch as the plaintiffs attempted to establish title in Thomas Garrett by adverse possession, which, to be effective, must be open and notorious, it would seem that the testimony objected to was relevant as to the point of notoriety; but as the circuit judge says, in his order refusing the motion for a retrial, "I do not think that the verdict of the jury can be sustained upon the ground of such adverse possession by Thomas Garrett, from which a grant of the land would be presumed," this error, if error it be, would seem to be harmless, for the inference is that, if the plaintiffs' case rested only on such adverse possession, he would have granted a new trial. The only other stipulation as to this point is that mentioned in the fifth exception. The record excluded was manifestly *res inter alios acta*, and was, therefore, incompetent. We are unable to perceive such a connection with the matters here in issue

as would bring it within the exception to the general rule. This exception must, therefore, be overruled.

The next inquiry is whether there was error in refusing the motion for a nonsuit upon the ground that the plaintiffs, by introducing the deed from John S. Moore and Elizabeth Moore to E. W. Moise, had thereby proved title out of themselves. We are not prepared to accept that view. The plaintiffs claimed title as heirs of Thomas Garrett, and made no claim of title through or under that deed, or through the grantors named therein. It did not appear from the face of the deed, or from any other competent evidence, how or when John S. Moore and Elizabeth Moore acquired the title to the land which they undertook to convey to Moise, under whom the defendants claimed; and hence, while it did not serve the purpose for which it was introduced,—to show that both parties claimed from a common source,—it likewise did not show that the title of John S. and Elizabeth Moore was superior to that of Thomas Garrett, under whom the plaintiffs claimed as heirs at law. Consequently, if the plaintiffs offered any evidence tending to show that the title was in Thomas Garrett, either by adverse possession or otherwise, in the absence of any evidence that the title had ever passed out of him, they would be entitled to go to the jury on such evidence. The plaintiffs certainly did offer some evidence of title by adverse possession in Thomas Garrett, which, though conflicting, it was for the jury to pass upon. There was no error in refusing the motion for nonsuit.

Our next inquiry is whether the several exceptions imputing error to the circuit judge in charging on the facts are well founded. We have carefully considered these exceptions in connection with the charge of the judge, and deem it sufficient to say that we do not think that any of them can be sustained, as we do not see that it would serve any useful purpose to consider them in detail.

It only remains to consider the exceptions to the order refusing a new trial. Some of the points raised by these exceptions have already been disposed of, and will not again be considered. Indeed, the exceptions raise but two points which seem to require further consideration: First, as to whether there was any competent evidence that the parties claimed from a common source of title; second, whether there was error in ruling as to the disqualification of the juror J. L. Ardis. The circuit judge, in his order refusing the motion for a new trial, used this language: "I do not think that the verdict of the jury can be sustained upon the ground of such adverse possession by Thomas Garrett from which a grant to the land would be presumed, but I conclude that the evidence as to a common source of title was sufficient to support the verdict, and I cannot grant a new trial on the ground last above mention-

ed." From this it is apparent that the circuit judge based his refusal of the motion for a new trial solely upon the ground that the evidence was sufficient to show that both parties claimed from a common source of title; and if, as we have seen, the evidence upon which he relied to support his conclusion was incompetent, then there was error of law in refusing the motion for a new trial. The deed from John S. Moore and Elizabeth Moore to E. W. Moise, introduced by plaintiffs for the avowed purpose of showing a common source of title, certainly did not show, or even tend to show, that the defendants claimed under Thomas Garrett. On the contrary, it only showed that the defendants claimed under John S. Moore and Elizabeth Moore, and certainly the plaintiffs did not claim under those persons, for they claimed under Thomas Garrett, whose name is not mentioned, or in any way alluded to, in that deed. So that the only evidence to support the conclusion of the circuit judge must be found in the testimony of John S. Moore and Elizabeth Moore, which, as we have seen, was incompetent. Upon this ground, therefore, there was error of law in refusing the motion for a new trial.

It only remains to consider whether there was error in refusing the motion for a new trial upon the ground of the disqualification of the juror James L. Ardis, who sat on the trial of this case. The undisputed fact is that Ardis was convicted of larceny in May, 1871, and sentenced to confinement in the penitentiary for the term of 10 months, and there was no pretense that he had ever been pardoned. The circuit judge finds as a fact "that none of the parties to this action or their respective counsel had knowledge of the conviction of Ardis during the trial of the case." These facts must be accepted as true, for the former is not only fully established by the record of the conviction of Ardis, but was also undisputed; while the latter was not only found by the circuit judge, but his finding is fully sustained by the evidence adduced. Upon these facts two questions of law arise: First, whether J. L. Ardis was disqualified to sit as a juror; second, if so, does the fact that he was one of the jurors who rendered the verdict in this case entitle the defendants to a new trial? As to the first question, there can be no doubt that Ardis was disqualified, under the express provisions of the present constitution, which had gone into effect before the trial, which took place in October, 1897. In section 22 of article 5 of the present constitution we find the following provision: "The petit jury of the circuit courts shall consist of twelve men, all of whom must agree to a verdict in order to render the same. Each juror must be a qualified elector under the provisions of this constitution, between the ages of twenty-one and sixty-five years, and of good moral character." And in section 6 of article 2 it is declared that: "The following persons are disquali-

fied from being registered or voting: First. Persons convicted of * * * larceny." It is clear, therefore, that the juror in question, not being a qualified elector, was disqualified to sit as a juror. It is contended, however, that inasmuch as the juror was convicted of larceny in 1871,—long prior to the adoption of the present constitution,—at a time when, it is claimed, such conviction did not disqualify him from serving as a juror, he could not be disqualified by any subsequent legislation, either constitutional or statutory, as such legislation would be *ex post facto*, and therefore void, under the provisions of the constitution of the United States. In the first place, we are not prepared to admit that Ardis was qualified to sit as a juror, even under the law as it stood at the time of his conviction, for the reasons that will be presently stated; and, in the second place, we are of opinion that the qualifications of an elector, and, as a consequence, the qualifications of a juror, may, at any time, be changed by the sovereign power of the state,—the people,—speaking through their regularly ordained constitution, whenever it is deemed necessary or expedient for the public welfare that such change should be made, without any violation of the *ex post facto* provision of the constitution of the United States, and without divesting any vested rights of the citizen. As is said in Cooley on Constitutional Limitations (2d Ed., at page 598), in speaking of the so-called right to participate in elections: "Each state establishes its own regulations on this subject, subject only to the fifteenth amendment to the national constitution, which forbids that the right of citizens to vote shall be denied or abridged on account of race, color or previous condition of servitude. *Participation in the elective franchise is a privilege rather than a right* [Italics ours], and it is granted or denied on grounds of general policy." Hence a state may make any change in the law prescribing the qualifications of electors deemed necessary to effectuate its views of public policy, subject only to the provisions of the fifteenth amendment, above referred to; and any legislation to that end possesses none of the features of an *ex post facto* law (see comments of Judge Cooley upon this subject in his work on Constitutional Limitations, at page 263 et seq.), and cannot be regarded as divesting any vested right of the citizen. If this be so as to the important matter of the qualifications of an elector, how much more is it true as to the qualifications of a juror! Indeed, service on a jury is not a matter of right, but a matter of public duty, the performance of which is enforceable by proper penalties. It cannot be regarded as a privilege, but, on the contrary, is usually regarded as a burden. Hence we see no reason why the state may not, from time to time, make such alterations in the law prescribing the qualifications of a juror by legislation, either constitutional or statutory, as the case may

require, as may be regarded most conducive to the public welfare. A citizen cannot claim any vested right in any statutory privilege or exemption, unless it rests upon some consideration importing into it an element of contract. As is said in Cooley, Const. Lim. 383: "The citizen has no vested right in statutory privileges or exemptions. Among these may be mentioned exemptions from the performance of public duty upon juries, or in the militia, and the like. * * * All these rest upon reasons of public policy, and the laws are changed as the varying circumstances seem to require." From these views it necessarily follows that, when the question arises as to the qualifications of a person to sit as a juror, such question must be determined by the law as it stands when such person is presented as a juror. This view is sustained by the case of *State v. Williams*, 2 Hill (S. C.) 881, where it was held that the qualification of a juror relates to the time when he is called to serve, and a want of qualification is cause of challenge. In delivering the opinion of the court, his honor, judge O'Neill, uses this language: "If he had the qualification at that time, and afterwards ceased to be qualified, he could not (if objected to) be sworn on the jury. This shows that the objection is personal to the juror, and must be determined by his qualification at the time when the challenge is made." It is also supported by analogy by the case of *Murphy v. Ramsey*, 114 U. S. 15, 5 Sup. Ct. 747, where the question was as to the right to vote. In delivering the opinion of the court, Mr. Justice Matthews uses this language: "The disfranchisement operates upon the *existing state* and condition of the person, and not upon a past offense." (*Italics ours.*) It may be noted here that this case also supports our view as to the question of *ex post facto* above presented. It is clear, therefore, that James L. Ardis was disqualified to serve as a juror upon the trial of this case.

Want of time and space forbids any extended consideration of the question hereinbefore suggested as to whether the juror was disqualified under the law as it stood at the time he was convicted of larceny. That law may be found in the act of 1871 (14 St. at Large, p. 690), as there was then no constitutional provision upon the subject. The provisions of that act applicable to this question have been carried forward into the Revised Statutes of 1893 as sections 2377 and 2379. The former section provides that all persons who are entitled to vote "shall be liable to be drawn and serve as jurors, except as herein provided"; and the latter section reads as follows: "If any person whose name is placed in the jury box is convicted of any scandalous crime, or is guilty of any gross immorality his name shall be withdrawn therefrom by the board of jury commissioners, and he shall not be returned as a juror." Reading these two sections together, it seems plain that a person, though entitled to vote,

if convicted of a scandalous crime,—larceny, for example,—is not liable to be drawn or serve as a juror, but is expressly forbidden to be returned as a juror, and is, therefore, not qualified to serve as a juror.

The only remaining inquiry is whether the disqualification of Ardis to serve as a juror entitled the defendants to have their motion for a new trial granted. In view of the express provisions of the constitution above quoted, which are declared mandatory, it is difficult to see how the question can be answered otherwise than in the affirmative. This being a question of title to real estate, it is not necessary to cite authority to show that the parties were entitled to a trial by jury. What that jury should consist of is expressly declared in mandatory terms by the constitution. It must be a body of 12 men, each of whom must be a qualified elector, and "all of them must agree to a verdict, in order to render the same." These are the express mandates of the constitution, and must be obeyed. But here we have a body of 12 men, one of whom is not a qualified elector, who have undertaken to render a verdict, which, under the terms of the constitution, they have no power to do; and hence the same should be disregarded, and set aside, and a new trial ordered.

It is contended, however, that this objection comes too late, and cannot now be considered. A number of cases have been cited to sustain the position that objection to a juror comes too late after verdict, as that which is a cause of challenge to a juror cannot be urged as a ground for a new trial; though there is one case, which has not been cited,—*Kennedy v. Williams*, 2 Nott & McC. 79,—in which it was held that, where the objection was not known to the parties until after the jury had brought in their verdict, it was a good ground for a new trial. In addition to this, it will be remembered that when those cases were decided we had no such constitutional provision as we now have in regard to juries. Besides, the jury law of 1871, above referred to, contained a section which has been incorporated in the Revised Statutes of 1893 as section 2406, which reads as follows: "If a party knows of any objection to a juror in season to propose it before the trial and omits to do so, he shall not afterwards be allowed to make the same objection, unless by leave of the court." This provision would seem to imply that, if a party did not know of the objection in season to make it before the trial, he would not be precluded from making such objection afterwards. We are not aware of any case which has been decided since the enactment of this statute which holds that a party would be precluded from making an objection to a juror after the trial, when such objection did not come to his knowledge in time to make it before or during the trial. Respondents only rely on section 2407 of the Revised Statutes of 1893, which provides as follows: "No irregularity

in any writ of venire facias, or in the drawing, summoning, returning or empanelling of juries shall be sufficient to set aside the verdict, unless the party making objection was injured by the irregularity, or unless the objection was made before the returning of the verdict." A sufficient answer to this position is that the objection here relied upon is to the disqualification of one of the persons who undertook to serve as a juror, and is not based upon any irregularity in the writ of venire facias, or in the drawing, summoning, returning or impaneling of the jurors; and hence the section does not apply. It seems to us, therefore, that the circuit judge erred in not granting a new trial upon the ground of the disqualification of James L. Ardis to serve as a juror, the knowledge of which did not come to the parties in season to make the objection before or at the trial; and that the verdict should have been set aside upon the ground that it was not the verdict of a constitutional jury. The judgment of this court is that the judgment of the circuit court be reversed, and that the case be remanded to that court for a new trial.

(123 N. C. 120)

COOPER v. KIMBALL

(Supreme Court of North Carolina. Oct. 18, 1898.)

CROPS—LANDLORD'S LIEN—MORTGAGES—RECORDATION.

1. Under Code, § 1790, as amended by Acts 1889, c. 476, making advancements for cultivating soil a lien on crops raised thereon, if an agreement specifying such advancements is recorded in the county registry within 30 days after its date, a mortgage on crops, which does not state that it is for advancements, and which was recorded more than 30 days after its execution, confers no agricultural lien, and is ineffectual, as to third persons, until registration.

2. An agreement, after default between the mortgagor and mortgagee, by which the former remains in possession as tenant, gives the mortgagee a landlord's lien on the crop, superior to an unrecorded mortgage thereon.

Appeal from superior court, Vance county; Bryan, Judge.

Action by D. Y. Cooper against D. B. Kimball to recover crops on lands purchased at a foreclosure sale, and which defendant had taken under a mortgage of the crop. There was a judgment for plaintiff, and defendant appeals. No error.

T. T. Hicks, for appellant. A. C. Zollicoffer and T. M. Pittman, for appellee.

CLARK, J. The land was sold on July 12, 1897, under the deed of trust. The purchaser immediately, during the preparation of the deed, entertained negotiations with the mortgagor, giving him the option to buy back the property or pay rent,—his decision to be made in 10 days,—and he continued in possession in consequence. The trustee's deed to the purchaser was filed for registration the

same day, and a few moments thereafter the defendant filed in the same office a mortgage on the crop, which had been executed on the 31st of March, 1897. This is not expressed to be for advances to be made, and besides it was not recorded within 30 days after its execution, and therefore has no rights as an agricultural lien by virtue of the Code, § 1790, and its amendment (Acts 1889, c. 476); and *Killebrew v. Hines*, 104 N. C. 182, 10 S. E. 159, 251, has no application. It is simply a mortgage, which had no effect as to third parties till its registration; and at that time the land, with the growing crop thereon, had already passed, by the filing of the trustee's deed to the plaintiff. *Jones v. Hill*, 64 N. C. 198, cited in 104 N. C., at page 195, and 10 S. E., at page 161. The sale and conveyance to the purchaser were a most effective assertion of ownership and possession as against third parties, and the mortgagor so recognized it, also, as against himself, by treating with the purchaser for the renting or purchase of the property, and remaining in possession under an option given him by the purchaser. Indeed, there being no agricultural lien or recorded mortgage on the crop, even if there had been no sale and conveyance to the purchaser, an agreement, after default, between the mortgagor and the mortgagee, that the former was to remain in possession as tenant, would confer a landlord's lien upon the mortgagee. *Jones v. Jones*, 117 N. C. 254, 23 S. E. 214, cited and approved in *Ford v. Green*, 121 N. C. 70, 28 S. E. 132. The plaintiff is entitled to recover. Code, § 1754. No error.

(123 N. C. 7)

OAMP MFG. CO. v. LIVERMAN et al.

(Supreme Court of North Carolina. Oct. 10, 1898.)

PARTITION—PARTIES—DEBTS OF DECEDENT—SALE OF LAND.

1. A parol partition cannot be sustained where there are interested in the land a feme covert and infants incapable of making the partition.

2. Testator having devised part only of his estate, and given a life estate in this to his wife, with remainder over, there should be sold to pay his debts, first the undevised property, and then, in case more is needed, the devised property, subject to the life estate, and last the life estate.

3. Persons who buy of the heirs and devisees, within two years after the death of deceased, timber on land which he owned at his death, take subject to claims of his creditors.

4. Persons who buy, of the heirs and devisees of deceased, timber standing on land which he owned at his death, may, on all the property of deceased being sold in a suit by his creditors, have a resale; the complaint and order of sale in the creditors' suit, which at first included part of deceased's property, having, by agreement of parties therein, been changed to include all of it, the agreement having also provided that if L., who became the purchaser, did so purchase, the parties to the agreement should have seven months to redeem, the price being less than half the value of the property, and the heirs having continued

in possession, insisting on their rights under the sale, and the consent papers seeming more in the nature of a mortgage to procure money to pay decedent's debts than a bona fide sale.

Appeal from superior court, Hertford county; Norwood, Judge.

Action by the Camp Manufacturing Company against A. J. Liverman and others to have set aside as fraudulent a sale of property made in a creditors' suit to pay debts of W. P. Jenkins, deceased, and to have plaintiff's rights in timber which he bought from deceased's heirs and devisees recognized, or to have a resale subject to such rights. Complaint dismissed, and plaintiff appeals. Reversed.

George Cowper, Winborne & Lawrence, and Francis D. Winston, for appellant.

FURCHES, J. W. P. Jenkins died in July, 1886, having first made a last will and testament, which was duly admitted to probate. Said Jenkins, at the time of his death, was the owner of something over 800 acres of land, and by his will he devised 200 acres "lying in the angle formed by the St. John and Woodland's road, also including the dwelling house and outbuildings which I now occupy, to my beloved wife and daughter Stella." "This gift shall be theirs jointly, and Stella's after the death of her mother (my wife). Should Stella die without issue, this said property shall be divided among her half brothers and sisters or their heirs." But the testator does not dispose of any other part of his lands by said will. This being so, he died intestate as to all other lands except the 200 acres thus willed to his wife and his daughter Stella. The said W. P. Jenkins left other children and grandchildren surviving him, besides Stella, to wit, P. C. Jenkins, W. W. Jenkins, M. F. Raby, wife of C. W. Raby, and two grandchildren, to wit, P. C. Tyler and Pulaski Tyler, sons of a deceased daughter; and it seems to be conceded that he did not leave sufficient personal property to pay his debts, and that it was and is necessary to sell lands to pay his debts. After his death the children had a parol partition of the land; and, within less than two years from the death of the testator, W. P. Jenkins, the plaintiff, bought growing timber standing on the land of Raby and wife and W. W. Jenkins, according to their parol partition. It is admitted that these purchases were within two years from the death of the ancestor. The plaintiff also bought timber growing on the lands willed to the widow and Stella. But this transaction seems to have taken place more than two years after the death of the testator. The said Stella married the defendant Renfrow, and soon thereafter died without having issue; and, since the commencement of this action, W. W. Jenkins has died, and neither his personal representative nor his heirs at law have been made parties to this action. The executors named in the will of W. P. Jenkins, failing to pay the debts of the estate of their testator, and failing to take

steps to convert real estate into assets for that purpose, the creditors in 1893 commenced proceedings against the executors and the heirs at law of the testator to sell lands for assets to pay debts. The complaint as originally filed only asked a sale of the 200 acres devised to the widow and the daughter Stella. But afterwards, and on the day of sale, by consent of the parties, the pleadings were amended so as to include all the lands of which the testator died seised; and the decree theretofore had was amended so as to include all his lands. Under this amended order, they were all sold and purchased by the defendant Liverman at the price of \$1,575, although there is evidence tending to show that the lands were worth \$3,700 or \$4,000. It is provided in this agreement to amend the pleadings and order of sale so as to include all the lands, that, if any of the parties thereto shall buy the lands, any of the heirs shall have seven months and a half to redeem their parts. In other words, if Liverman bought, the heirs should have seven and a half months to redeem, and Liverman is one of the signers to this paper, and it appears that the heirs are still in possession of the lands.

This is a case of singular complications, and we have had much trouble in arriving at a satisfactory solution of the matters involved. We are asked by the same attorneys who brought the creditors' suit, and obtained the order under which the lands were sold, to set aside this sale for irregularity and fraud. The testator was the owner of a large landed estate, embracing more than 800 acres. Of this large estate he willed 200 acres to his wife and daughter Stella jointly, with a contingent remainder over, upon Stella's death without issue, to her half brothers and sisters. This contingency has happened, and the half brothers and sisters of Stella have become the owners of this remainder, not as her heirs, as was contended by plaintiff, but under the will of W. P. Jenkins. These 200 acres specifically devised were not subject to the payment of the debts of the testator until the 600 and odd acres not devised were first appropriated; and it would seem from the amount of debts proved and the value put upon the land that the undevised land would have been amply sufficient to have paid all the debts and proper costs of administration. But, singular as it may seem, the complaint as originally drawn only asked for the sale of the 200 acres willed to the widow and the daughter Stella, and the original order was drawn in this way. It may be, if this order had not been changed by the agreement of the parties and the defendant Liverman, that they would have lost their rights, and the widow, who seems to have been the special object of the testator's bounty, would be without a home. But, owing to the fact that the complaint was changed, and the order of sale changed, so as to include all the land, on the very day the land was sold, and this sale made,

and confirmed on the same day it was made, although there were femes covert and infant children interested,—and this under an agreement that, if the defendant Liverman became the purchaser, the parties to this agreement should have 7 months and 15 days to redeem,—and when it appears that said defendant purchased the land for less than one-half its value, and that these heirs are still in possession and insisting on their rights under this sale, which causes us to look at the whole proceeding with suspicion, it does not seem to us that the widow, who seems to be the stepmother of the other children except Stella, who seems to have been a half sister and a minor at the time this proceeding was had, has been fairly dealt with. The consent paper seems to have been more in the nature of a mortgage to raise money to pay the debts of the estate than to procure a bona fide sale of the property, in which was included the 200 acres willed to the widow and to Stella, and which they had no right to sell unless the unwilling lands proved insufficient to discharge the debts.

The parol partition set up by the plaintiff cannot be sustained where there are a feme covert and two infant children, at the time it is alleged it took place, interested in the land, who were incapable of making any such partition. We do not say that we would sustain it without this, but with this we certainly cannot.

Our opinion, then, is that this sale should be set aside; that the personal representative and heirs at law of W. W. Jenkins should be made parties defendant; that an order should then be made in this proceeding (all the parties being before the court) to first sell all the lands not willed to the widow and Stella; and, if they bring enough to pay the debts mentioned in the petition to sell land, that the other lands so willed to the widow and Stella should not be sold; if the unwilling lands should not bring enough to pay the debts, as above stated, and it becomes necessary to resort to the lands so willed, they should be sold subject to the life estate of the widow, and that her life estate should only be sold in the event that this and the rest and residue of the lands do not bring enough to pay the debts; that, out of the proceeds of said sale, the defendant Liverman be first paid the money he has paid on the sale theretofore had; that the residue, if any after this, be divided among the heirs at law, but the plaintiff be paid out of the share of Raby and wife the amount he paid them for timber, with interest thereon, and the residue of their part, if any, be paid to Mrs. Raby; that the same thing be done as to the heirs of W. W. Jenkins and the defendant Liverman; that as Mrs. Jenkins and Stella sold to plaintiff more than two years after the death of the testator, and as plaintiff denies that he had any knowledge, at the time he purchased of them, of any outstanding debts (and this seems not to be disputed by defendants), it

would seem that this sale will stand. The case will be proceeded with as directed in this opinion. There is error. Error.

(123 N. C. 24)

FIRST NAT. BANK OF WASHINGTON v. EUREKA LUMBER CO.

(Supreme Court of North Carolina. Oct. 25, 1898.)

PROMISSORY NOTES—INDORSEMENT BY CORPORATION—VALIDITY—NOTICE OF DISHONOR—CONFESSION OF JUDGMENT BY MAKER—EFFECT—PARTIES—INSTRUCTIONS.

1. An indorsement of a note by a corporation in due course of business, and for its benefit, although not strictly in accordance with its by-laws, is binding upon it.

2. Under Code, § 50, an indorsement on a note renders the indorser liable as a surety; and no demand on the maker, or notice to the indorser of such demand, is necessary to bind him.

3. The confession of judgment by the maker of a note in favor of the holder thereof does not discharge sureties or indorsers who are not parties thereto.

4. The holder of a note is entitled to bring suit against any indorser thereof without joining others.

5. In an action on a note, an instruction that, if the jury believe the evidence, they will fix the amount of the recovery at the face value of the note, with interest, is reversible error, where the evidence was conflicting as to what amount of cash and collateral security plaintiff had in its possession, applicable to the note, belonging to the maker, after the notes matured.

Appeal from superior court, Beaufort county; Norwood, Judge.

Action by the First National Bank of Washington against the Eureka Lumber Company. From a judgment for plaintiff, defendant appeals. Reversed.

W. B. Rodman, for appellant. Charles F. Warren, for appellee.

MONTGOMERY, J. The plaintiff alleges in its complaint that the defendant company indorsed and guaranteed to the plaintiff the payment of the notes sued upon,—the notes having been executed by the Washington Planing Mills to the defendant; and the counsel of the plaintiff, in the conduct of the trial, and in his argument here, treated the writing on the back of the notes as an indorsement, and not as a guaranty. The defendants, in their answer, denied that they were either guarantors or indorsers of the notes, and averred that they simply sold the notes to the plaintiff. On the trial, however, the president of the defendant company, as a witness for the defendants, testified, in substance, that the defendants had an agreement with the plaintiff by which these notes were to be discounted by the plaintiff bank upon their indorsement by the defendants and others, and that in pursuance of that agreement the notes were indorsed by the defendants, and discounted by the plaintiff. So we will take it as an intended indorsement, and not as a guaranty; thereby eliminating from the discussion the conflicting testimony

of the witness as to the nature of the words on the back of the notes, and as to the time when they were placed there. But the defendants insist that the indorsement was not made according to the requirements of the by-laws of defendant company, and therefore created no liability against them. If it be conceded that the by-laws were not strictly followed in reference to the indorsement, yet it appeared by the testimony of the defendants' witnesses that the money for which the notes were discounted was entered to the credit of the defendants in the plaintiff's bank, and was drawn out by the defendants for their uses and purposes. The defendants will not be allowed, under such conditions, to deny that they made the indorsements.

The defendants further insist that, even if there was an indorsement by them of the notes, this action cannot be maintained, because they say that no notice of any demand upon the makers of the notes was given to the defendants before the commencement of this action. There is nothing in that contention. No such notice was necessary. The indorsement was upon a plain promissory note, and rendered the defendants liable as sureties; and no demand on the maker, or notice to the defendants of such demand, was necessary previous to the bringing of this action. Code, § 50.

Another contention of the defendants was that as the maker of the note (the Washington Planing Mills) had, before the commencement of this suit, confessed a judgment to the plaintiff for the amount of the notes, the notes had been on that account merged in the judgment; and they asked his honor to instruct the jury that the notes were merged in the judgment, that they had ceased to exist for any purpose, and that the plaintiff could not maintain any action on them against the defendants. His honor was right in refusing to give the instruction. Between the parties to an action wherein a judgment is rendered, the judgment is a merger, and the note or instrument sued upon is extinguished; but, as to sureties or indorsers who are not parties to the judgment, there is no merger or extinguishment of the note or instrument. Code, § 186; *Hix v. Davis*, 68 N. C. 231.

The defendants requested the court (No. 3) to instruct the jury "that it being admitted that C. M. Brown was president of the Washington Planing Mills, and it being further admitted that C. M. Brown is an indorser on the notes declared on, and is now the holder of the judgment due James J. Fowle, and that he is the owner of a certain part of the judgment in favor of the plaintiff, and it being further admitted that the property of the Washington Planing Mills is held by George W. Kugler in trust to sell the same, and apply the proceeds to the payment of the Fowle judgment, and then to other judgments pro rata, the court charges you that,

it being admitted that this arrangement was made with the consent of the plaintiff, the plaintiff is, as between the plaintiff and this defendant, compelled to credit the judgment notes sued on with the value of said plant, or all except the amount due to the Kugler Lumber Company under said trust, and especially to all that part which under the trust would go to C. M. Brown." This instruction was asked as if Brown was a party to the action, but, as he was not, it could not have been properly given. However, the same question was raised by a motion made by the defendant, upon the answer, to make Brown and George W. Kugler, trustee, and the other parties mentioned in the answer, parties to this action, as necessary to a proper determination of the suit; and further, in the language of the motion, "that the plaintiff be required to first proceed against the property bought by G. W. Kugler, trustee, and exhaust the same, before proceeding against the defendant." The motion was denied, and the defendant appealed. So in discussing the motion the instruction will necessarily be involved. The defendant contends first that the plaintiff occupies the position (he being president of the defendant company) of an officer of a corporation who has procured for himself a preference of his own debt against the corporation over other creditors at a time when the corporation was insolvent. But such is not the fact here. Brown, though president of the company, was, so far as the plaintiff is concerned, only a surety. The planing mills was the principal debtor, and the notes were executed for a consideration which inured to the benefit of Brown's company, the planing mills, and not for his benefit as an individual. The defendant further contends that because Kugler bought in the real estate of the planing-mills company at execution sale with the consent of the plaintiff in trust for the benefit of all the execution creditors, including the plaintiff and the defendant, to be sold by the trustee, and the proceeds applied among the execution creditors, and the property not yet having been sold, but being still in the hands of the trustee, he is in equity entitled to have Brown made a party, in order that he may apply his part of the money arising from the sale of the property by Kugler to the payment of the notes sued on, because, as he alleges, Brown was a prior indorser on the notes. If there was any equity, upon the above statement, which the defendant could invoke out of the facts in this case to aid him in carrying out his demand, Brown would be a proper party. But we see nothing in the case but a plain, legal arrangement among execution creditors to prevent a sacrifice at execution sale of property in which they were all interested. The execution debtor, the Washington Planing Mills, so far as we see from the record, has no longer any interest in the controversy as to the property in the hands of Kugler; and

the only interest the defendant has in the trust property is the right to compel the trustee, Kugler, to sell it, and out of the proceeds to pay him his proper share.

As to whether or not Brown is a prior indorser of the notes sued on, that question it can raise in the execution of the trust by Kugler, or in an action between it and Brown; and it will not be allowed to obstruct and delay the plaintiff in the collection of whatever amount is due upon the notes. The defendant was an indorser, and made by our statute a surety; and the plaintiff had a right to sue the defendant alone, as he did.

We have thought it best to discuss the case at length, because most of these matters involved the right of the plaintiff to make any recovery on the indorsement of those notes under any circumstances; but at the same time, because of the erroneous instruction given by his honor, which was in these words, "If you believe the evidence in this case, you should answer both issues, 'Yes,' and fix the amount of the recovery at the face of the notes, allowing interest from the day that each note, respectively, fell due," there must be a new trial. The instruction was erroneous, because the testimony was conflicting as to what amounts the plaintiff bank had in its possession in the way of cash and collateral securities belonging to the Washington Planing Mills after the notes fell due, and before the appointment of the receiver for the planing mills. It is not necessary to notice the objections to the evidence, from the view which we take of the case. New trial.

(123 N. C. 129)

LYNE v. WESTERN UNION TEL. CO.
(Supreme Court of North Carolina. Oct. 25, 1898.)

TRIAL—INSTRUCTIONS—TELEGRAM—NEGLECT IN DELIVERY—DAMAGES.

1. The court need not charge in the language of the instructions asked, if, where proper, they are given in substance.

2. A telegraph company was in the habit of going to the back door of the post office when the general delivery window was closed for addresses of parties unknown to it. On this occasion the messenger found the window closed, and saw a light in the office, but did not go back to inquire. One of the clerks was there at the time who could have given him the address wanted. *Held* sufficient to go to the jury on the question of negligence in delivering a telegram.

3. The addressee of a telegram may recover for mental anguish and suffering caused by the negligence of the company in delivering it, and this though it does not disclose the relation of the parties.

Appeal from superior court, Wake county; Timberlake, Judge.

Action by Maggie E. Lyne against the Western Union Telegraph Company. There was a judgment for plaintiff, and defendant appeals. Affirmed.

Robert C. Strong, for appellant. Shepherd & Busbee, for appellee.

FURCHES, J. The plaintiff is the widow of R. G. Lyne, who was called by her "Gregory." The plaintiff alleges: That at 9 o'clock p. m. on the 23d day of October, 1897, J. B. Lyne, a brother-in-law of plaintiff and a brother of her husband, sent her the following telegram: "Richmond, Va., Oct 23, 1897. To Mrs. R. G. Lyne, Care Mrs. Mattie Wortham, Raleigh, N. C.: Gregory met accident; not live more 24, 26 hours. J. B. Lyne." That this telegram was received at the office of the defendant in Raleigh, N. C., and that it was not delivered to her until 1 o'clock p. m., October 24th. That this delay in the delivery of the telegram was caused by the negligence of the defendant and its agents. That by and on account of said negligence she was unable to reach the city of Richmond until the morning of the 25th of October, and not until after the death of her husband. That said negligence caused her great pain and mental suffering, for which she demands damages in this action. The defendant admitted receiving the message, denied all allegations of negligence, sets up contributory negligence on the part of the plaintiff, and denies her right to recover, and especially denies her right to recover damages for mental anguish and suffering. It appeared on the trial that the message was received at the Richmond office at 10:10 p. m., October 23d, and at the Raleigh office at 10:28 of the same day; that it was put in the hands of Eugene Cole, one of the messenger boys of the defendant, for delivery; that he did not know the address or residence of Mrs. Wortham; that he examined the city directory, and did not find it there; that he then went to the hotels in the city, and failed to find it on their registry; that he then went to the post office, where he was in the habit of going for such information, and found the general delivery window closed; that he saw a light in the office, but did not go to the back door to inquire for the address of Mrs. Wortham, but returned with the message, undelivered, to the Raleigh office of the defendant. It was in evidence that the delivery messengers of the defendant were in the habit of going to the post office for such information, and that when it was after office hours, and the general delivery window was closed, they were in the habit of going to the back door of the post office, and making the inquiry there; that one of the clerks of the post office was in there at the time the messenger went to the post office, and, if he had gone to the back door and inquired, the post-office clerk would have given him the address of Mrs. Wortham; that Mrs. Wortham resided at 110 Salisbury street, within a few hundred yards of the defendant's Raleigh office, but had only resided there a few months, and her residence was not known to the defendant. There was other evidence in

the case, which we deem it unnecessary to give or refer to, as the case turns upon what we have given and the instructions of the court. There were some exceptions to evidence, and, without discussing these, it is sufficient to say they have been considered, and that we are of the opinion they cannot be sustained.

There are quite a number of prayers for special instructions. Some of them were given by the court, and some were refused, except as covered by the charge of the court; and we are of the opinion that the charge of the court gave all the defendant's prayers for instruction which the defendant was entitled to, and that the charge was a correct exposition of the law. It is not necessary that the court give its charge in the language of the prayers, even when the prayers are proper, if they are given in substance. *Thompson v. Telegraph Co.*, 107 N. C. 449, 12 S. E. 427.

The defendant contended that it was not guilty of negligence in delivering the telegram; that the residence of Mrs. Wortham was not known to defendant, and that defendant had exercised due diligence in its endeavor to ascertain the same. But it must be admitted that there is some evidence of negligence, or a want of due diligence. This is disclosed by the defendant's witness Cole, who testified that he went to the post office to obtain this information, and that the general delivery window was closed, but that he saw a light in the post office, and did not go to the back door to inquire. When it is in evidence that the defendant was in the habit of going to the back door for such information, in case the general delivery window was closed, and when it was shown by one of the clerks of the post office that he was in the office at the time the messenger was there, and could have given him the desired information (the address of Mrs. Wortham) if the messenger had made the inquiry, this was not only some evidence, as in *Wittkowsky v. Wasson*, 71 N. C. 451, but such evidence as should go to the jury. The evidence seems to have been clearly and correctly submitted to the jury upon proper instructions from the court, and the verdict of the jury is binding upon us. We cannot review or reverse the finding.

It was contended by the defendant that the plaintiff could not recover damages for her mental anguish and suffering, even if it should be found that the defendant was guilty of negligence in delivering the message. But the doctrine has been so firmly settled in this court that she can that we only feel called upon to cite *Young v. Telegraph Co.*, 107 N. C. 370, 11 S. E. 1044, *Thompson v. Telegraph Co.*, 107 N. C. 449, 12 S. E. 427, and *Sherrill v. Telegraph Co.*, 109 N. C. 528, 14 S. E. 94.

The defendant further contended that, if it be held that a plaintiff may recover for mental anguish and suffering, the plaintiff in this

case cannot do so, for the reason that the telegram does not disclose the relation of the parties,—does not disclose that "Gregory" was the husband of the plaintiff,—and that, as the telegram does not show this, it cannot be shown in evidence. We cannot sustain this contention. The relation of the parties was not disclosed in *Sherrill v. Telegraph Co.*, supra: "Tell Henry to come home. Lou is bad sick." Nor was it disclosed in *Telegraph Co. v. Adams*, 75 Tex. 531, 12 S. W. 857, and it was held in that case that the plaintiff could recover for mental anguish and suffering. That case contains a very clear and interesting discussion of the matter. The telegram in that case is as follows: "To F. E. Adams, Athens: Clara, come quick. Rufe is dying." The same contention was made in that case that the defendant makes in this, and the court say, among other things, "that the rule insisted on by appellant is too restricted to be safely applied to communications sent by the electric telegraph. * * * When such communications relate to sickness and death, there accompanies them a common-sense suggestion that they are of importance, and that the persons addressed have in them a serious interest." We only quote briefly from this opinion, and recommend it to the attention of the profession. It seems to be sustained by the decision in *Telegraph Co. v. Lavender* (Tex. Civ. App.) 40 S. W. 1035. From these opinions, and that of *Sherrill v. Telegraph Co.*, supra, we have no hesitation in holding that the plaintiff is entitled to recover for mental pain and suffering, if entitled to recover at all. Having examined the record carefully, and finding no error, the judgment is affirmed.

(123 N. C. 57)

PENDER v. MALLETT et al.

(Supreme Court of North Carolina. Oct. 18, 1898.)

RECEIVERS—FRAUDULENT CONVEYANCES—EXAMINATION OF PARTIES BEFORE TRIAL—PLEADING—MISJOINDER—ARGUMENTATIVE AND EVIDENTIARY PLEADINGS—ACTIONS AGAINST MARRIED WOMEN.

1. Under Code, § 581, authorizing the examination of a defendant before pleadings filed, to procure information for framing the complaint, and, after answer filed, to procure evidence in the cause, an order for the examination of defendants before answer filed was premature, where such examination was not asked for the purpose of obtaining information for framing the complaint.

2. A ruling that a certain order for the examination of defendants before answer filed, under Code, § 579 et seq., was premature, did not preclude an order for such examination at a date after issue should be joined, as such ruling, made at a different stage of the cause, was not *res judicata*.

3. A demurrer to a complaint on the ground of misjoinder was properly overruled, where the parties and causes of action objected to were omitted in a substituted complaint filed by leave of court, and there was a discontinuance as to them.

4. The fact that a complaint is argumentative and evidentiary, though ground for a mo-

tion, if made before answer or demurrer, is not ground for demurrer.

5. The fact that a second complaint, which is a substitute for the original, and filed by leave of court, states the alleged cause of action in a manner different from or antagonistic to such original, is not available as ground for demurrer.

6. A receiver appointed in a proceeding supplementary to execution is not the representative of the debtors alone, and can maintain an action to set aside fraudulent transactions of such debtors.

7. Where a married woman claims as her separate estate property transferred to her by her insolvent husband, or by an insolvent firm of which he is a member, in fraud of his creditors, she may be sued in regard to it, her husband being joined with her as defendant.

Appeal from superior court, Edgecombe county; Brown, Judge.

Action by John R. Pender, receiver of John P. Mallett and another, against John P. Mallett and others. From an order remanding the cause to the clerk, and directing him to proceed to execute a previous order for the examination of defendants before trial, defendants appeal. Affirmed.

The complaint, which was filed June 11, 1896, after alleging the appointment and qualification of plaintiff as receiver of the property of defendants John P. Mallett and O. B. Mehegan, on application of Julian M. Baker and Ida M. Adams, judgment creditors, and describing the property in controversy, in the possession of defendants S. Mallett (the wife of said John P. Mallett and sister of said Mehegan) and the Edgecombe Homestead & Loan Association, averred the rendition of a judgment in favor of said Baker and Adams against said Mallett and Mehegan for \$5,952.73, with 8 per cent. interest from February 1, 1894, and the fraudulent disposition of their property, and conversion thereof into cash, for the purpose of secreting the same from their creditors, and with intent to hinder, delay, and defraud said Baker and Adams and other creditors in the collection of their debts, and also the seizure of certain of such property on a warrant of attachment, and the condemnation thereof to the payment of said judgment in favor of said Baker and Adams. Said complaint also alleged that defendants John P. Mallett and Mehegan, being insolvent, and devising and intending to cheat and defraud said Baker and Adams in the enforcement of their said judgment, fraudulently turned over to defendant S. Mallett money amounting to more than \$1,800, and shipped to the addresses of fictitious persons, at divers places, goods of the value of about \$1,000, and procured defendant S. Mallett to be registered as a free trader, and established her in the mercantile business, by purchasing a stock of goods in her name, but with their own money; that defendant S. Mallett is also the holder of bank stock of the value of \$400, which she purchased with money fraudulently turned over to her by defendant John P. Mallett; and that said John P. Mallett is also the owner of 10 shares of

stock in defendant Edgecombe Homestead & Loan Association, of the value of \$820. In said complaint plaintiff prayed that he be adjudged the owner of the property therein described, and that he recover the possession thereof. Defendant S. Mallett demurred to said complaint, on the grounds (1) that it misjoins an alleged cause of action against demurrant with an alleged cause of action against the defendant association; (2) that it misjoins parties defendant who are not alleged to be liable on the same cause of action, viz. demurrant, who has no interest in the cause of action alleged against the defendant association, which, also, has no interest in the cause of action alleged against demurrant; and (3) that said complaint is both argumentative and evidentiary. Pending the demurrer, and on September 28, 1897, the clerk issued an order for the examination of defendants John P. and S. Mallett, before him, on October 5, 1897, under Code, § 579 et seq., touching the matters in controversy in said action, which proceeding said defendants moved to quash for want of jurisdiction, there being no issues of fact in controversy, and the only matters at issue being questions of law on the demurrer. Their motion being overruled, they excepted and appealed; and at the October term, 1897, Bryan, J., presiding, said judgment of the clerk was overruled, and said proceeding ordered dismissed, to which order plaintiff excepted. On October 11, 1897, plaintiff, by permission of the court, filed a substituted complaint, containing substantially the same averments as the other, except that it omitted the alleged cause of action against the Edgecombe Homestead & Loan Association, and alleged, in addition, that defendant S. Mallett participated in the alleged scheme of her co-defendants to cheat and defraud their creditors, and that the money and property fraudulently appropriated by her amounted to at least \$1,000, and praying that defendants be required to pay plaintiff \$1,000 as the value of the property and money withdrawn by them from the reach of the judgment creditors, and that, for the payment thereof, defendant S. Mallett be declared a trustee of the stock of goods and bank stock therein described, and also for general relief. To this complaint defendant S. Mallett demurred on the several grounds specified in her demurrer to the first complaint, and on the additional grounds (1) that said complaint attempts to set up a different cause of action on the same alleged facts as stated in the first complaint; (2) that said complaint attempts to make parties defendant whose interest is antagonistic to that of demurrant; and (3) that no cause of action is alleged against demurrant, for that it appears from the complaint that she was a feme covert at the time of the alleged payments to her, and plaintiffs can maintain no action against her therefor because of her coverture, and that the alleged conspiracy in which she is alleged

to have participated was with her husband, and must be presumed to have been under his coercion. On hearing said demurrer at the April term, 1898, before Brown, J., the same was overruled, it appearing that the defendant loan association had been eliminated from the action, and it was ordered that defendants John P. and S. Mallett have until May 20, 1898, to answer the substituted complaint. On motion of plaintiff, it was further ordered that defendants each appear before the clerk, on May 23, 1898, for examination, according to law, concerning the matters set out in the pleadings. To said order and judgment defendants excepted, but, the court being of opinion that no appeal then lay, the clerk was ordered to withhold the transcript, and to proceed to take said examination, unless otherwise ordered by the supreme court. Owing to the fact that defendants had applied to the supreme court for a review of said orders on certiorari, and the decision had not then been sent down, said examination was continued to a future day; and on June 2, 1898, the certificate therein having been received, in which it was declared that "the certiorari will issue, but it will not suspend the order of examination of defendants" (30 S. E. 324, 122 N. C. 163), the clerk fixed June 7, 1898, as the time for said examination, and issued his order therefor. Defendant S. Mallett moved to quash the proceedings, on the grounds that the only issues in dispute on the pleadings are issues of law, and that plaintiffs are estopped to make such examination before answer filed, by the order of Judge Bryan, which is *res judicata*; and defendants John P. Mallett and Mehegan moved to quash as to them, on the grounds that they are not parties to the action, and that they cannot be examined in said proceeding for the reasons stated by their co-defendant S. Mallett. The motions were overruled, and defendants excepted and appealed. Defendants insisted that the examination could not be proceeded with until said appeals had been determined. Plaintiff insisted that the clerk should proceed with the examination, noting defendants' exceptions, and that an appeal from the ruling of the clerk would be premature. The clerk decided that defendants' contention was correct, and refused to take the examination, to which decision plaintiff excepted and appealed; and at the June term, 1898, the court (Brown, J.), being of opinion that the appeal will not lie from an order directing the examination of parties to an action, remanded the cause to the clerk, with directions to fix a date, and proceed with said examination, regardless of any appeal. From this order defendants appeal.

G. M. T. Fountain, for appellants. Jacob Battle and Gilliam & Gilliam, for appellee.

CLARK, J. Under Code, § 581, the defendant may be examined before pleadings filed, to procure information in framing the com-

plaint, as was the case in *Holt v. Warehouse Co.*, 116 N. C. 480, 21 S. E. 919, where it was held that an appeal from such order was premature and would be dismissed; or the defendant may be examined after answer filed to procure evidence in the cause (*Helms v. Green*, 105 N. C. 251, 11 S. E. 470; *Vann v. Lawrence*, 111 N. C. 82, 15 S. E. 1081); and in the latter case the court held that an appeal from such an order would be premature, pointing out that trials would be needlessly prolonged and costs extravagantly swelled if an appeal could lie to this court "upon every isolated question of practice, or the admissibility of evidence, competency of witnesses, or the like." The examination in this case not having been asked to procure evidence in framing the complaint, his honor, Judge Bryan, properly held at fall term, 1897, that the order to examine the defendants before answer filed was premature. At April term, 1898, Judge Brown overruled the demurrer, and gave the defendants till May 20th to file answer, and ordered examination to be taken May 23d. The issue would regularly have been joined by filing the answer at April term, and, as by the grace of his honor time was given till the 20th of May, he was within the practice by setting the examination for May 23d, a date after issue should be joined; and the former order of Judge Bryan, made at a different stage of the cause, was not *res judicata*. The defendants appealed at April term, 1898, which lay from overruling the demurrer, though not from an order directing examination of witnesses, and this was held in this case. *Pender v. Mallett*, 122 N. C. 163, 30 S. E. 324. The appeal would ordinarily stop all proceedings in the lower court, including proceedings under orders from which, if considered alone, an appeal would be premature. But in this cause, upon the case as presented, we directed that the writ of certiorari should not suspend the order of examination of the defendants,—a matter which rested in the discretion of this court. Code, § 957.

This brings us to the consideration of the demurrer, from overruling which an appeal lay, but as to which we find no error. The first two grounds of first demurrer for misjoinder are eliminated by the omission of the parties and causes of action objected to in the second or substituted complaint filed by leave of court, and the finding of fact by Judge Brown that there has been a discontinuance as to them. The third ground of demurrer, that the complaint was argumentative, and evidentiary, is not ground for demurrer, but, if true, would have sustained a motion (if made before answer or demurrer) for a replader and to make the complaint more explicit. *Daniels v. Baxter*, 120 N. C. 14, 26 S. E. 635. As to the first additional ground of the amended demurrer, the second complaint is not for a different cause of action and antagonistic to the first, but merely a different mode of stating the same cause of action; and if it were, as the demurrer alleges, the second

complaint is, in effect, a substituted complaint by leave of the court, and might be different or even antagonistic to that stated in the original complaint,—for this is not the case of an amendment of summons, or even of the complaint, to confer jurisdiction, by charging an entirely new cause of action, or evading defenses to the original action, which would not be admissible. *Gillam v. Insurance Co.*, 121 N. C. 369, 28 S. E. 470. The second additional ground of demurrer cannot be sustained. The receiver is the hand of the court, bringing this proceeding under its orders, and is not the representative of the debtors alone, and can maintain an action to set aside fraudulent transactions of the debtors. 24 Am. & Eng. Enc. Law, 699, notes; *Porter v. Williams*, 59 Am. Dec. 523, and notes. As to the last ground of demurrer, the defendant S. Mallett is now a free trader and sued as such. It is immaterial that the property came into her hands before she was made a free trader. But, even if she were not a free trader, the action concerns property she claims as her separate property, and she can be sued in regard thereto, no matter when she acquired it, her husband being joined with her as defendant. Code, §§ 178, 424, subd. 4. It cannot be allowed that, when an insolvent husband (or his firm, as here charged) makes over his property to his wife in fraud of his creditors, she cannot be sued for the recovery thereof because she is a married woman. If in such case the specific property (money, for instance) has been invested in some other shape, the fund may be followed. *Edwards v. Culberson*, 111 N. C. 344, 16 S. E. 233, and cases there cited. No error.

(53 S. C. 503)

BAILEY et al. v. GRAY.

(Supreme Court of South Carolina. Nov. 4, 1898.)

INJUNCTION—EASEMENT—PRESCRIPTION—GRANT—ADJOINING LANDOWNERS—LIABILITIES.

1. An owner of a lot is not entitled to an injunction to restrain the excavation of an alley for the erection of a building, where it appears from his allegations that the easement he claims to a right of way in such alley was created for the benefit of and appurtenant to an adjacent lot, and not that of complainant.

2. Where an owner has access to his premises in a town from two sides, the inconvenience of not having access from another side does not constitute that "necessity" which is required to support an easement to a right of way from necessity.

3. To sustain a claim to an easement to a right of way in an alley by prescription, it must be alleged that the right claimed has been exercised and enjoyed adversely to the right of some other person.

4. An owner of a lot adjoining an alley cannot have an injunction to restrain the erection of a building therein on the ground that it prevents the passage of light and air through his windows, since such a right to light and air cannot be acquired by the enjoyment of such privileges for any length of time.

5. An owner of a lot cannot sustain a claim of an easement to a right of way in an alley

founded on a grant where it appears from his deed and the deeds of those under whom he claims that the easement was created for the benefit of, and as appurtenant to, an adjoining lot.

6. An action cannot be maintained against an adjoining landowner for injuries resulting from an excavation for the erection of a building, in the absence of allegations of negligence.

Appeal from common pleas circuit court of Laurens county; James Aldrich, Judge.

Bill by M. S. Bailey & Son against W. L. Gray for an injunction to restrain the excavation of an alley. From a decree in favor of defendant, plaintiffs appeal. Affirmed.

The complaint alleges:

"(1) That the plaintiffs, Mercer S. Bailey and William J. Bailey, are and were January 2, 1893, partners in business, under the firm name of M. S. Bailey & Son.

"(2) That heretofore, on October 7, 1863, one J. W. Simpson, for value, conveyed to Edward H. Fisher and John Agnew, their heirs and assigns, a lot of land, of which he was seised and possessed in fee in the city of Laurens, in said county and state, with three storerooms located on a part of said lot, being described in said deed as follows: 'All that corner lot of land, and buildings thereon, situate and lying in the village of Laurens, South Carolina, containing one-fourth of an acre, more or less, bounded on the north by the street leading through the south side of the public square to Greenville court house, on the east by the street leading to Augusta, on the south by lot belonging to the estate of John Smith, deceased, and on the west by the N. Pyles and J. Wistar and W. D. Simpson lot, the latter now vacant, and being originally a part of the lot now being conveyed, all of which lot was deeded from H. C. Young to Adams, and from Adams to John W. Simpson, with the understanding, however, that the right of way to said vacant lot now owned by J. Wistar and W. D. Simpson is to be forever secured to its south side either through the alley now opened in the rear of the block of storerooms as there now stand, or southerly to the street running east to the railroad depot lot, at least eight feet wide, together with the same width the whole rear of said vacant lot,'—and that the said deed was duly recorded.

"(3) That on the 31st day of May, 1869, the said Edward H. Fisher and John Agnew, for value, conveyed the said lot of land, with the block of stores thereon situate, and the incidents and appurtenances thereto belonging, to John Kyle, his heirs and assigns, described as follows: 'All that corner lot of land, and the buildings thereon, situate and lying in the village of Laurens, S. C., containing one-fourth of an acre, more or less, bounded on the north by the street leading through the south side of the public square to Greenville court house, on the east by the street leading to Augusta, on the south by lot belonging to the estate of John Smith, deceased, and on the west by N. Pyles' lot and J. Wistar and W. D.

Simpson's lot, the latter now vacant, and being originally a part of the lot now being conveyed; all of which lot was deeded by H. C. Young to Adams, and by Adams to J. W. Simpson, with the understanding that the right of way to said vacant lot now owned by J. Wistar and W. D. Simpson is to be forever secured to its south side, either through the alley now opened in the rear of the block of storerooms as they now stand, or southerly into street running east to the railroad depot lot at least eight feet wide, together with the same width the whole rear of said vacant lot, as the same was conveyed to us by the said Edward H. Fisher and John Agnew by John W. Simpson, by deed bearing date the seventh day of October, 1863,—and that the said deed was duly recorded.

"(4) That on July 9, 1869, the said Edward H. Fisher and John Agnew, for value, conveyed to the said John Kyle, his heirs and assigns, all that lot of land in the town of Laurensville known as 'Lot No. 7' in the survey of the real estate of John Smith, deceased, bounded on the east by Abbeville street, on the south by Cross street, and on the west and north by lands of the estate of John Kyle, being twenty-seven feet wide and twenty-three feet long.

"(5) That on the — day of February, 1872, the said John Kyle died, leaving of force his last will and testament, which was admitted to probate in the probate court for Laurens, South Carolina, on March 7, 1872, wherein he devised the said two lots of land conveyed to him by the said Edward H. Fisher and John Agnew to M. C. Law.

"(6) That on the 17th day of June, 1875, the said M. C. Law and John G. Law, for value, conveyed the said lots of land, with the block of storerooms thereon, with all appurtenances, to W. L. Boyd and James M. Boyd, their heirs and assigns, a mercantile firm known as Boyd Brothers, the said lots being described as follows: 'All that piece, parcel, or lot of land situate, lying, and being in the county and state aforesaid, in the town of Laurensville, bounded on the north by the street leading through the public square to Greenville C. H., S. C. on the west by the street leading to Augusta, Ga., on the south by Cross street, and on the west by lands now or formerly the property of N. Pyles and J. Wistar and W. D. Simpson; comprising the two lots conveyed to the late John Kyle, deceased, by Edward H. Fisher and John Agnew, of Columbia, S. C. (the one on the 31st day of May, 1869, and the other on July 9th, 1869), supposed to contain in the aggregate something more than one-fourth of an acre, be the same more or less, saving and excepting and reserving an alley eight feet wide for the benefit of the owners of the Simpson lot above mentioned, as set forth in the deed of 31st of May, 1869,—and that the said deed was duly recorded.

"(7) That on March 14, 1885, the undivided interest of James M. Boyd in the said prem-

ises, with the block of stores and all incidents and appurtenances thereto belonging, were duly conveyed to the said W. L. Boyd, his heirs and assigns.

"(8) That on January 12, 1892, the said W. L. Boyd being the owner in fee of the said premises, and being in possession of the same, for the benefit of his creditors conveyed to John W. Ferguson, his heirs and assigns, the said premises, which had been conveyed to W. L. Boyd and James M. Boyd by the said John Kyle, and that the said deed was duly recorded.

"(9) That on January 2, 1893, the said John W. Ferguson, as assignee aforesaid, after advertising the said premises for sale in lots describing an alley ten feet wide running in the rear of said store lots or block of stores, and north of the remainder of said premises, the remainder of said premises being a vacant lot lying on the south side of said alley, sold at public outcry to the plaintiffs, for the sum of six thousand three hundred dollars, and conveyed to them, the said Mercer S. Bailey and William J. Bailey, under their firm name of M. S. Bailey & Son, their heirs and assigns, for the said sum of money, the said corner lot, with the block of stores thereon situate and appurtenances thereto belonging, described in said deed of conveyance as follows: 'All that lot or parcel of land situate in the corporate limits of the city of Laurens, known as "storeroom No. 1," in the Boyd block, bounded on the north by Main street, east by Harper street, south by an alley ten feet wide, and west by storeroom No. 2 of said block; also, all that certain other lot or parcel of land in the city of Laurens known as "storeroom No. 2" of said block, bounded on the north by Main street, east by storeroom No. 1, south by alley ten feet wide, and west by storeroom No. 3; also, all that certain other lot or parcel of land in the city of Laurens known as "storeroom No. 3," of the same block, bounded on the north by Main street, east by storeroom No. 2, south by an alley ten feet wide, and west by Fowler's block,—and that said deed was duly recorded. That under the same advertisement, and at the same time and place, the said John W. Ferguson, as assignee aforesaid, sold at public outcry to the defendant, W. L. Gray, for the sum of five hundred and five dollars, the remainder of the said premises, the same being a vacant lot, and lying south of said alley, and described in said advertisement and deed as follows: 'All that certain lot lying, being, and situate within the corporate limits of the city of Laurens, in the county and state aforesaid, containing one-tenth of an acre, more or less, and bounded north by an alley ten feet wide, in the rear of the Boyd block and Fowler block, east by Harper street, south by South street, and west by Watts lot.'

"(10) That each of said stores purchased as aforesaid from the said assignee are, and have been for over twenty years, two stories

high, with glass windows for admitting light, in the rear of each of said stores, overlooking the said alley, and each store, in the basement of the same, has had for over twenty years a cellar under the first story of the same, opening out on a level with the ground on said alley, and the said alley is necessary for the use of said cellars, and for admitting light and air to the said windows; and that the plaintiffs are in possession of the said corner lot comprising the said three stores and store lots, and since their said purchase of the same have been using the said alley as necessary and appurtenant to the said premises; and that those under whom plaintiffs claim had so used the said alley as appurtenant to the said store lots for over twenty years; and that, without the use of said alley, the plaintiffs would have no outlet from the cellars in said stores to the public highway, and would have no light and air through their windows in the rear of said storerooms, and the said premises as purchased would become almost useless to the plaintiffs, and be greatly damaged.

"(11) That the title of the plaintiffs' and defendant's premises abutting on said alley extends to the center line of said alley, with the right of easement to either over the entire length and breadth of the same, in connection with their respective premises, but neither has the right to obstruct or destroy said alley without the consent of the other.

"(12) That the defendant, W. L. Gray, went into, and is in, possession of the lot lying south of said alley under and by virtue of his said purchase of the same from John W. Ferguson, as assignee as aforesaid, and is threatening to excavate and obstruct said alley, and to erect a brick building thereon, extending over and from his own lot across said alley to the rear of the plaintiffs' block of stores, which excavation, if made, will injure plaintiffs' walls, which building, if erected on said alley, will destroy the plaintiffs' use of their said cellars, and of the air and light in the rear of said buildings; and the defendant has entered upon said alley, and commenced the threatened acts aforesaid, against the objections and without the consent of the plaintiffs.

"(13) That the threats and acts of the defendant aforesaid are inconsistent with the facts and conditions of the purchase of his said lot, and inconsistent with and contrary to the rights of the plaintiffs, as derived from their purchase of the said premises, contrary to the rights of the plaintiffs as exercised since their said purchase, and by those under whom they claim for more than twenty years; that the said threats and acts of the said defendant are prejudicial to the plaintiffs, and, if the same are continued and carried out, the said defendant will cause great and irreparable loss and injury to the plaintiffs. Wherefore the plaintiffs demand judgment against the defendant, that he be enjoined and restrained perpetually from ob-

structing or excavating the said alley, or from erecting buildings or material thereon or any part thereof, and for such other and further relief as may be just, and for the costs of this action."

F. P. McGowan and Ferguson & Featherstone, for appellants. Cothran, Wells, Ansel & Cothran, for respondent.

McIVER, C. J. The question presented by this appeal being whether his honor, Judge Aldrich, erred in sustaining a demurrer upon the ground that the allegations in the complaint are not sufficient to constitute a cause of action, it will be necessary for the reporter to incorporate in his report of the case a copy of the complaint as set out in the "case."

The object of the action was to obtain an injunction restraining the defendant from obstructing and excavating a certain alley in the town of Laurens, and from erecting buildings or material thereon, or on any part thereof. It appears from the allegations of the complaint (which, for the purposes of this discussion, must be assumed to be true) that on the 7th of October, 1863, J. W. Simpson conveyed to Fisher & Agnew a lot of land in said town, upon which three storerooms stood, containing one-fourth of an acre, more or less, the boundaries of which are specifically set forth in the second paragraph of the complaint, the western boundaries being a lot of N. Pyles, and a vacant lot of J. Wistar and W. D. Simpson, "and being originally a part of the lot now being conveyed, all of which lot was deeded from H. C. Young to Adams, and from Adams to John W. Simpson, with the understanding, however, that the right of way to said vacant lot now owned by J. Wistar and W. D. Simpson is to be forever secured to its south side, either through the alley now opened in the rear of the block of storerooms as they now stand, or southerly to the street running east to the railroad depot lot, at least eight feet wide, together with the same width the whole rear of said vacant lot." On the 31st of May, 1869, Fisher & Agnew conveyed the said lot to John Kyle, describing it in practically identical terms with those used in the preceding deed, including the words used to secure the right of way to the lot then owned by J. Wistar and W. D. Simpson, which, for convenience, will hereafter be designated as the "Simpson Lot." On the 9th of July, 1869, Fisher & Agnew conveyed to said Kyle another lot, formerly belonging to the estate of John Smith, which appears to lie south of the lot previously conveyed to said Kyle. Both of the lots thus conveyed to Kyle by Fisher & Agnew were devised by John Kyle to M. C. Law, and she, with John G. Law (probably her husband), on the 17th of June, 1875, conveyed the same to W. L. Boyd and James M. Boyd. In that deed, after describing the premises conveyed so as to cover

both of the lots conveyed by Fisher & Agnew to John Kyle, the following words are used: "saving and excepting and reserving an alley eight feet wide for the benefit of the owners of the Simpson lot, above mentioned, as set forth in the deed of 31st of May, 1869." On the 14th of March, 1885, the undivided interest of the said James M. Boyd in the above-mentioned premises was conveyed to the said W. L. Boyd; and on the 12th of January, 1892, the said W. L. Boyd, by his deed of assignment for the benefit of his creditors, conveyed the said premises to John W. Ferguson, Esq. On the 2d of January, 1893, the said Ferguson, as assignee as aforesaid, "after advertising the said premises for sale in lots, describing an alley ten feet wide running in the rear of said store lots or blocks of stores, and north of the remainder of said premises (the remainder of said premises being a vacant lot lying on the south side of said alley), sold at public outcry to the plaintiffs, for the sum of \$6,300, and conveyed to them, * * * the said corner lot, with the block of stores thereon situate and appurtenances thereto belonging"; the premises conveyed being described as bounded on the south by the said 10-foot alley. At the same time, the remainder of the premises were sold and conveyed to the defendant for the sum of \$505, and are described as lying south of said 10-foot alley, and bounded north by the same alley.

The foregoing statement shows how the parties plaintiffs and defendant derived their title to the premises which they respectively claim; but we are unable to perceive how it shows, or even tends to show, that the plaintiffs ever acquired any such easement as that upon which they base their claim for the relief demanded in their complaint. On the contrary, it shows that such easement was originally created for the benefit of the owners of the Simpson lot, and as appurtenant to that lot, and not for the benefit of the owners of the premises now held by plaintiffs, nor as appurtenant to such premises. This easement thus originally created for the benefit of the owners of the Simpson lot is recognized in all of the subsequent conveyances, in which the terms are set forth in the complaint; and in the last one, in which the terms are specially set forth (the deed from M. C. Law and John G. Law to the Boyds), it is emphasized and made stronger by the saving and excepting words, above copied from that deed. But in none of these papers is there a hint even of any easement in favor of any other persons than the owners of the Simpson lot; and they are not before us making any complaint, and hence we are not at liberty to consider what may be their rights. Nor are we at liberty to consider and determine who is the owner of the fee in the land over which the alley referred to has been established, as the necessary parties are not before us. Whether such fee remained in the devisees by virtue of the

saving clause in their deed to the Boyds, or whether it remained in Mr. Ferguson as assignee by reason of the fact that, in his conveyances to both plaintiffs and defendant, the premises conveyed are bounded by said alley, are questions which we cannot now consider, for want of the necessary parties. It is very certain, however, that such fee is neither in the plaintiffs nor the defendant, unless it be under the legal proposition set forth in paragraph 11 of the complaint, which will hereinafter be considered. It is obvious, therefore, that the allegations in the complaint based on plaintiffs' paper title are not sufficient to constitute a cause of action.

But the plaintiffs contend that the allegations contained in the tenth, twelfth, and thirteenth paragraphs of their complaint are sufficient to constitute a cause of action. These allegations are long and detailed, and need not be set forth in *hæc verba*, as they can be seen by reference to the copy of the complaint, which will be incorporated in the report of this case. It is sufficient to say here that, as we understand it, these allegations are intended to show that the plaintiffs are entitled to the easement which they claim—First, from necessity; second, by prescription.

Inasmuch as it appears in the complaint that plaintiffs' premises are open, on two sides, to the public streets of Laurens, we do not see how it is possible to base the claim of easement upon necessity. The fact that it would be very convenient for plaintiffs to have access to their lot from the south side, as well as from the public streets on the north and east of their lot, does not constitute that "imperious necessity," as it is called in some of the books, which is necessary to constitute a right of way by necessity. As is said by Nott, J., in *Lawton v. Rivers*, 2 McCord, at page 448, "there must be an actual necessity, and not a mere inconvenience, to entitle a person to such right." It is true that the distinguished judge goes on to say that there need not be "an absolute and irresistible necessity. An inconvenience may be so great as to amount to that kind of necessity which the law requires; and it is difficult, and perhaps impossible, to lay down with exact precision the degree of inconvenience which will be required to constitute a legal necessity." But he proceeds to show that, as the plaintiff in that case had access to the public road by a navigable water course flowing in front of his door, there was no legal necessity which entitled him to claim a right of way, by land, through his neighbor's premises. So here we say that, as the plaintiffs had access to their lot from the public streets on two sides, there was no legal necessity that they should have access from the south side. We suppose that in many, if not most, cases, the owner of a lot in a town or city would find it very convenient to have access to his lot from all the four sides; but, when he has access from

two sides, we do not think that the inconvenience of not having access from one side can be regarded as so great as to amount to such a necessity as the law contemplates.

Second, as to prescription: As is said in the case just cited, "three things appear to be necessary to establish a right by prescription: (1) Use and occupation or enjoyment; (2) the identity of the thing enjoyed; and (3) that it should be adverse to the right of some other person." The allegations in the paragraphs of the complaint now under consideration seem to contemplate that two easements are claimed: (1) A right of way; (2) a right to light and air. We will consider these easements separately, and, first, as to the right of way. While it may be conceded that the allegations of the complaint are sufficient to show the first requisites laid down by Nott, J., in *Lawton v. Rivers*, supra, as necessary to establish a right by prescription, viz. the enjoyment of such right of way by the plaintiffs and those under whom they claim for a period exceeding 20 years; and while, possibly, the second requisite, viz. the identity of the thing enjoyed, is sufficiently alleged, though it seems that in the conveyance from Mr. Ferguson, as assignee, to the plaintiffs, the width of the alley was changed from eight to ten feet (by what authority does not appear),—yet there is a total absence of any allegation as to the third requisite, viz. that the right claimed has been exercised and enjoyed adversely to the right of any other person; nor is there any fact alleged from which adverse use and enjoyment could be inferred. Indeed, taking all the allegations in the complaint together, it would seem that such use and enjoyment were permissive, and not adverse. This is fatal to the complaint so far as it is based upon a claim of right of way by prescription. Second, as to the right to light and air, which it is claimed has been acquired by prescription: The English rule upon this subject has been distinctly repudiated in this state (*Napier v. Bulwinkle*, 5 Rich. Law, 311); in Massachusetts (*Keats v. Hugo*, 115 Mass. 204); in Pennsylvania (*Rennyson's Appeal*, 94 Pa. St. 147); and in New York (in *Doyle v. Lord*, 64 N. Y. 432),—the American doctrine is contradistinguished from the English doctrine as distinctly recognized. So, in Ohio, in the case of *Mullen v. Stricker*, 19 Ohio, 135, it is said to be the settled law of that state "that no prescriptive right to the use of light and air through windows can be acquired by any length of use or enjoyment." So, also, in Illinois, in the case of *Keating v. Springer*, 146 Ill. 481, 34 N. E. 805, it is said: "The prevalent rule in the United States is that an easement in the unobstructed passage of light over an adjoining close cannot be acquired by prescription." The syllabus of the case of *Napier v. Bulwinkle*, supra, which correctly represents the decision of the court, reads as follows: "Plaintiff's windows in his house, at

the extremity of his own land, looked over defendant's house, and the enjoyment of light and air through them continued for fifty years. Defendant then obstructed them by a new house built on the foundation of his old one, and carried to a greater height. Action for the obstruction. It was held that the enjoyment of every easement must be adverse, that is, as of right, to raise by twenty years' continuance the presumption of a grant, which implies the assent of the servient owner; that in the case of any easement claimed, which, if not rightful, constitutes a legal injury, for which an action will lie, neglect to sue for the period of twenty years, during which the enjoyment continued, furnishes evidence of assent, and so proof of the enjoyment, when nothing else appears, raises the presumption; but that in the case of a window, which gives no cause of action to the owner of the space over which it looks, he is not bound to obstruct within twenty years to prevent the acquisition of a right; and, without some other circumstance from which his assent to the easement as a right may be inferred, his grant cannot be presumed from the mere unobstructed enjoyment." It is true that there is an older case in this state, —*McCready v. Thomson*, Dud. 131,—which would seem to countenance the English doctrine that an uninterrupted enjoyment of light and air, through windows overlooking the premises of another, for more than 20 years, would be sufficient to create such easement; but the comments on that case in the subsequent case of *Napier v. Bulwinkle* show that such doctrine is not now recognized in this state, nor in many, if not most, of the other states. The true rule, as we understand it, is that a right to the unobstructed passage of light and air through the windows of a person's house cannot be acquired by the enjoyment of such privilege of any length of time, unless it appears that such enjoyment had been in some way adverse to the legal rights of his neighbor,—some circumstance that would give the neighbor a right of action for the invasion of his legal rights. And it is difficult to conceive how the enjoyment of light and air can be adverse to the legal rights of another. Several of the cases above cited from other states rest their conclusion that such an easement cannot be acquired by prescription upon the ground that the enjoyment of light and air is not adverse. As is well said by Mr. Justice Metcalf, in *Rogers v. Sawin*, 10 Gray, 376: "The making of a window in one's building, on his own land, and overlooking the land of his neighbor, is no encroachment on his neighbor's rights, and therefore cannot be regarded as adverse to him." Or, as is said by Gray, C. J., in *Keats v. Hugo*, supra: "The actual enjoyment of the air and light by the owner of the house is upon his own land only. He makes no tangible or visible use of the adjoining lands. nor, indeed, any use of them which can be

made the subject of an action by their owner, or which in any way interferes with the latter's enjoyment of the light and air upon his own lands, or with any use of those lands in their existing condition. In short, the owner of the adjoining lands has submitted to nothing which actually encroached upon his rights, and cannot therefore be presumed to have assented to any such encroachment."

If, then, the allegations in the complaint are insufficient to show that the plaintiffs acquired the easement claimed by prescription, our next inquiry is whether there are any allegations sufficient to show that, under any of the conveyances mentioned in the complaint, the plaintiffs acquired such easement by grant. It is quite certain that none of these conveyances show any express grant of such easement by the plaintiffs, or any of those under whom they claim; and we think that none of them show any implied grant. The fact that Mr. Ferguson, who had acquired the title to the lot now claimed by plaintiffs and the lot claimed by defendant, on the same day conveyed the one to the former and the other to the latter, and the further fact that at that time the alley was open and unobstructed, are not sufficient to imply a grant of the easement claimed by the plaintiffs. In *Muller v. Stricker*, supra, the owner of two adjacent lots, having dwelling houses on them, conveyed one to the plaintiff, and the other to the defendant, by deeds containing covenants of warranty. The house purchased by plaintiff received light and air through windows overlooking an open space on the lot purchased by defendant. The defendant being about to obstruct these windows by building upon and filling up the open space, an action for injunction was brought by plaintiff. Held, that there was no grant of an easement for light and air implied from the fact that the windows were in use at the time of the conveyances, and were necessary to the convenient enjoyment of the property, and the injunction was refused. See, also, *Keating v. Springer*, supra, and *Keats v. Hugo*, supra, to same effect.

We are next to consider the allegation in the twelfth paragraph of the complaint that the excavation threatened by defendant will injure and endanger plaintiffs' walls. In the case of *Gilmore v. Driscoll*, 122 Mass. 199, the law upon this subject is elaborately reviewed by Gray, C. J.; and it is there shown to be the settled rule in this country that while the soil, in its natural condition, cannot be lawfully injured by excavations made by the adjoining proprietor on his own land, yet, for injuries done to buildings or other improvements, no right of action can be maintained, without allegations of negligence; and there is no such allegation in the complaint.

It only remains to consider the legal proposition stated in the eleventh paragraph of the complaint, whereby it is complained that

plaintiffs and defendant are each the owners of the fee in the soil over which the alley runs, to the center of the alley, under the well-settled doctrine that, where land conveyed is bounded by a road or stream, the conveyance carries the fee to the center of the road or stream. Whether this doctrine would apply in this case, where the boundary is an alley,—a private way,—need not be considered, under the view we take of this case. The circuit judge held that this doctrine does not apply to this alley, as it was "a mere private right of way appurtenant to the Simpson lot." The exception imputes error in this holding, because "he should have held that the plaintiffs have an interest in said alley as incident and appurtenant to their said premises, although the alley may be only a private way, subject to an easement in favor of the Simpson lot." But, as we have seen, the allegations in the complaint are not sufficient to show that the alley was appurtenant to the premises of the plaintiffs. For this reason, therefore, the exception cannot be sustained. But, besides, this clause in the deed from the Laws to Kyle expressly excepts the alley, not merely the right of way through the alley; and therefore we do not see how either plaintiffs or defendant can claim title to the soil over which the alley runs, or any part thereof. The devisees of Kyle, and those under whom they claim, took their title subject to the right of way secured to the owners of the Simpson lot, and the only way by which this right could be preserved was by excepting the strip of land eight feet wide, over which the alley ran, from the premises conveyed to the Boyds. We agree, therefore, with the circuit judge that the facts stated in the complaint are not sufficient to constitute a cause of action in the plaintiffs, and hence there was no error in sustaining the demurrer. The judgment of this court is that the judgment of the circuit court be affirmed.

(53 S. C. 496)

CAVE v. CAROLINA MIDLAND RY. CO.
(Supreme Court of South Carolina. Nov. 2, 1898.)

CONNECTING CARRIERS—LIABILITY—DAMAGE TO
FREIGHT—PLEADINGS.

Act Jan. 5, 1895 (21 St. at Large, p. 822), provides that when, under contract for shipment of freight over the lines of two or more connecting carriers, the responsibility of each shall cease upon delivery to the connecting line in good order, if such freight be lost or damaged it shall be the duty of the initial or terminal line, upon notice, to adjust such loss or damage within 40 days, and upon failure to do so, or to trace such freight and inform the person giving the notice by what carrier such freight was lost or damaged, such carrier shall be liable for all of such loss or damage. *Held* that, to maintain an action against a terminal carrier for damages to freight, it must be alleged and proved that the shipment was made under a contract that the responsibility of each carrier should

cease upon delivery to its connecting carrier in good order.

By divided court, Gary, A. J., and Pope, J., dissenting.

Appeal from common pleas circuit court of Barnwell county; R. O. Watts, Judge.

Action by L. M. Cave against the Carolina Midland Railway Company. From a judgment in favor of defendant, plaintiff appeals. Affirmed by divided court.

Bellinger, Townsend & O'Bannon, for appellant. Robt. Aldrich, for respondent.

McIVER, C. J. This is an action to recover damages for the loss of one horse, and for injuries to several other animals, occasioned by the alleged negligence of a common carrier in the transportation of said animals from Atlanta, in the state of Georgia, to Barnwell, in the state of South Carolina. The plaintiff bases his right to recover exclusively upon the terms of an act passed by the general assembly of this state, and approved 5th of January, 1895 (21 St. at Large, p. 822). Upon reading the complaint, the defendant interposed an oral demurrer to the complaint, upon the ground that the facts stated therein were not sufficient to constitute a cause of action, in that there was no allegation in the complaint "that the contract under which the freight was shipped provided that the responsibility of each of the carriers shall cease upon the delivery to the connecting line in good order." After hearing argument, his honor, Judge Watts, rendered judgment sustaining the demurrer, and dismissing the complaint. From this judgment plaintiff appeals upon a single exception imputing error to the circuit judge in sustaining the demurrer, upon the ground that the facts stated in the complaint were insufficient to give the plaintiff a cause of action under the statute above referred to.

It becomes necessary, therefore, first to ascertain what are the facts stated in the complaint; and, second, whether the facts alleged are sufficient to constitute a cause of action under the statute.

In the first paragraph of the complaint it is alleged that the defendant is a railroad corporation, and is engaged in the transportation of freight, as a common carrier, in connection with the Georgia Railroad Company and the South Carolina & Georgia Railroad Company, between city of Atlanta, in the state of Georgia, and the town of Barnwell, in the state of South Carolina. The second paragraph of the complaint reads as follows: "That on the 17th day of December, A. D. 1896, at Atlanta, in the state of Georgia, one J. B. Thompson, as agent of the plaintiff, delivered, on behalf of plaintiff, one car load of live stock, containing eighteen horses and ten mules, the property of the plaintiff, of the value of thirteen hundred and fifty dollars, to the Georgia Railroad Company, a connecting carrier with the South Carolina & Georgia Railroad Company and the defendant, be-

tween Atlanta, Ga., and Barnwell, S. C., consigned to the plaintiff, as consignee, at Barnwell, S. C., and in consideration of a reasonable compensation as freight money to be paid by the plaintiff to the defendant upon the arrival of said stock at their destination and delivery to the plaintiff as consignee; and the said Georgia Railroad Company thereupon received said stock, and undertook and agreed to transport the same by the Georgia Railroad Company to its freight station at Augusta, ready to be delivered to such company or carrier whose line might be considered a part of the route to the destination of said stock, it being distinctly understood and agreed that the responsibility of the Georgia Railroad Company should cease at the station where delivered to such carrier, the said condition to apply to and govern the transportation of this stock over any and all roads which should form a part of the route to the destination named." In the third paragraph it is alleged "that said car load of stock was thereupon carried by said Georgia Railroad Company to Augusta, Ga., and there delivered to the South Carolina & Georgia Railroad Company, whose line was considered a part of the route to their destination at Barnwell, S. C., and were carried by said South Carolina & Georgia Railroad Company to Blackville, S. C., where it was delivered to the defendant, whose line was a part of the route to Barnwell, S. C., a station on said line, and was carried and delivered by defendant to the plaintiff, who paid defendant fifty-one dollars and fifty cents, the reasonable charges for freight at Barnwell, S. C." In the fourth paragraph it is alleged "that, while said car load of stock was being carried under said contract mentioned in the second paragraph of the complaint," one of the horses was negligently lost or destroyed, and nine other animals were injured and damaged, "through the negligence and carelessness of the carrier"; but it is not alleged, either in this or any other paragraph of the complaint, which one of the three carriers was responsible for such negligence. In the fifth and last paragraph of the complaint it is alleged that on the 2d of January, 1897, the plaintiff gave notice to the defendant of the said loss, damage, and destruction, and that, although more than 40 days has elapsed since such notice was given, the same has never been adjusted, nor did the defendant trace such freight, and inform plaintiff when, where, and by which carrier the said freight was lost, damaged, or destroyed.

The statute upon which this action is based reads as follows: "That when under contract for shipment of freight or express over two or more common carriers, the responsibility of each or any of them shall cease upon delivery to the connecting line 'in good order,' and if such freight or express has been lost, damaged or destroyed, it shall be the duty of the initial, delivering or terminal road, upon notice of such loss, damage or destruction being

given to it by the shippers, consignee or their assigns, to adjust such loss or damage with the owners of said goods within forty days, and upon failure to discharge such duty within forty days after such notice, or to trace such freight or express, and inform the said party so notifying when, where and by which carrier the said freight or express was lost, damaged or destroyed, within said forty days, then said carrier shall be liable for all such loss, damage or destruction in the same manner and to the same extent as if such loss, damage or destruction occurred on its lines,"—followed by a proviso, the terms of which are not pertinent to the present inquiry.

The manifest object of this act was to give a shipper or his consignee a right of action only in cases where the goods were shipped under a particular kind of contract, which is specified in the act, viz. a contract for the shipment of freight over two or more connecting lines of common carriers, where, under the terms of the contract, the responsibility of each carrier ceases upon delivery of the freight to the connecting carrier "in good order." This is clear from the express terms of the statute: "When under contract for shipment of freight or express over two or more common carriers, the responsibility of each or any of them shall cease upon delivery to the connecting line 'in good order,'" etc. It is observable that these words are put within quotation marks in the statute, indicating that they are taken from the contract of shipment referred to in the act. It is obvious, from an inspection of the complaint hereinabove set out, that the plaintiff has failed to allege that his stock was transported under such a contract of shipment as that specified in the act. There is no allegation in the complaint that the responsibility of any one of the three carriers entrusted with the transportation of this stock was to cease upon the delivery of the same to the connecting carrier "in good order," and this omission is fatal to the complaint; for, when one seeks to avail himself of a special remedy provided by statute, the rule is well settled that he must be careful to bring his case, both by allegation and proof, within the terms of the statute.

The Georgia cases cited by counsel for appellant do not apply in this case, for in none of them was the question presented in this case either raised or considered. In one of those cases (*Railway Co. v. Austin*, 29 S. E. 11) the chief justice, in delivering the opinion of the court, says: "The record shows that by the contract of shipment the responsibility of each carrier was to cease upon delivery to the next *in good order*" (italics ours,) while here the record fails to show anything of the kind. So, in the case of *Forrester v. Railway Co. (Ga.)* 19 S. E. 811, the bill of lading showed that the melons were received by the initial carrier "in good order"; and when the same case was again before the court (23 S. E. 416) it was stated in the opin-

ion that "it appears that the melons were in good order when received by the initial carrier"; and the court held that, in the absence of any evidence to the contrary, the presumption would be that they were in like good order when delivered to the connecting carrier. In this case, however, there is no allegation that the stock was in good order either when delivered to the initial or any other carrier. Indeed, these Georgia cases seem to imply that, in order to sustain an action under a statute similar to, though not identical with, ours, it is necessary that it should appear that the freight was being transported under a contract of shipment whereby the responsibility of each carrier terminated upon the delivery of the freight "in good order" to the connecting carrier, and therefore tend rather to support than conflict with our view.

I think, therefore, that the judgment of the circuit court should be affirmed; but, as this court is equally divided, the judgment of the circuit court stands affirmed, under the constitution of this state.

JONES, J., concurs.

GARY, A. J. (dissenting). As I cannot concur in the opinion of Mr. Chief Justice McIVER, I will state briefly the reasons for my dissent. The general rule is that, when a company is chartered for railroad transportation, it is a common carrier over its own lines only, unless by contract, usage, or character of business it has become so beyond its terminal or over connecting lines. *Hill v. Railroad Co.*, 43 S. C. 461, 21 S. E. 337. It is also a well-settled principle that the connecting line becomes liable as a common carrier as soon as goods are delivered to it for transportation by the initial road. This liability is extended by section 1720, Rev. St. 1893, which is as follows: "In case of the loss of or damage to any article or articles delivered to any railroad corporation for transportation, over its own and connecting roads, the initial corporation or corporations first receiving the same shall, in every case, be liable for such loss or damage, but may discharge itself from such liability by the production of a receipt in writing for the said article or articles, from the corporation to whom it was its duty to deliver such article or articles, in the regular course of transportation. In which event, the said connecting road or roads shall be severally liable, but may in succession and in like manner discharge themselves respectively therefrom," etc. It will thus be seen that not only the initial road, but all the connecting lines to whom the goods are delivered for transportation, are made liable as common carriers. The foregoing section, however, provides in what manner such liability may be discharged by the respective roads. The act of 1895, which is set out in the opinion of Mr. Chief Justice McIVER, was not intended to affect the foregoing liability of the sev-

eral roads in the first instance, but to provide in what manner the said liability could be discharged. The complaint alleges that the property was delivered to the defendant for transportation, as one of the connecting lines. It therefore became liable as a common carrier. The defendant was the "terminal" road, and the plaintiff alleges that he gave notice of his loss and damage to the defendant, in order that the same might be adjusted; that, although more than 40 days have elapsed after such notice was given, the same has not been adjusted, nor did the defendant trace such freight, and inform the plaintiff when, where, and by which carrier the said freight was lost, damaged, or destroyed. The act of 1895 shows that the defendant was liable for the loss, damage, or destruction of the property. The discharge of the defendant from liability in the manner provided by law was a matter of defense, and formed no part of plaintiff's cause of action. The liability of the defendant was fixed by statute, and, even if there had been a contract against such liability, it would have been null and void, as against public policy. I therefore think the judgment of the circuit court should be reversed.

POPE, J., concurs.

(55 S. C. 207)

STATE v. HOLLEYMAN et al. (two cases).¹
(Supreme Court of South Carolina. Oct. 31, 1898.)

**CONSTITUTIONAL LAW — POLICE POWER — INTER-
STATE COMMERCE — DISPENSARY LAW —
CONTRABAND LIQUORS.**

1. It is within the police power of the state to prohibit, as done in Dispensary Act March 6, 1896, the handling and hauling in the nighttime of alcoholic liquors by citizens of the state who are owners of such liquors.

2. Dispensary Act March 6, 1896, providing (section 37) that "any person handling contraband liquors in the nighttime or delivering the same shall be guilty of a misdemeanor," is not unconstitutional, as interfering with interstate commerce.

3. Where one purchases intoxicating liquor for his own use from persons outside the state, and carries it into the state, and does not comply with the regulations of the dispensary law of 1895 after his arrival in the state, such liquor is "contraband," within Dispensary Act March 6, 1896, § 37, providing that "any person handling contraband liquors in the nighttime or delivering the same shall be guilty of a misdemeanor."

By a divided court. McIver, C. J., and Gary, A. J., dissenting.

Appeal from general sessions circuit court of Chesterfield county; W. C. Benet, Judge.

Charles Holleyman, Louis Holleyman, and Charles Nixon were convicted of unlawfully hauling contraband spirituous liquors in the nighttime, and they appeal. Affirmed by a divided court.

W. P. Pollock, for appellants. J. M. Johnson, for the State.

¹ On petition of appellants, remittitur stayed.

POPE, J. The two above-stated cases were heard together before Judge Benet and a jury at the April term, 1897, of the court of general sessions for Chesterfield county, in this state; and both cases originated out of the same transaction and the same state of facts, and the indictments were similar in all respects, excepting the names of the defendants. The defendants were convicted, and, after sentence, appealed to this court on twelve grounds. Before considering these grounds of appeal, it may not be amiss to state briefly the facts underlying the controversy. On the 11th of December, 1896, in the nighttime, the defendants were arrested by the officers of the law, and were found to have in their possession 21 gallons of corn whisky, from Hightower's distillery, in the state of North Carolina; and they were in Chesterfield county, in this state, with the said whisky transported in two buggies; and they were on their way to their homes at Lamar, in the county of Darlington, in this state; and also the whisky was purchased and so transported for the individual use of the defendants (appellants). Each keg and jug filled with whisky was claimed by one particular individual, so that there was no joint ownership thereof. The indictments alleged that said defendants "did unlawfully handle and haul contraband spirituous liquors in the nighttime, against the form of the statute in such case made and provided," etc. The statute referred to was what was known as the "Dispensary Law" of this state. It was admitted that no tags were upon said liquors. The grounds of appeal were as follows: "First. Because his honor, W. C. Benet, presiding judge, erred in charging the jury that the dispensary law (the act of 1896) is in all respects a lawful exercise of the police power by the general assembly of South Carolina. Second. Because he erred in charging the jury that a citizen of this state can bring into the state, from without the state, only one gallon of intoxicating liquors, without complying with certain requirements of the dispensary law, and then only when he is accompanying the same as his personal baggage. Third. Because he erred in instructing the jury that all liquors, except such as have been bought from a state officer authorized to sell the same, and have been tested by the chemist of the South Carolina College, and found to be chemically pure, are contraband; and he erred in instructing the jury that all liquors in this state, except dispensary liquors, and liquors passing through the state in transit, going through the state consigned to points beyond this state, shall be deemed contraband, and may be seized without warrant; and he erred in instructing the jury that all alcoholic liquors, other than domestic wines, which do not have on the packages in which they are contained labels and certificates going to show that they have been tested by the chemist of the South Carolina College, and purchased

from a state officer authorized to sell them, are contraband, and upon seizure shall be forfeited to the state, except liquors held by owners of registered stills in bonded warehouses. Fourth. Because he erred in instructing the jury that these defendants could have gotten certificates from the state dispensary commissioner, by which the liquor purchased by these defendants without the state, while said liquor was without the state, could be protected under the dispensary law. Fifth. Because he erred in refusing to instruct the jury whether a citizen of the state has a right to handle and haul liquors, purchased from a dispensary, in the nighttime, and in charging the jury that there is no such question as that in this case, and in further charging the jury that there is no evidence in this case to which the law can apply. Sixth. Because he erred in refusing to charge the jury that 'liquors and wines are recognized as commodities which may be lawfully made, bought, and sold, and must therefore be deemed to be the subject of foreign and interstate commerce; and so, if the liquors for the handling and hauling of which the defendants herein were indicted were brought from the state of North Carolina into this state, the defendants had the right to carry them on to their destination, unmolested, under the United States constitution, and they were guilty of no violation of state law in handling and hauling the same,'—and in adding the following proviso thereto: 'Provided, that the liquors were not contraband liquors, in the sense of the dispensary law; and I have given you the definition which the law gives to "contraband liquor" in this state.' Seventh. Because he erred in refusing to charge the jury that: 'It does not matter for what purpose an article is imported from another state or from a foreign country. The state cannot interfere with its bringing or importation. It does not matter whether the importation is for personal use, or for some other purpose. It is the importation, and not the use, which is protected by the constitution of the United States; and the importation is general, and not confined to any particular class or kind of importation,'—and in adding the following proviso thereto: 'I charge you that, with this addition: Unless the liquor, when seized, is contraband liquor.' Eighth. Because he erred in charging the jury that 'if liquor is found in the possession of a person, in the condition which makes it contraband, when, whether it comes from another state or inside the state, it would be liable to seizure, and the handling and hauling of it in the nighttime would be illegal.' Ninth. Because he erred in refusing to charge the jury that 'the only way that a state can interfere with the free importation of commodities or articles of commerce from one state to another is under an inspection law; but the act of South Carolina of 1896, known as the "Dispensary Law," is not an inspection law.'

Tenth. Because he erred in refusing to charge the jury that 'if the defendants were engaged in bringing in or importing liquors from the state of North Carolina into the state of South Carolina at the time they were arrested, they were simply doing what they had a right to do, under the constitution of the United States, and were violating no valid state law; the United States supreme court having declared so much of the dispensary law of South Carolina as relates to the importation of liquors from without the state into the state to be unconstitutional, null, and void.' And he erred in charging the jury: 'That is correct, except that, if the liquors in their possession were contraband liquors, then they were not doing what they had the right to do in this state.' Eleventh. Because he erred in refusing to charge the jury that 'when a state recognizes the manufacture, sale, and use of intoxicating liquors as lawful, it cannot discriminate against the bringing of such liquors in and importing them from other states. Such legislation is void, as a hindrance to interstate commerce.' And he erred in holding that this proposition did not apply to the dispensary law. Twelfth. Because he erred in charging the jury: 'If you are satisfied beyond a reasonable doubt that they (the liquors in the possession of the defendants) were contraband liquors, you will find them (the defendants) guilty.'"

At the beginning of our remarks upon the contention here presented, it is proper to state that the appellants concede that the dispensary law of this state, now to be reviewed, is conformable to the provisions of our state constitution; so that our inquiries will be directed to the alleged want of conformity of such state law with the constitution of the United States, or, to limit the inquiry to the precise part of the federal constitution, to an alleged conflict with article 1, § 8, which declares, "The congress shall have power to regulate commerce with foreign nations and among the several states and Indian tribes." Our investigations are happily limited to that commerce between the states in the matter of intoxicating liquors. And here again it is our good fortune to find a line of decisions of the United States supreme court which relieve our labors of much tedium. Beginning with the cases of *Bowman v. Railway Co.*, 125 U. S. 465, 8 Sup. Ct. 689, 1062; *Lelsy v. Hardin*, 135 U. S. 100, 10 Sup. Ct. 681; *In re Rahrer*, 140 U. S. 545, 11 Sup. Ct. 865; *Scott v. Donald*, 165 U. S. 68, 17 Sup. Ct. 265; *Rhodes v. Iowa*, 170 U. S. 412, 18 Sup. Ct. 664; and *Vance v. W. A. Vandercook Co.*, 170 U. S. 438, 18 Sup. Ct. 674,—the United States supreme court has had before it some very interesting phases of the liquor problem, as it entwines itself about the interstate commerce provisions of the United States constitution. Briefly stated, the results of these cases established these propositions:

(a) *Bowman v. Railway Co.*, supra, held

that it was not in the power of a state, by its legislation, exclusive of some action by congress, to lay a restriction upon a common carrier (which was a railroad) to regulate commerce between its people and those of the other states of the Union, in order to effect its end, however desirable that end might be.

(b) *Lelsy v. Hardin*, supra, held that a state law could not prevent the sale of liquors in unbroken packages which were received by the resident of the state from parties outside the state.

(c) In *re Rahrer*, supra, held that after August 8, 1890 (at which date the Wilson bill became a law of the United States), it was in the power of a state to punish, under laws enacted under the police power of the state, any one who sold liquors in original packages bought from parties outside the state.

(d) *Scott v. Donald*, supra, held that the dispensary law passed by the state of South Carolina, in those of its provisions which sought to discriminate between citizens of its own state, against citizens of another state, in the privilege of receiving from parties outside the state spirituous liquors, was void, as a violation of the interstate commerce provision of the federal constitution; or, to reproduce the language of Mr. Justice Shiras, who formulated the opinion of that court: "It is sufficient for the present case to hold, as we do, that when a state recognizes the manufacture, sale, and use of intoxicating liquors as lawful, it cannot discriminate against the bringing of such articles in, and importing them from, other states; that such legislation is void as a hindrance to interstate commerce, and an unjust preference of the products of the enacting state as against similar products of the other states."

(e) *Rhodes v. Iowa*, supra, held that under the Wilson bill a state could not punish a common carrier, or its agent, for moving an unbroken package of liquor from one point to another point in the state of Iowa before it delivered the same to the consignee, although the common carrier or its agent knew it was an unbroken package of liquor; and it also held, in construing the words of the act of congress usually called the "Wilson Bill," whose language was "that all fermented, distilled and other intoxicating liquors or liquids transported into any state or territory or remaining therein for use, consumption, sale, or storage therein, shall, upon arrival in such state or territory, be subject to the operation and effect of the laws of such state or territory enacted in the exercise of its police powers to the same extent and in the same manner as though such liquors or liquors had been produced in such state or territory, and shall not be exempt therefrom by reason of being introduced therein in original packages or otherwise" (26 Stat. 313), that the word "arrival," as used in this act, in the light of all its provisions, was not intended to and did not cause the power of the state to attach to an

interstate commerce shipment while the merchandise was in transit under such shipment, and until its arrival at the point of destination, and delivery there to the consignee.

(f) *Vance v. W. A. Vandercook Co.*, supra, held, in construing the dispensary law enacted in 1896, and the identical act now undergoing consideration, that: (1) Under the act of August 8, 1890, the restrictions and regulations of state laws become operative on the original packages of intoxicating liquors imported into a state before the sale thereof, and therefore such packages cannot be sold, if the state law forbids the sale, or can only be sold in the manner and form prescribed by the state regulations. (2) A state law cannot be void because in excess of state authority, when it is but the execution of a power lawfully vested in the legislature of the state to forbid the sale of liquors in the original packages. (3) From the fact that a state law permits the sale of liquor subject to particular restrictions, and only upon enumerated conditions, it does not follow that the law is not a manifestation of the police power of the state. (4) The act of congress of August 8, 1890, subjects the sale of original packages of intoxicating liquors to state laws which restrict or regulate such sales as well as to laws which forbid them. (5) Giving to state officers the exclusive right to purchase all intoxicating liquors to be sold in the state does not make a state law regulating such sales inherently discriminatory, and therefore unconstitutional, on the ground that the officers have arbitrary discretion in determining where and from whom they will purchase liquors. (6) The fact that the provision omitted from a new law had been, before its enactment, declared to be unconstitutional, affords a conclusive demonstration of its inconsistency with the new law. (7) Authorizing the use by a resident of wine or liquor made by him for such purpose does not make an unconstitutional discrimination. (8) Compelling a resident of the state who desires to order intoxicating liquors from another state for his own use first to communicate his purpose to a state chemist, and depriving any nonresident of the right to ship any intoxicating liquors, unless previous authority is obtained from state officers, are unconstitutional regulations of interstate commerce. (9) The right of a citizen to carry on interstate commerce is conferred by the constitution of the United States, and its exercise depends solely upon the will of the person engaged therein, and cannot be, in advance, controlled or limited by the state, in any department of its government. (10) An inspection law must not substantially hamper or burden the constitutional right, on the one hand, to make, and, on the other hand, to receive, an interstate shipment. (11) A requirement that a sample shall be sent in advance for inspection, before intoxicating liquors are brought into the state, cannot be supported as an inspec-

tion law, but such a law must, at least, provide for some inspection of the article imported.

Since all the questions except one seem to be federal questions, we very naturally turn to the decisions of the supreme court of the United States for their decision; and it is to the two latest decisions that we must turn, for the appellants, in common with many others, have given a force and meaning to the decision of *Scott v. Donald*, *supra*, which the supreme court of the United States, in its last decision (*Vance v. W. A. Vandercook Co.*, *supra*), has taken occasion to point out. The appellants, as before remarked, seem to attribute to *Scott v. Donald*, *supra*, this meaning, namely, that the dispensary act of 1895 was not, in any of its features, a valid exercise of the police powers of the state, whereas the court, in the case just cited, was careful to avoid this. When the facts underlying the controversy in *Scott v. Donald*, *supra*, are considered, it will be seen that *Scott*, the appellee, had ordered three shipments of alcoholic liquors to be made to him from the states of California, Maryland, and New York, respectively, which shipments, when so made, were seized, while in the hands of a common carrier, and before delivery to the consignee could be made; and the judgment of the supreme court of the United States was that, because of some features in the act of 1895, the state could not justify the exercise of its police power; because the act was invalid, being in violation of the federal constitution. Hence, when the latest decision (that of *Vance v. W. A. Vandercook Co.*, *supra*) was rendered by the United States supreme court, it was held that the act of 1895, amendatory of the act of 1895, was a valid exercise of the police power of the state, except when it interdicted the delivery to a consignee within the state of alcoholic liquors from outside the state for the use of the consignee, but not so as to liquors which were intended to be sold by the consignees; and, passing upon the first phase of this question (as to consignees for their own use), the said court did hold that the inspection laws were invalid. So far as these latest decisions extend, it may be said: First, that no state can interdict the delivery by a common carrier of any alcoholic liquors from without the state to a consignee within the state for his own use; second, that when the word "arrival," occurring in the act of congress commonly called the "Wilson Bill," is to be construed, it must be held that such word means an arrival of such liquors into the hands of the consignee within the state. The trouble in connection with the cases we are considering is that the liquors were in the hands of their owners when they crossed the threshold of this state; coming from Hightower's distillery, in the state of North Carolina, where these liquors were purchased by these three citizens of South Carolina. They may be said to have reached the consignees at the

state line. As will be perceived, this is an entirely different question from that decided in the *Rahrer Case*, the *Scott-Donald Case*, or the *Vance-Vandercook Case*; for in each of these cases the liquors had not reached the hands of the consignees. So now we are confronted with this difficulty in the cases now at bar: The owners of those packages of liquors have in their own hands such liquors, and are confessedly handling and hauling such liquors in the nighttime, in violation of sections 33 and 37 of the dispensary act passed in 1895. Is not the police power of the state sufficiently powerful to interdict the citizens of the state from handling and hauling in the nighttime alcoholic liquors, when they are the owners thereof? Is it not in exact keeping with the laws of the state in relation to hauling seed cotton at night? Section 280 of the Criminal Statutes of South Carolina provides: "It shall not be lawful for any person to buy or sell or receive by way of barter, exchange or traffic of any sort, any seed cotton between the hours of sundown and sunrise. * * *" This is confessedly in the exercise of the police power. Why, therefore, may not a state, in the exercise of its police power, forbid the handling or hauling of spirituous liquors at night? This also would be the exercise of the police power of the state, and cannot in any sense affect the interstate commerce laws. It should be noted, however, that these sections 33 and 37 by their terms affect "contraband liquors." A question may arise as to whether a person purchasing for his own use liquors from persons outside this state, and carrying this property with him into his own state, may not justly claim that such liquors in his hands are not "contraband liquors," and therefore not in violation of these sections. If a man may order for his own use spirituous liquors from another state, and have such liquors delivered to him at his own home, in South Carolina, without incurring liability therefor under the dispensary law, which forbids it,—relying for freedom from such liability upon the interstate commerce provision of the United States constitution,—why may not a citizen take his buggy or wagon, and go into another state, and purchase spirituous liquors, and by his own buggy or wagon transfer such liquors to his home, and claim immunity therefor under the interstate commerce clause of the constitution? We are inclined to think he could, except for section 37 of the dispensary act of 1895, which provides: "Any person handling contraband liquors in the nighttime or delivering the same shall be guilty of a misdemeanor, and on conviction * * *." The word "contraband," used in this section, refers to any liquors other than dispensary liquors. The appellants admit that the liquors found in their possession were not dispensary liquors.

When the exceptions here presented are taken up *seriatim*, it will be found that they

are untenable, in the light of our views heretofore expressed. As to the fifth exception, when examined it will be found to ask of the circuit judge a ruling upon what would be the effect of hauling liquors at nighttime which had been purchased of the dispensary. The circuit judge declined to rule upon the matter, for the simple reason that the liquors here involved were admitted not to have come from the dispensary. This was not error. I think, therefore, our judgment should be, "It is the judgment of this court that the judgment of the circuit court be affirmed." But the members of the court are equally divided. Hence, under the constitution of this state, the judgment of the circuit court stands affirmed.

JONES, J. I concur in affirming the judgment of the circuit court in these cases. The act of congress known as the "Wilson Act," quoted in the opinion of Mr. Justice POPE, expressly leaves intoxicating liquors within the control of the police power of the state, "upon their arrival in said state." In *Rhodes v. Iowa*, 170 U. S. 412, 18 Sup. Ct. 664, reaffirmed in *Vance v. W. A. Vandercook Co.*, 170 U. S. 438, 18 Sup. Ct. 674, the supreme court of the United States has construed "arrival in the state," in this act, to mean "arrival at the point of destination, and delivery to the consignee." Let us assume that the police power of the state can only operate upon an article of interstate commerce after it ceases to be such in an interstate commerce transaction. When is an interstate commerce transaction as to intoxicating liquors consummated? Manifestly, when such article is delivered to the consignees. In the case before us it is admitted that the whisky was actually delivered into the hands of the buyers in North Carolina. So far as the nonresident seller was concerned, it reached its destination when the buyers received it. Even if such a transaction between citizens of this state and a citizen of North Carolina could be called an interstate commerce transaction, it was consummated by actual delivery in North Carolina. The moment, therefore, that the whisky, in the actual custody of its owner, a citizen of this state, entered the territory or jurisdiction of this state, it became subject to the operation of the police power of the state; the commercial power of the United States having yielded its grasp when the interstate transaction was consummated by delivery. Suppose a common carrier had delivered this whisky to the defendants at a station on or near the state line; could it be fairly contended that the whisky had not reached its destination, because the owners in actual possession contemplated carrying it through Chesterfield county to their residences, in Darlington county? Such a view would make easy the illicit traffic in intoxicating liquors, especially in border counties; for, under the cover of darkness, evil men could travel the country loaded with such liquors,

and, if an actual sale could not be proven, escape all risk, under the plea of "personal use." It is surely within the police power of the state to prohibit the hauling and handling of contraband liquors in the nighttime, as a means to prevent, or make more difficult, illicit traffic under cover of night. Admitting that the state cannot confiscate, as contraband, intoxicating liquors imported for personal use, while in the control and protection of interstate commerce, undoubtedly the state may declare such liquors contraband for failure to comply with state regulations after such articles are received by the importer in this state, for then interstate commerce control ends. Whether such state regulations are reasonable, as applied after the liquor ceases to be an article in interstate commerce, is a question not appertaining to the commercial power, but to the police power,—if, indeed, any legislation not void on constitutional grounds can in this state be declared void merely on the ground of unreasonableness. We are not called upon in this case to say whether the dispensary law should be read so as to give the importer for personal use a reasonable time after receipt of the imported liquor in which to comply with state regulations, so as to prevent such article from being regarded as contraband, in view of the provision that "persons having liquor which they wish to keep for their own use may throw the protection of the law around the same by furnishing an inventory of the quantity and kinds to the state commissioner and applying for certificates to affix thereto." The defendants made no such defense, and, if they had, the question would be one, not under the commercial power of the United States, but under the police power of the state. Appellants stand or fall on the question whether section 37 of the dispensary law is void as applied to the admitted facts in this case, as against the interstate commerce clause of the United States constitution. As to this question, I have endeavored to show that such clause has no application in this case. Bona fide importers for personal use, as well as importing illicit traffickers under the guise of "personal use," must comply with state regulations, when they attach under its police power, or take the consequences. If these views are correct, the circuit court committed no reversible error in modifying defendants' requests to charge, and in his refusal to charge certain requests touching interstate commerce. Appellants admit that they were hauling and handling intoxicating liquors in the nighttime in this state without compliance with the regulation of the dispensary law, after the actual receipt by them of such liquors. Under these circumstances, such liquor was contraband.

McIVER, C. J. I cannot concur in the conclusion reached by Mr. Justice POPE, for the reason that such conclusion is, as it seems to me, in direct conflict with the decisions of

the supreme court of the United States in the cases which will be hereinafter cited. The precise question presented by these appeals (for it is conceded that both of the cases stated in the title are to be controlled by the same principle) is whether a citizen of South Carolina, residing herein, can lawfully bring into this state, for his own use, spirituous liquor which he has bought in another state. This question has been conclusively determined in the affirmative by the case of *Scott v. Donald*, 165 U. S. 53, 17 Sup. Ct. 265; and the same principle there decided has been recently reaffirmed in *Vance v. W. A. Vandercook Co.*, reported in 170 U. S. 438, 18 Sup. Ct. 674. In the case first cited the action was brought against a state constable to recover damages for seizing and carrying away certain packages containing spirituous liquors belonging to the plaintiff, which he had imported from other states, while such packages were in the hands of the common carrier through whose agency the packages had been brought into this state. The plaintiff recovered judgment below, and the case was carried by writ of error to the supreme court of the United States, where the judgment was affirmed. Mr. Justice Shiras, in delivering the opinion of the court (concurring in by all the other justices except one), after determining that the dispensary law of this state was not an inspection law, and is not within the scope of the act of congress of the 8th of August, 1890, commonly called the "Wilson Bill," and after holding that the dispensary law recognized the manufacture, sale, and use of spirituous liquors as lawful, announced the holding of the court, in these words: "It is sufficient for the present cases to hold, as we do, that when a state recognizes the manufacture, sale, and use of intoxicating liquors as lawful, it cannot discriminate against the bringing of such articles in, and importing them from, other states; that such legislation is void, as a hindrance to interstate commerce, and an unjust preference of the products of the other states." It is true that the case of *Scott v. Donald* arose under the dispensary law approved the 2d of January, 1895, while the case now under consideration arose under the dispensary law approved the 8th of March, 1896; but the two acts, so far as the questions which arise in the present case are concerned, are identically the same, and hence the construction placed upon the provisions of the act of January, 1895, by the supreme court of the United States must be regarded as the proper construction of similar provisions in the act of March, 1896. Indeed, we do not understand that it is claimed, in the opinion of Mr. Justice POPE, that the act of 1896 must receive a different construction from that placed upon the act of 1895, by the supreme court in the case of *Scott v. Donald*, so far as the present case is concerned,—perhaps for the reason above indicated. But (what is absolutely conclusive)

we find that in the case of *Vance v. Vandercook*, supra, which arose, not only after the passage of the act of 1896, but after the passage of the act of 1897 (22 St. at Large, p. 535) amendatory thereof, the supreme court of the United States distinctly reaffirms the ruling in *Scott v. Donald*, that a resident of this state may lawfully import from another state spirituous liquor for his own use, and goes on to declare that this right arises from the constitution of the United States, and cannot be prohibited or materially interfered with, or in any way hampered, by any state law; and the court proceeds to hold that the provisions of the act of 1897 designed to provide for the inspection of liquor imported by a resident for his own use (which, however, have no application to the present case), doubtless enacted to avoid the effect of the decision in *Scott v. Donald*, cannot so operate, as those provisions do not impart to the act of 1897 the features of a valid inspection law, and then concludes the discussion of this branch of the case in these words: "Conceding, without deciding, the power of the state, where it has placed the control of the sale of all liquor within the state in charge of its own officers, to provide for an inspection of liquors shipped into a state by residents of other states for use by residents within the state, it is clear that such a law, to be valid, must not substantially hamper or burden the constitutional right on the one hand to make, and on the other to receive, such shipment." It is very obvious that the case of *Vance v. W. A. Vandercook Co.* draws a marked distinction between the power of a state to prohibit the importation of liquor for sale, and the power to prohibit the importation of that article for personal use. Under that authority a state may prohibit the importation of liquor for sale, even in original packages, by virtue of the provisions of the act of congress of the 8th of August, 1890, commonly called the "Wilson Bill," but it cannot prohibit the importation of spirituous liquors by a resident of this state for his own personal use. This, being the decision of a tribunal which is confessedly the final arbiter in all questions involving the construction of the constitution and laws of the United States, must be accepted by all other tribunals and all citizens as the settled law of the land, whether conformable to our own views or not.

Applying these principles to the case in hand, the inevitable result is a reversal of the judgment below. The undisputed evidence is that these defendants, who are residents of the state of South Carolina, had gone over into the adjoining state of North Carolina, and there purchased the liquor in question for their own use, and were transporting the same, in their buggies, to their homes, in South Carolina. While on their way, during the nighttime, they were arrested by a state constable and his posse at some point in South Carolina, their liquor and teams seized,

and they placed in jail. At the next succeeding term of the court of general sessions they were indicted for a violation of section 37 of the dispensary act of 1896, under the charge that they "did unlawfully handle and haul contraband liquors in the nighttime," contrary to the provisions of said act. The case came on for trial before his honor, Judge Benet, and a jury. Under his charge the jury found the defendants guilty, and from the judgments rendered they have appealed, upon the several grounds set out in the opinion of Mr. Justice POPE, in which various errors are imputed to the circuit judge in his charge, as well as in his refusals to charge certain requests. I do not propose to consider these grounds seriatim, but rather to confine myself to what I consider the controlling questions in the case.

In the first place I would remark that I do not suppose that any question can be or will be made, based upon the fact that these defendants were not bringing this liquor into the state by the use of the agencies usually employed for that purpose, such as railroads, etc., but were bringing it into the state in their own private vehicles. Indeed, no such point has been presented by Mr. Justice POPE, and in fact Judge Benet expressly instructed the jury that this fact made no difference, using this language: "Interstate commerce may be carried on in this country on foot, or by wagon or by caravan, as well as by railroads or steamboat or canal or river, or in any other of the more modern and improved forms of transportation." It is suggested, however, that this case differs from the cases decided by the supreme court of the United States, in this respect: That in all of those cases the liquors were seized before delivery to the consignee by the common carrier through whose agency the liquors ordered for personal use from another state were brought into this state, whereas in the case now under consideration the liquors, bought by the defendants in the state of North Carolina for their own use, were brought into this state by the owners of such liquors, in their own private vehicles, and not by the agency of a common carrier, and therefore when these parties crossed the state line the liquors were in the hands of the owners,—had reached the possession of the consignees, so to speak,—and when these parties were arrested they were engaged in transporting the liquors to their homes, in this state. But what difference this can make I am at a loss to conceive. If a resident of this state has a right, under the interstate commerce clause, to import into this state, through the agency of a common carrier, spirituous liquors for his own use, it is impossible for me to conceive why he may not bring liquors which he has purchased in North Carolina for his own use into this state in his own private vehicle. To hold otherwise would involve the absurdity of holding that a person may lawfully do by an agent what he cannot do himself. This, as I under-

stand it, was the view which Mr. Justice POPE seemed inclined to take; but he bases the conclusion which he reaches upon the ground that the liquor in question was "contraband," and, as section 37 of the dispensary act of 1896 makes it a penal offense to handle "contraband liquor in the nighttime," the parties could be convicted for a violation of that section of the statute. It is quite true that there are several sections in the act just referred to declaring that any spirituous liquors not obtained from the dispensary authorities are contraband liquors. But the very meaning of the term "contraband" shows that no article can be so characterized, unless it is an article the importation or exportation of which is prohibited by law. Now, if, as we have seen, the interstate commerce clause of the constitution of the United States secures to a resident of this state the right to import from another state spirituous liquor for his own use, it follows necessarily that such liquor cannot be regarded as contraband, and the statute of any state which undertakes to declare such liquor contraband must be held void, because in conflict with the constitution of the United States. A right conferred upon the citizen by the constitution of the United States cannot be denied or destroyed by any state legislation. If spirituous liquor be a legitimate article of commerce, as it is declared to be in the case of *In re Rahrer*, 140 U. S., at page 556, 11 Sup. Ct. 865, and if, as we have seen from the cases above cited, a resident of this state has a right, secured to him by the constitution of the United States, to import spirituous liquor into this state for his own use, then it follows necessarily that a state statute which declares such liquor "contraband," and makes it a penal offense to handle such liquor in the nighttime, not only materially interferes with and hampers the right secured to the citizen by the constitution of the United States, but absolutely destroys such right, and cannot, therefore, be sustained as a legitimate exercise of legislative power. The analogy suggested by Mr. Justice POPE, drawn from the provisions of section 280 of the Criminal Statutes, which make it a penal offense for any person to traffic in seed cotton in the nighttime, does not hold good, for the reason that such statute does not purport to interfere with any right derived from the interstate commerce clause of the constitution of the United States, while the object and purpose of the dispensary law are to deprive the residents of this state of such right, and for the further reason that the seed-cotton act makes no discrimination between seed cotton raised in this state and that which may be obtained from another state, while the dispensary law does discriminate between liquors obtained from another state and those obtained from the dispensary; making the handling of the former in the nighttime a penal offense, while the handling of the other in the nighttime is not forbidden.

It may be said, however, that under the pro-

visions of the act of congress of the 8th of August, 1890, commonly called the "Wilson Bill," the legislature is permitted to enact any legislation, in the exercise of its police powers, that it may deem necessary or proper, in regard to spirituous liquors imported into one state from another state, after such liquor has reached the hands of the owner or consignee. Such a view would completely emasculate the interstate commerce clause of the constitution of the United States, and would effectually destroy the right thereby secured to the citizen. Under that view, a resident of this state who ordered spirituous liquors shipped to him by rail from California, North Carolina, or any other state, for his own use, would be liable, as soon as he received the liquor from the railroad depot and placed it in his wagon for transportation to his home, not only to have his liquor, but his wagon and team, seized and confiscated; and, if night should overtake him while hauling the liquor to his own home, he would further be liable to indictment for violating section 37 of the dispensary law. Indeed, if he should succeed in reaching his home unmolested, and should undertake to remove such liquor in the nighttime from one apartment in his dwelling house to another, he would be liable to an indictment for handling contraband liquor in the nighttime. It is very manifest, if this view should be adopted, that the right secured to the citizen by the constitution of the United States would be as effectually denied and destroyed as if a state should pass a statute forbidding, in the most explicit and positive terms, a resident of this state from importing into this state from another state spirituous liquor for his own use; for no person would venture to import liquor from abroad, if he knew that he was liable to lose such liquor as soon as it was brought within the limits of the state, and to be subjected to indictment and punishment if he happened to be overtaken by night in hauling such liquor from the railroad depot to his own home. As is held in *Vance v. W. A. Vandercook Co.*, supra, any state law containing provisions which "are so onerous and burdensome in their nature as to substantially impair the right" thus derived from the constitution of the United States, or which "so hamper and restrict the exercise of the right as to materially interfere with, or in effect prevent, its enjoyment," are void, so far as such provisions are concerned; for, as is further said in the same case in speaking of what are claimed to be the inspection features of the dispensary law, "it is clear that such a law, to be valid, must not substantially hamper or burden the constitutional right on the one hand to make, and on the other to receive, such shipment."

There are other errors pointed out by the exceptions which would be sufficient to call for the reversal of the judgments appealed from,—for example, exception 9, which is fully sustained by the case of *Vance v. W. A. Vandercook Co.*, supra, and exception 11,

31 S.E.—24

which imputes error in refusing to charge defendants' seventh request, which is nothing but a quotation from the opinion of the court in *Scott v. Donald*, at page 101, 165 U. S., and page 272, 17 Sup. Ct., laying down the rule applicable to that case, in which the court was called upon to construe and apply the dispensary law; and hence there was clearly error in refusing that request because not applicable to the dispensary law. There are other exceptions worthy of consideration, but what I have said sufficiently indicates the grounds of my dissent, and I do not deem it necessary to extend this opinion by considering all of the exceptions. I am of opinion, therefore, that the judgment of the circuit court should be reversed.

GARY, A. J., concurring.

(123 N. C. 79)

WILLCOX et al. v. CHERRY et al.
(Supreme Court of North Carolina. Oct. 25, 1898.)

CONDITIONAL SALES—LEASES.

Parties agreed to hire certain personal property for six months, and to use it with care and keep it in good order. They were to pay a certain sum as "rent," but had the privilege of purchasing it within the term, and the rent was to be deducted from the price; the rent and the price, however, being the same. The "renting" was to be terminated by the lessor at any time if the rent was not paid as agreed. Held a conditional sale, and not a lease.

Appeal from superior court, Halifax county; Norwood, Judge.

Action by Willcox Bros. and others against Cherry & Swindell and others. There was a judgment, from which the Smith-Courtney Company appeals. Affirmed.

Thos. N. Hill and MacRae & Day, for appellants. Gilliam & Gilliam, for Cherry & Swindell. R. O. Burton and E. L. Travis, for appellees.

DOUGLAS, J. In 1892, Fenner Bros. obtained from the Smith-Courtney Company two lots of machinery, and subsequently executed two paper writings, the essential parts of which are as follows: "This certifies that J. H. Fenner and D. C. Fenner, doing business under the name of Fenner Bros., * * * have received of Smith-Courtney Company * * * the following articles of personal property, to wit, * * * which we are at liberty to use with care, keeping the same in good order. We have agreed to hire the said above personal property for the term of six months from this date, and to pay for the same the sum of six hundred and thirty-four and $\frac{64}{100}$ dollars, as rent therefor, in the following manner: * * *. It is also further understood that we may, at any time within the time above specified, purchase the said personal property by paying therefor the sum of six hundred and thirty-four dollars and

ninety-four cents as the price thereof, and, if we do so purchase and pay for the same, then, and in that case only, the rent therefor paid shall be deducted from the price thereof. Said renting may be terminated at the option of said Smith-Courtney Company, or their agents, at any time, if the rent is not paid as above agreed and at the time above specified." The second paper is similar to the first, except as to its date, the description of the machinery, and the amount of rent. In both papers the amount of rent for six months' use is exactly equal to the purchase price. Neither of them was registered. Thereafter, in December, 1892, Fenner Bros. gave to Willcox Bros. their note for \$5,000, and to secure the same executed to E. L. Travis, trustee, a deed conveying the machinery now in question. In May, 1895, the defendants Cherry & Swindell purchased the property from Fenner Bros. at the price of \$2,500, Willcox Bros. and the trustee joining in the bill of sale. They simultaneously executed to Travis, as trustee for Willcox Bros., a new deed of trust, conveying the same property to secure the unpaid balance of the purchase money. Of that balance there is now due the principal sum of \$514.50, to recover which this action was brought. The court below held that the two contracts in question executed by Fenner Bros. to Smith-Courtney Company were conditional sales, and were intended as security for the purchase price of the property described in them, and gave judgment accordingly. The Smith-Courtney Company appealed from this ruling, thus directly presenting to us the only point in the case.

We think that this case is directly governed by that of *Manufacturing Co. v. Gray*, 121 N. C. 168, 28 S. E. 257, the opinion in which met, and still meets, our unqualified approval. We are satisfied, from a bare inspection of the paper itself, that it was intended to be a conditional sale, and was put in the form of a lease to avoid the registration laws, or possibly to work an unjust forfeiture, neither of which can meet our approval. Both are frauds in law. The registration laws are intended to prevent fraud by giving notice to the world of the exact conditions upon which property is held, so that it may not be used as a basis of fictitious credit or fraudulently conveyed to innocent purchasers. Based upon the highest principles of public policy, they should be beneficially construed, and any mere evasion of their essential provisions must be deemed a fraud in law. We have carefully considered the case of *Foreman v. Drake*, 98 N. C. 311, 3 S. E. 842, and in so far as it conflicts with this opinion it is hereby overruled. In that case the true nature of the transaction was evidently not understood by the court, as is evident from the following passage in the opinion: "By the terms of the agreement, the feme defendant had the right at any time during the term of hiring to purchase the property for a price

substantially the sum of money agreed to be paid as compensation for the use of the property. This seems to be a singular stipulation, and suggests a want of good faith in some way, but of itself it cannot change the nature and defeat the purpose of the contract. There may be some reason for it that we do not see. It is not suggested, nor does it appear, that the whole transaction was a sham and a fraud." In the case at bar, that it is a "sham" is shown by the evidence and found by the referee and the court below. Fenner, one of the contracting parties, testifies that it was intended as a sale, while Smith, practically the other contracting party, testifies to facts that make it a sale. A "contract," from "contrahere, contractum," is a bringing together or meeting of two minds to a common intent, of which the written instrument is the legal evidence. In this case the common intent was evidently a sale of the machinery in such a way as to secure the purchase money. This seems evident to us from the face of the instrument itself, even if we exclude all testimony. We cannot imagine that a business man of common sense would rent property upon exactly the same terms upon which he could buy it, and we do not find any rule of interpretation which requires us to place upon a contract a construction which would indicate that at least one of the contracting parties was mentally incapable of contracting. In *Greer v. Church*, 13 Bush, 430, 433, where the facts were similar to those in this case, the court says: "If, however, the writing upon its face shows that the transaction was a sale, and not a renting, it is immaterial what name the parties choose to give it. The sum of \$400 for one month's rent of an instrument valued by both parties at \$550 is preposterous. * * * There can be no room to doubt that the real transaction was intended to be and was a sale, and that the device of calling it a renting was resorted to in order to secure the payment of the \$150 of purchase money not paid in hand." In *Hervey v. Locomotive Works*, 93 U. S. 664, 672, the court says: "Nor is the transaction changed by the agreement assuming the form of a lease. In determining the real character of a contract, courts will always look to its purpose rather than to the name given to it by the parties. If that purpose be to give a vendor a lien on the property until payment in full of the purchase money, it is liable to be defeated by creditors of the purchaser who is in possession of it." For this position there is abundance of authorities. *Puffer v. Lucas*, 112 N. C. 377, 17 S. E. 174; *Clark v. Hill*, 117 N. C. 11, 23 S. E. 91; *Barrington v. Skinner*, 117 N. C. 47, 23 S. E. 90; *Manufacturing Co. v. Gray*, supra; 6 Am. & Eng. Enc. Law (2d Ed.) 447. We do not wish to be understood as saying that parties, acting in entire good faith, cannot make a valid contract of lease with the option of purchase. Such a case is not now before us. The judgment is affirmed.

(123 N. C. 90)

HOWARD v. CENTRAL WAREHOUSE CO. et al.

(Supreme Court of North Carolina. Oct. 25, 1898.)

CORPORATIONS—CONFESSION OF JUDGMENT—INSOLVENCY.

A confession of judgment by an insolvent corporation to one creditor is not void as to another because the president, who is surety on the debt confessed, buys in the property at sheriff's sale, and also the unsatisfied part of the judgment, no fraud being claimed.

Appeal from superior court, Edgecombe county; Brown, Judge.

Action by George Howard against the Central Warehouse Company and others. There was a judgment for plaintiff, and defendants appeal. Reversed.

John L. Bridgers, for appellants. W. O. Howard, for appellee.

FAIRCLOTH, C. J. We have this case: The defendant warehouse company was indebted to the plaintiff and also to the Pamlico Insurance & Banking Company by notes, with defendant Shackelford as surety. The warehouse company, being insolvent, confessed judgment to the banking company, Shackelford not being a party. The property of the warehouse company was sold by the sheriff, and Shackelford became the purchaser. The judgment of the banking company was assigned to one Davis, and after the sale the unsatisfied part of the judgment was assigned to the defendant Shackelford. It is admitted that each debt was a bona fide debt, and that there was no actual fraud in any of these transactions, and that the defendant Shackelford was president and a director of the warehouse company. The plaintiff insists that the confessed judgment in effect discharged the surety on the note, and that it is void, on the authority of *Hill v. Lumber Co.*, 113 N. C. 173, 18 S. E. 107. There the judgment confessed by an insolvent corporation was in favor of one of its directors, and it was held to be invalid against other creditors because of the confidential relation between the director and the company, by reason of which he had peculiar knowledge of the affairs and insolvency of the company, thereby putting the creditors on unequal ground. The question is elaborately considered in the case above cited, and need not be repeated. The plaintiff fails to bring himself within the principle of that case. In the absence of fraud, why may not an insolvent debtor pay one of his creditors in full? Why may not a creditor of an insolvent debtor pursue his remedy and gain advantage by his judgment? It only works out the principle of the diligent creditor. *Blalock v. Manufacturing Co.*, 110 N. C. 99, 14 S. E. 501. Here the judgment was in favor of a creditor, not one of the officials of the company. The discharge of the defendant as a surety is the result of payment of the debt by his

principal, not by any participation of the surety as such, and we are unable to see any ground for holding that the judgment complained of is void, or how the plaintiff acquired any legal or equitable right against the surety. *Electric Light Co. v. Henderson Electric & Gaslight Co.*, 116 N. C. 112, 21 S. E. 951; *Langston v. Improvement Co.*, 120 N. C. 132, 26 S. E. 644. Error.

(123 N. C. 136)

ROBINSON v. ROBINSON.

(Supreme Court of North Carolina. Oct. 25, 1898.)

DIVORCE—INJUNCTION—WIFE'S SEPARATE ESTATE.

Since a husband has no control over, or right to interfere with, the wife's separate estate, except the right of ingress, egress, and regress to it, when she is in actual possession, he will be restrained, pending a divorce suit, from interference therewith, and from receiving the rents therefrom.

Appeal from superior court, Wake county; Bryan, Judge.

Action by Laura D. Robinson against B. J. Robinson. From an interlocutory judgment in favor of defendant, plaintiff appeals. Reversed.

Douglass & Sims, for appellant. S. G. Ryan and Armistead Jones, for appellee.

FAIRCLOTH, C. J. The plaintiff institutes this action for divorce from bed and board, and, before filing her complaint, she files affidavits, and asks the court for an injunction restraining her husband from interfering with her separate property, or from renting or collecting the rents for the same, and for alimony pendente lite. The unanswered affidavits of the plaintiff, after setting out the reasons and causes for leaving her husband's house and separating from him recently before this action began, also alleged that the plaintiff is the owner in fee of a certain house and lot in the city of Raleigh, and that the defendant exercises control over said house and lot without her permission, and has rented out the same to a tenant now in possession, collecting and appropriating the rent to his own use, and refusing to pay over to or allow the plaintiff any part of said rent. The affidavits also allege that the defendant has possession of certain personal property belonging to the plaintiff, refusing to allow her the possession or the use of the same. We will not pass upon the motion for alimony pendente lite, as the pleadings, when filed, and the trial, may or may not show that she is entitled to it. We think his honor should have made an order restraining the defendant from interfering with the plaintiff's property. The wife's property is her separate estate, and the husband has no control over or right to interfere with it, except the right of ingress, egress, and regress to it, when she is in actual possession of her real estate. *Manning v. Manning*, 79 N. C. 293; *Cecil v. Smith*, 81 N. C. 285. And the wife

is entitled to recover her separate property, and also the income derived therefrom. *Manning v. Manning*, supra. We are at liberty to enter here (Code, § 957) such judgment as should have been entered in the superior court. And it is now ordered by this court that the defendant, B. J. Robinson, is restrained and forbidden to exercise any control over or interfere with the house and lot of the plaintiff, described in her affidavits, or to receive the rents or income therefrom, until the hearing and the further order of the superior court. In the meantime this action will proceed in the superior court according to the course and practice of that court. It is further ordered that the clerk of this court issue a copy of this judgment, directed to the sheriff of Wake county, commanding him to deliver a copy of this order to the defendant, B. J. Robinson, and to make due return of his action in this matter to the superior court. The judgment of his honor was erroneous, to the extent above indicated. Judgment reversed, and order issued.

(123 N. C. 45)

BATTS v. STATON.

(Supreme Court of North Carolina. Oct. 25, 1898.)

PARTITION—BOUNDARIES—PAROL EVIDENCE—ADVERSE POSSESSION—DECLARATIONS OF DECEASED GRANTOR.

1. The description in a decree in partition proceedings of a boundary line cannot be set aside by parol evidence of a contemporaneous or subsequent agreement between the adjoining landowners changing the boundary lines.

2. On an issue as to whether defendant had acquired title to a strip of land by adverse possession, it was error to permit a witness for plaintiff to testify that the deceased father of plaintiff had told witness that he (father) had not objected to the strip of land being included in defendant's adjoining property because he (father) had been in possession of both sides of the disputed lines for many years by reason of his being the administrator of defendant's grantor, since the effect of the evidence would be to aid plaintiff by the declarations of his deceased grantor.

Appeal from superior court, Edgecombe county; Timberlake, Judge.

Action by D. B. Batts against H. L. Staton to recover a strip of land between their lands. From a judgment for plaintiff, defendant appeals. Reversed.

H. G. Connor, for appellant. Gilliam & Gilliam, for appellee.

MONTGOMERY, J. Partition, by decree of the superior court of Edgecombe, was made of a tract of land in that county in 1870 among the devisees of Benjamin Batts. The shares of Isaac and D. B. Batts were co-terminous, and the line between them was described in the survey made at the time of partition as running from a bunch of birches near Bryan's old mill, S., 70½ W., to an oak on the road; being represented on the map used in the trial by the line running from A

to B. The plaintiff, who is the son of D. B. Batts, is the owner of (two-thirds undivided interest) the share allotted to his deceased father, and the defendant is the owner of the share which was allotted to Isaac by purchase from the son and only heir at law of Isaac. The defendant is in possession, also, of a part of the share allotted to the plaintiff's father, lying just along and south of the line, A, B, and between the lines represented by A, D, and E on the map. This action was brought to recover the possession of that piece of land lying between A, D, and E. The defendant, in his answer, admits that the commissioners, in their report in the partition proceedings, fixed the line between the two shares as the plaintiff has alleged in his complaint; but he avers that at the time of the filing of the report, in 1870, Isaac and D. B. Batts made an agreed line which changed the line set out in the survey, by which Isaac, under whom the defendant claims, obtained the land represented by the letters A, D, and E, that each took possession of his share under the changed line, and that adverse possession has been had of the same by the defendant and those under whom he claims since that time, up to the commencement of this action,—a period of about 25 years. The defendant introduced several witnesses who testified on the matter of the changing of the line between Isaac and D. B. Batts, all of whom testified, however, that the agreement was made after the partition was completed. Henry Batts said that: "Doctor D. B. Batts and his brother had some difference about the dividing line fixed by the division, but after a while they came upon an arrangement so as to give Isaac a way over the creek." Frank Batts testified that: "Some time after the division was made, Dr. Batts told me to catch my horse and get some sticks. He wanted me to run the furrow from the white oak to the gum bush on the path. Isaac was there. I ran to the gum bush, where it strikes the path. The fence was run on the furrow. The fence went down after the stock law was passed. The ditch on Dr. Batts' side goes to the line and stops. Dr. Batts had the ditch cut. I was there from the time the land was divided until two years ago. The hedgerow was always recognized as the line by Dr. Batts and his brother after their agreement." G. L. Lilly testified that: "I was on the land when it was divided. After that, Dr. Batts and his brother made an agreed line between them, which began at the white oak on the road, and ran with the fence until it struck the path, and then with the path until it struck the creek. Dr. Batts told me the change was made to give his brother an outlet to the creek. This line was made the year after the division. It was recognized as a line for the ten or eleven years I remained there."

His honor refused to give at the defendant's request an instruction which was in the following words: "If the jury find that D. B.

Batts and Isaac Batts made an agreement as to the location of the dividing line between their land in 1870, and made an agreed line, and placed a fence upon said agreed line, and so recognized the line during their joint lives, and during the life of the survivor, D. B. Batts, till his death, in 1885, and said land was recognized by their heirs and assigns until 1896, the plaintiff, the heir of D. B. Batts, is estopped from disturbing the line which was established by his father, D. B. Batts." There was no error in his honor's refusal to give this instruction. By all the evidence bearing on that question, it appeared, as we have said, that the changed line was made after the survey and partition. But, if the change had been made contemporaneously with the survey and running of the line in the partition proceedings, the plaintiff would not be estopped from setting up the original line. In no case will the description contained in a deed be set aside by parol evidence, except where the deed describes the land by distance and course only, and old marks are made to appear, corresponding in age with the time of the execution of the deed, so nearly within the courses and distances that they may reasonably be supposed to have been made for the boundaries. *Read v. Shenck*, 13 N. C. 415; *Caraway v. Chancy*, 51 N. C. 361; *Davidson v. Arledge*, 88 N. C. 326; *Shaffer v. Hahn*, 111 N. C. 1, 15 S. E. 1033. In the first cited case the court said: "And for many years we have in all cases, I believe, except one, adhered to the description contained in the deed; and it is much to be lamented that we do not altogether. The case to which I allude is: Where the deed describes the land by course and distance only, and old marks are found, corresponding in age, as well as can be ascertained, with the date of the deed, and so nearly corresponding with the courses and distances that they may well be supposed to have been made for its boundaries, the marks shall be taken as the termini of the land. This is going as far as prudence permits; for what passes the land not included by the description in the deed, but included by the marked termini? Not the deed, for the description contained in the deed does not comprehend it. It passes, therefore, either by parol or by a mere presumption. As far as we know, there has been no series of decisions by which the description in the deed is varied by marks, unless they were made for the termini of the land described in the deed, or supposed to be so made, and to which it was intended the deed should refer, or to which it was supposed the deed did refer, or rather supposed that the courses and distances corresponded with the marks, and that the same land was described, whether by course and distance in the deed, or by the marked termini."

But the defendant set up as a second defense that his claim, followed by 20 years' adverse possession on the part of himself and those under whom he claims, had ripened into a title in fee to the land. On that matter, J.

M. Howell, a witness for the plaintiff, was permitted to testify, over the objection of the defendant, that: "Shortly before his death, Dr. Batts said to me that he had entered into possession of his brother's [Isaac's] land soon after his death, as administrator, and had so held possession for many years, and that thus being in possession of both sides of the disputed lines was the reason he had never taken the trouble to straighten the line." This witness had already testified that Isaac died in 1872, and that Dr. Batts took possession of his land as administrator, and so continued in possession until his death, in 1885. That part of the testimony of Howell which referred to the declarations of Dr. Batts as to not straightening the line, and his reason for not doing so, ought not to have been received. It carried with it the weight of Dr. Batts as a witness testifying to the fact that he had only given permission to his brother to use the line agreed upon as a matter of favor, reserving the right of property in himself. This is apparent, and its importance is emphasized in the fact that in his charge his honor said to the jury that one of the plaintiff's contentions was that the location of the line by consent was made by Dr. Batts simply for the convenience of his brother, and not in any sense to affect the established line. The effect of Howell's testimony in this vital point was to bring to the aid of the plaintiff the declaration of his deceased father, and that testimony must have had weight with the jury.

The defendant introduced no evidence on the defense set up in his amended answer, and it is needless to notice that part of the case. For the error in receiving the evidence of Howell in the respect pointed out in this opinion, there must be a new trial.

(123 N. C. 162)

STATE ex rel. GOODWIN v. CARALEIGH
PHOSPHATE & FERTILIZER
WORKS.

(Supreme Court of North Carolina. Oct. 25,
1898.)

PLEADING—AMENDMENT—DISCRETION OF COURT—
APPEALABLE ORDERS—CHANGING
CAUSE OF ACTION.

1. The discretion of the court in the amendment of pleading is subject to the exception that the amendment must not set up a different cause of action, nor change the subject of the action, nor deprive defendant of defenses he would have had to a new action.

2. Where it is claimed that the effect of the allowance of an amendment to pleading is to change the cause of action, the remedy is not an immediate appeal, but to note an exception and appeal from the final judgment, if it is adverse.

3. It is no ground for exception to the amendment of a complaint that it would set up a cause of action barred by limitations, as that would be matter of defense, which defendant, if he chooses, may set up in his answer thereto.

Appeal from superior court, Wake county; Timberlake, Judge.

Action by the state, on relation of W. H. J. Goodwin, against the Caraleigh Phosphate

& Fertilizer Works. From a judgment for plaintiff, defendant appeals. Appeal dismissed.

Edward C. Smith, for appellant. Douglass & Sims, for appellee.

CLARK, J. It was held in this case (121 N. C. 91, 28 S. E. 192) that the allowance or refusal of a motion to amend pleadings is a matter within the discretion of the presiding judge, and no appeal lies. But this is subject to the exception that the amendment of the complaint does not assert "a cause of action wholly different from that set out in the original complaint, does not change the subject of the action, nor deprive the defendant of defenses he would have had to a new action." *Parker v. Harden*, 122 N. C. 111, 28 S. E. 962, quoting *King v. Dudley*, 113 N. C. 167, 18 S. E. 110, and cases cited in *Clark's Code* (2d Ed.) pp. 223, 224. Even when it is claimed that it has that effect, the remedy is not an immediate appeal, but to note an exception and appeal from the final judgment if it is adverse; so, in any aspect, this appeal would be dismissed. In *Gillam v. Insurance Co.*, 121 N. C. 369, 28 S. E. 470, the court approved a refusal of leave to amend the complaint in that case, for the above reasons; but the granting permission to amend is not ground for exception that the complaint would set up a cause of action that is barred by the statute of limitations, as that is matter of defense to be set up in the answer to the amended complaint, if the defendant shall choose to plead that defense. In *Sams v. Price*, 121 N. C. 392, 28 S. E. 486, it is held: "Where the cause of action is changed by an amended complaint, the defendant has a right to set up in the answer thereto any legal defense, including the statute of limitations, just as if the action had been commenced at the date of the amended complaint." So, the court was within its discretion in allowing the amendment; and the defendant can neither appeal at this stage, nor has he suffered any damage that entitled him to note an exception. If so advised, it is open to him to plead the statute of limitations as if the action was commenced at the date of the amended complaint; and the plaintiff will consider then whether he will prosecute the action further, if that defense is sustained by the trial judge. It would insufferably increase the length and expense of litigation if appeals can be taken from such rulings as this in anticipation of the probable effect of the ruling. It may be, the defendant may not set up the statute of limitations, or, should it be sustained when set up, the plaintiff may not appeal. In either event this appeal will have been unnecessary, and, at all events, is nothing more than an inquiry speered at the court as to the effect of the amendment (*Ely v. Early*, 94 N. C. 1; *Kron v. Smith*, 96 N. C. 390, 2 S. E. 532), and which can be presented on appeal from the final judgment if adverse to

the defendant, and in no wise calls in question the power of the court to allow the amendment. Appeal dismissed.

(123 N. C. 74)

WILCOX v. LEACH.

(Supreme Court of North Carolina. Oct. 25, 1898.)

TAX SALES—RIGHTS OF PURCHASERS—ASSIGNEES.

1. In an action to recover possession of land upon title based on a tax deed, although the grantee in the deed, where no attempt is made to rebut the presumption, is, under Laws 1895, c. 119, § 66, deemed conclusively to be the purchaser at the sale or his assignee, he may be shown to be the assignee of the purchaser, although the deed does not set forth the assignment.

2. Where a county purchased land at a tax sale, under Laws 1895, c. 119, § 90, it only acquired a right to foreclose the certificate of sale by proceedings similar to the foreclosure of a mortgage, and it acquired no fee-simple interest therein until the land was purchased by it at the foreclosure sale.

3. The assignee of a tax certificate of sale issued to a county acquired no greater interest therein than the county had, and could only acquire a fee-simple title by foreclosure of the certificate, as provided by Laws 1895, c. 119, § 90.

Appeal from superior court, Halifax county; Norwood, Judge.

Action by Willis W. Wilcox against M. T. Leach for the possession of land. From a judgment for plaintiff, defendant appeals. Reversed.

Thos. N. Hill and W. A. Dunn, for appellant. R. O. Burton and E. L. Travis, for appellee.

MONTGOMERY, J. This case differs in one material respect from the other cases which have been before this court involving the title to land sold for taxes since the act of 1887 and those subsequent on that subject. In his complaint the plaintiff simply makes the general allegation that he is the owner of the land, and entitled to its possession, without setting out specifically the sources of his title. The defendant, in his answer, sets up various defenses, legal and equitable, most, if not all, of which have been already frequently passed upon by this court adversely to the defendant, from *Sanders v. Earp*, 24 S. E. 8, to *Peebles v. Taylor*, 27 S. E. 999. The plaintiff in this action introduced the tax deed executed by the tax collector to the plaintiff, and also evidence going to show the alleged authority of the maker to execute it, and also evidence of the sale of the certificate, which the tax collector had issued to the county, to the plaintiff, by the county authorities. The defendant introduced evidence of a similar character. It is stated in the record that "the plaintiff in apt time objected to the admission of any evidence for the defendant, or the consideration of any defense set up by him, on the ground that he had not brought himself within the provisions of sec-

tion 66, c. 119, Laws 1895, in that he failed to show that all taxes due upon the land in controversy have been paid by him or those under whom he claims. The plaintiff did not waive any of the presumptions and conclusions arising from his tax deed, under chapter 119, Id., and other laws of this state, but claimed and asserted them in apt time." The court, after refusing to give each and all of the special instructions prayed by the defendant, told the jury that, upon the evidence, the plaintiff was entitled to recover, and to respond "Yes" to the issue, "Is the plaintiff the owner of the land described in the complaint?" That instruction was given, doubtless, because of the opinion of his honor that the defendant had not put himself in position, under section 66, c. 119, Acts 1895, to defeat the title of the plaintiff. The defendant had made no effort to rebut the presumptions of the law set out in section 66 of the revenue act, and that section made conclusive the following facts: "(1) That the manner in which the listing, assessment, levy and sale were conducted was in all respects as the law directed. (2) That the grantee named in the deed was the purchaser or his assignee. (3) That all the prerequisites of the law were complied with by all the officers who had or whose duty it was to have had any part or action in any transaction relating to or affecting the title conveyed or purporting to be conveyed by the deed, from the listing and the valuation of the property up to the execution of the deed, both inclusive, and that all things whatsoever required by law to make a good and valid sale and to vest the title in the purchaser were done, except in regard to the points named in this section wherein the deed shall be presumptive evidence only." But the plaintiff showed in his evidence, and so did likewise the defendant (which, we think, they both had a right to prove), that the plaintiff was the assignee of the county of the certificate executed by the tax collector to the county. While, as we have said, the grantee named in the tax deed is deemed conclusively to be the purchaser or his assignee, yet we think that, under the act, it clearly was permissible on the part of the plaintiff or defendant to show that the grantee was the assignee of the purchaser, although the deed did not set forth the assignment. So that, notwithstanding the defendant was, by the presumptions in section 66, because he did not attempt to rebut them, and by the conclusions in that section, prevented from trying to defeat the plaintiff's title, yet, as he showed that the plaintiff was the assignee of the county (the purchaser), it is clear that the right and the title of the plaintiff under the deed must be exactly the title and interest which the purchaser (the county of Halifax) had in the land under the tax collector's certificate of purchase. The assignee, the plaintiff, could have no greater interest or higher title in the land than his assignor,

the county of Halifax, had. This being so, it follows that the plaintiff could have only such interest and title against the defendant in and to the land as he made out in the trial.

What title and interest, then, did the county, the assignor of the plaintiff and the purchaser at the sale, have in the land? The answer is, only that of a mortgagee. Under section 90, c. 119, Acts 1895, the only right conferred upon the county in lands sold for taxes when purchased by the county is to foreclose the liens or certificates by proper proceedings in the courts "in all respects, as far as practicable, and in the same manner and with like effect as though the same were a mortgage executed by the owners of such real estate to the owner and holder of such certificates or liens for the amount therein expressed, together with such subsequent and prior taxes due thereon." A county, under such circumstances, can acquire no fee-simple interest in such lands until they are purchased by the county at the foreclosure sale, as is especially provided in section 90 of the last-mentioned act. And, to strengthen this position, if any support were needed, section 91 of the same revenue act gives to the assignee of a certificate of sale originally issued to a county the right to foreclose in the same manner and with like effect as in a case where such county commissioners may proceed to foreclose. It is clear from a careful reading of the statute of 1895 on this question that a county which is the purchaser of land sold for taxes must proceed to collect only by foreclosure, and that an assignee of the county must proceed in the same way only; while an individual purchaser or his assignee may proceed by foreclosure, or demand a fee-simple deed from the sheriff or tax collector, after the time of redemption has passed. Our conclusion, then, is, that the instruction of his honor was erroneous, and that he should, upon the whole evidence, have instructed the jury to respond to the issue, "No." Reversed.

(128 N. C. 128)

KORNEGAY v. MORRIS.

(Supreme Court of North Carolina. Oct. 25, 1898.)

SPECIFIC PERFORMANCE—NECESSARY PARTIES.

In an action by one who claimed title to property through a will to compel the specific performance of a contract for the purchase of such property, the widow of the testator, who has a possible interest in the property, is a necessary party.

On a petition to rehear. Case remanded. For former opinion, see 29 S. E. 875.

MONTGOMERY, J. The case is before us on a petition to rehear. The action was begun on the part of the plaintiff to compel the defendant to specifically perform his contract to purchase from the plaintiff a certain

piece of real estate in the city of Goldsboro. The defendant, in his answer, admitted his agreement to purchase, and said he was ready and willing to pay the price agreed on if he could be sure of getting a good title to the property, and he averred that the plaintiff had no such title. Whether or not the plaintiff had a title in fee absolute to the property depends upon the construction of certain clauses in the will of James F. Kornegay, deceased. The plaintiff insists that he took a title in fee upon the death of the testator (his father), and the defendant contends that the estate of the plaintiff is a fee defeasible upon his mother's survival of him. The argument on the rehearing has at least satisfied us that the rights of the widow, Frances E. Kornegay, are so vitally involved in this action as that it would be proper to have her made a party to the action. A decision in the case between the parties as now constituted would not conclude the rights of Mrs. Kornegay, and the question sought to be decided would not be settled thereby, and, if acted upon by others in the purchase of real estate devised to the plaintiff under the will of the testator (as it probably would be), might result in litigation between the purchasers and the widow, and thereby subject them to annoyance and costs, and loss of time, if nothing more. We therefore have determined, in order that the rights of all persons interested may be disposed of in one final judgment, to remand the case to the superior court of Wayne county, to the end that Frances E. Kornegay may be made a party defendant, with the right to answer. This course has been adopted before by this court in the case of *Finlayson v. Kirby*, 121 N. C. 106, 28 S. E. 135. Remanded for the purposes mentioned in this opinion.

(123 N. C. 713)

STATE v. BOOKER.

(Supreme Court of North Carolina. Oct. 25, 1898.)

HOMICIDE—INSTRUCTIONS—PREMEDITATED KILLING—EVIDENCE.

1. On a trial for murder the evidence showed that the prisoner went to the house of deceased, with whom he had some words, went away, and in an hour returned, with a gun, and killed deceased. The court, after reciting the evidence, instructed that, if the jury were satisfied beyond a reasonable doubt that the prisoner did the killing, they should return a verdict of murder in the first or second degree, as they should find the facts, charging the law as to murder in the second degree; that, before they could convict of murder in the first degree, they must be satisfied beyond a reasonable doubt that the killing was willful, deliberate, and premeditated; that it was not necessary that the design to kill must have existed for any length of time, but it must have existed before the killing; and that they were the judges of the weight of the testimony and the credibility of the witnesses. *Held* sufficient, within the requirements of Code, § 413, providing that the court shall state correctly the evidence, and declare and explain the law arising thereon.

2. It is not error to refuse instructions, even

if they are proper, where they are substantially embodied in the main charge.

3. Under Laws 1893, c. 85, § 1, making all murder perpetrated by any kind of willful, deliberate, and premeditated killing murder in the first degree, the state must prove deliberation and premeditation, but it may do so by circumstantial evidence.

4. Where it appeared, on a trial for murder in the first degree, that the prisoner had some words with deceased, went away, and came back in about an hour, with a gun, and killed the deceased, the jury were justified in inferring that the death of the deceased was the result of deliberation and premeditation of the prisoner.

5. Laws 1893, c. 85, § 1, provides that all murder perpetrated by means of poison, starvation, or torture, or by any kind of willful, deliberate, and premeditated killing, is murder in the first degree. *Held* that, on the trial for murder by shooting deceased with a gun, it was not error to refuse an instruction that, to convict of murder in the first degree, the prisoner must have used the same degree of deliberation and premeditation as would have been used if he had killed the deceased by starvation.

Appeal from superior court, Wake county; Timberlake, Judge.

James Booker was convicted of murder in the first degree, and he appeals. *Affirmed*.

Penny White testified for the state: "Deceased was my daughter. She died year before last. Her head was shot off. The prisoner came to my house that morning after pepper, and, after he went off, the deceased was sitting on the steps. In about an hour the prisoner came back. I heard deceased halloo. She said, 'My Lord, have mercy; look here! and fell over on her side. Prisoner shot her in the head. He had a gun in his hand, pointed at her, and shot off the back of her head. I have known him five years. He got black pepper, and went off, but came back again. The deceased came from the garden, and sat down on the doorstep. There was a barrel near by. When prisoner came first, he had no gun. About 10 o'clock he came back again, and I heard deceased say, 'My Lord, look here!' and I looked, and the prisoner came around with a gun, shot her, and she fell behind the barrel on her side. The gun was about 8 feet from her when he shot. Load went in the back of her head. She never spoke a word after that. [Witness shows part of a dress said to have been worn by deceased at the time of the shooting. The puff on one of the sleeves shows a hole, and red stains appear upon the lining of the garment.] Deceased had on this when she was shot. Prisoner said nothing after he shot her, but went back to Crabtree. Robert and Richard Blake came to me first. I told them Jim Booker shot her. I was in hearing distance, and heard my daughter say nothing to provoke the difficulty. There was no fight, as I saw, and I could have seen it if there had been one. I could have heard, too, if there had been any quarrelling." On cross-examination: "I was not as far away as it is from where I am sitting to the courthouse door. Deceased didn't go into the house from the time she got him the pepper

until she was killed, and carried in. I did not tell Mr. Walters that I had to scuffle with prisoner before he shot my daughter. When prisoner came back the second time he did not talk with deceased. She was behind the barrel, squatting, and he shot her behind the barrel. He did not shoot her with my gun. He carried the gun off with him." Robert White testified for the state: "I am 14 years old. Deceased was my mother, and was killed when I got there. I had been hunting with a single-barrel gun. We had two guns, and the double-barrel gun was there where I left it, and when I came back both barrels were loaded. My mother was behind the barrel, dead, when I came home. Grandmother told me Jim Booker had come there and killed my mother. She said nothing about a fuss between them." On cross-examination: "No scuffling there; no evidence of any there. I know our gun was loaded, because I shot both loads out the next week." Robert Blake testified for state: "I heard report of gun that morning, and some one screaming. I started towards home, and as I came to the corner of the fence I saw Robert White coming up the hill. Asked him what was the matter, and he said the prisoner had shot his mother. I went on, and saw the old lady, who said Jim Booker had killed her. I saw the deceased resting on her side, with her head shot off. I looked at the gun in the house, and found that it had not been shot. I saw nothing of prisoner. Old lady said he went off towards Crabtree." C. M. Walters, deputy sheriff, testified for state: "Went to this house at 11 in the morning. Found some people there. Found deceased behind the barrel. Back of her head was turned over on her face, and brains scattered, and pieces of skull blown about. Old Lady Penny said the deceased was sitting on the doorstep [as she stated on her examination], and that Booker shot her as she started up. She said the deceased started to run. Deceased was near the house, and behind the barrel. I saw no signs of scuffling, and there was no suggestion that any fight had taken place. Old lady said, as prisoner and deceased went off that morning before the shooting, that they were quarrelling. Prisoner could have gotten through the house from behind, and shot deceased, without being seen by the old lady. There were two ways by which he could have got there without being seen."

Prisoner's evidence: Blake recalled, and testified: "I found no shot about deceased." R. M. Haughton testified: "Found the deceased 7 or 8 feet from the barrel. Did not measure the distance. Old Lady Penny said she saw prisoner with a gun, and ran to meet him, and caught the gun, and said to him 'Jim, you are not going to shoot my child,' and that prisoner threw her away from him, and shot her daughter. Walters and others were present." On cross-examination: "She said, the first she knew, prisoner was going out of the house with the gun."

Redirect by the state: Walters, recalled: "I was there with Haughton, and did not hear anything about a fuss or scuffling, that he testified about." Pearce testified: "I was there with Haughton, and did not hear Penny say what Haughton testified about."

The foregoing is all the evidence introduced on the trial. The prisoner, in apt time, requested the court to charge the jury as follows: "(1) That malice must be shown by the state before prisoner can be convicted of murder in the first degree. (Refused, except as covered by general charge; prisoner excepted.) (2) That, to convict prisoner of murder in the first degree, the same degree of deliberation and premeditation must have been used by the prisoner as would have been used by him if he had killed deceased with poison. (Refused, except as covered by general charge; exception.) (3) That, to convict of murder in the first degree, the prisoner must have used the same degree of deliberation and premeditation as would have been used if he had killed deceased with starvation. (Refused as above, and prisoner excepted.) (4) To convict of murder in the first degree, the same degree of premeditation and deliberation must have been used by prisoner as he would have used if he had killed deceased with imprisonment. (Refused as above, and prisoner excepted.) (5) That, before prisoner can be convicted of murder in the first degree, the jury must be satisfied beyond a reasonable doubt that he used the same degree of deliberation and premeditation as he would have used if he had killed deceased by torture, starvation, poison, or imprisonment. (Refused as above, and prisoner excepted.) (6) That if jury believe that killing resulted from a fight between prisoner and deceased, which occurred immediately before the death of deceased, the prisoner is not guilty of murder in the first degree. (Refused as above, and exception by prisoner.) (7) That if jury should not be satisfied beyond a reasonable doubt that the death did not result from a fight, which occurred shortly before the killing, between prisoner and deceased, they should not find prisoner guilty of murder in the first degree. (Refused as above, and prisoner excepted.) (8) That if they should find that the death occurred from a fight which was entered into by prisoner, deceased, and her mother, shortly before the killing, he is not guilty of murder in the first degree. (Refused as above, and prisoner excepted.) (9) That unless they shall be satisfied beyond a reasonable doubt that the death did not occur in consequence of a fight which took place between the prisoner, deceased, and another shortly before the death of deceased, he is not guilty of murder in the first degree. (Refused as above, and prisoner excepted.) (10) That if jury should believe that the killing was the result of a quarrel that had, immediately prior thereto, occurred between deceased and prisoner, the prisoner is not guilty of murder in the first degree.

(Refused as above, and prisoner excepted.) (11) That unless they are satisfied beyond a reasonable doubt that the killing did not result from a quarrel between prisoner and deceased, which occurred immediately before the killing, the prisoner is not guilty of murder in the first degree. (Refused as above, and exception by prisoner.) (12) That, to constitute murder in the first degree, all the elements must be united to constitute that offense. (Refused as above, and exception by prisoner.) (13) That, before the jury can convict of murder in the first degree, they must be satisfied beyond a reasonable doubt of the truth of each fact which constitutes the crime. (Refused as above, and exception by prisoner.) (14) That prisoner is not guilty of murder in the first degree if the jury shall believe there was a quarrel between him and deceased some minutes before the killing, unless they shall be satisfied beyond a reasonable doubt that he used the same kind or degree of premeditation or deliberation as would be used in killing by poison, lying in wait, starvation, torture, or imprisonment. (Refused as above, and prisoner excepted.) (15) That they must be satisfied beyond a reasonable doubt that prisoner used the same degree of premeditation or deliberation in killing the deceased, no matter what length of time elapsed after a quarrel or fight between them, as would be necessary to kill by poison, lying in wait, starvation, torture, or imprisonment. (Refused as above; prisoner excepted.) (16) That in weighing the testimony of the mother of deceased it is the duty of the jury to consider the fact that she is the mother. (Refused as above; prisoner excepted.) (17) That the same weight is not to be allowed to the testimony of a witness who has made contradictory statements about material matters; and, unless such witness is supported by testimony of a convincing nature, the jury should not convict of murder in the first degree. (Refused as above; prisoner excepted.) (18) That in considering the flight of prisoner the jury should take into consideration the fact that prisoner is a colored man, of but little intelligence. (Refused as above; prisoner excepted.) (19) There is no presumption of malice from the fact that the deceased was killed. It is the duty of the state to satisfy the jury beyond a reasonable doubt that malice existed from prisoner towards deceased at the time of the killing. (Refused as above; prisoner excepted.) (20) That the kind or degree of malice that prisoner had towards deceased at the time of the killing must have been such as a person has towards another whom he kills by way of poison, lying in wait, imprisonment, starving, or torture. (Refused as above; prisoner excepted.) (21) That the jury must be fully satisfied, or satisfied beyond a reasonable doubt, that prisoner had such malice (as indicated in above prayer No. 20), before they can convict the prisoner of mur-

der in first degree. (Refused as above; prisoner excepted.)"

Charge of the court: "Prisoner is charged in the indictment with murder in the first degree. Under the bill, however, the jury may find a verdict for murder in the first degree or second degree, manslaughter, excusable homicide,—which would be, 'Not guilty,'—according as the jury may find the facts to be from the evidence. I say, 'according as they may find the facts from the evidence,' and I want to emphasize this expression, for juries have no right, when certain facts are established, to find a verdict for a degree of homicide different from that which the law says must follow such a finding of facts. To illustrate: Suppose the evidence establishes the fact that prisoner slew deceased through necessity, in order to save his own life, or prevent great bodily harm to himself; the law says this will be excusable homicide, and your verdict must be, 'Not guilty.' Again, suppose the evidence establishes the fact that the killing, though unlawful and felonious, was without malice, either expressed or implied; the law says this would be felonious slaying, and your verdict must be, 'Manslaughter.' Suppose, again, the evidence establishes the fact that the killing was unlawful, felonious, and with malice, but without premeditation or deliberation; the law says this is murder in the second degree, and so your verdict must be. Again, suppose the evidence establishes the fact that the killing was unlawful, felonious, and with malice, also that it was with premeditation; the law says this is murder in the first degree, and so your verdict must be. I know there is a common idea among the people that in criminal cases the jury is the judge both of the law and fact, and can render just such a verdict as it may see fit, regardless of how the facts may be found; but I tell you, you have no such right under your oaths. Your province is exclusively to find facts, and your oaths require that you should apply the law as given you by the court to these facts, and render a verdict in accordance therewith. Your own common sense and reason tell you it must be done. If you are to be the judges of both the law and fact, why require the court to instruct you at all? It would be idle to do so. Again, if you follow the court, and the court make a mistake, there is the supreme court to correct it. If you refuse to do this, and follow your own ideas of law, and mistake the law, there is no power to correct it. I said I need not cite authority to sustain these positions, but to impress what I have said I will quote what the supreme court has said in *State v. Covington*, 117 N. C. 834, 23 S. E. 337: 'That the statute does not give juries the discretion, when rendering their verdict, to determine of what degree of murder a prisoner is guilty. They must find a verdict according to the evidence, and, believing a

prisoner guilty beyond a reasonable doubt in the first degree, it is their duty to so find, however much inclined to show mercy by rendering a verdict for the lesser offense.' And I will also add, as I have already said, believing the prisoner guilty of murder in the second degree, manslaughter, or not guilty at all, they must so find, however much sympathies or prejudices might incline them to find otherwise. In criminal cases the prisoner is presumed to be innocent, and the burden of establishing his guilt is upon the state, and the state must do this beyond a reasonable doubt. However, when the state has satisfied the jury beyond a reasonable doubt, in an indictment for murder, that prisoner slew deceased with a deadly weapon, the law presumes that the prisoner is guilty of murder in the second degree, and the burden shifts to the prisoner to satisfy the jury—not beyond a reasonable doubt, but simply to satisfy them—that he was excusable, or that the crime is for the lesser offense, to wit, manslaughter. So the first thing you will consider is, did the prisoner slay the deceased as alleged? The state relies on the following testimony: [The court here read the testimony in full.] The state says this testimony should satisfy you beyond a reasonable doubt of the killing as alleged. You must say how that fact is, and, if you are not so satisfied,—that is, if you are not satisfied beyond a reasonable doubt that prisoner killed deceased,—you need not go further. But, if you should be so satisfied, then you will proceed to determine whether the crime be murder in the first degree, second degree, manslaughter, or excusable homicide. Under the law, as the court sees it, there is no evidence to support a verdict of excusable homicide or manslaughter; so that, if you should be satisfied beyond a reasonable doubt that the prisoner did the killing, it will be your duty to return a verdict of murder in the first or second degree, as you may find the facts to be, applying the principles of law which I have given you. Now, although you may be satisfied beyond a reasonable doubt that the prisoner did the killing, as alleged, with a gun, which would make him guilty, as I have already explained, nothing else appearing, you should render a verdict of murder in the second degree. Before you can render a verdict of murder in the first degree, you must be satisfied, further, beyond a reasonable doubt, that the killing was willful, deliberate, and premeditated. Now, it is not necessary that the purpose or design to kill must exist for any particular length of time, but it must have existed before the killing, else it will not be murder in the first degree. The testimony relied on by the state to show this is that which tends to show that on the way to the house of the deceased the first time the prisoner and deceased had some words; that afterwards he left, and in an hour returned, with a gun, and slew the deceased under the

circumstances detailed by the witnesses, if they are to be believed. Prisoner says this ought not to so satisfy you; that the testimony of the state tending to show this is unreliable, but, even if believed, is not sufficient to fully satisfy you that the killing was willful and premeditated. You are the ministers of the law chosen to decide the facts, to pass upon the weight of testimony, to say whether it is to be believed or not believed, to say that it establishes certain facts or that it does not. In weighing the testimony it will be your duty to consider the interest of any of the witnesses, if you find that there is any; in considering his flight, if he did flee, the fact that he is an ignorant man; to consider, for instance, that the witness Penny is the mother of deceased; to consider any conflicting statements, if you find there are any; to consider the demeanor of witnesses on the stand, and any other facts or circumstances which tend to uphold or discredit the testimony of any of the witnesses. You will not let the fact that the prisoner did not go on the stand prejudice you against him."

The prisoner excepts to the charge of the court as not indicating the sort or degree of malice which is required by Act 1896, c. 85. Exception also as not containing any one or more of the 21 requests for charge by prisoner. Motion for new trial overruled. Prisoner excepted, and appealed from the judgment pronounced.

S. G. Ryan, for appellant. The Attorney General, for the State.

DOUGLAS, J. This is a conviction for murder in the first degree. The evidence tended to show that the prisoner went to the home of the deceased in the morning of the day she was killed, and got some black pepper; that he went off, but came back in about an hour, with a gun, and without provocation shot the deceased in the back of the head, killing her instantly. The only exceptions are to the charge and refusal to charge, none of which, in our opinion, can be sustained. The able charge of his honor correctly stated the law, and fully and clearly presented every reasonable contention of the prisoner. It met the requirements of section 413 of the Code, which provides that the court "shall state in a plain and correct manner the evidence given in the case and declare and explain the law arising thereon." He is not required to give *ipsissima verba* the instructions prayed by the defendant, either in civil or criminal cases, even if they are proper. It is sufficient if they are given substantially in the charge. *State v. Bowman*, 80 N. C. 432; *Rencher v. Wynne*, 86 N. C. 268; *State v. Boon*, 82 N. C. 637; *State v. McNeill*, 92 N. C. 812; *State v. Anderson*, Id. 732; *State v. Jones*, 97 N. C. 469, 1 S. E. 680; *State v. Brewer*, 98 N. C. 607, 3 S. E. 819; *Newby v. Harrell*, 99 N. C. 149, 5 S. E. 284; *Michael v. Foll*, 100 N. C. 178, 6 S. E. 264;

Conwell v. Mann, 100 N. C. 234, 6 S. E. 782; State v. Hargrave, 108 N. C. 323, 9 S. E. 406; Edwards v. Phifer, 121 N. C. 388, 28 S. E. 548; Norton v. Railroad Co., 122 N. C. 910, 934, 29 S. E. 886. In the last case, on page 934, in line 13,¹ a mistake of the printer inserted the word "objectionable" instead of "unobjectionable." What we said was: "That the court is not required to give the special instructions as asked, even when unobjectionable," if they are substantially included in the charge. A clear and connected charge, giving all the proper instructions in their logical order, without undue prominence to any one phase of the case, is better calculated to give the jury a correct impression of the law, as applicable to the facts under consideration, than can be obtained from any number of special instructions. Of course, the prisoner has the right to have every reasonable theory of his defense properly presented to the jury; but when this is done he has no further cause of complaint.

The exceptions are practically all pointed to the provisions of chapter 85 of the Laws of 1893, the first two sections of which are as follows:

"Section 1. All murder which shall be perpetrated by means of poison, lying-in-wait, imprisonment, starving, torture, or by any kind of willful, deliberate and premeditated killing, or shall be committed in the perpetration or attempt to perpetrate any arson, rape, robbery, burglary or other felony shall be deemed to be murder in the first degree and shall be punished with death.

"Sec. 2. All other kinds of murder shall be deemed murder in the second degree, and shall be punished with imprisonment of not less than two nor more than thirty years in the penitentiary."

It has been settled by a long line of authorities that the killing with a deadly weapon implies malice, and that, where it is admitted or proved beyond a reasonable doubt, the prisoner is presumed to be guilty of murder, and the burden then rests upon him of showing such facts as he relies on in mitigation or excuse. This rule of the common law has never been questioned in this state. State v. Byrd, 121 N. C. 684, 28 S. E. 353, and cases therein cited. Since the passage of the act of 1893, this presumption extends only to murder in the second degree, and the state is still required to prove beyond a reasonable doubt the facts necessary to bring the homicide within the statutory definition of murder in the first degree. State v. Fuller, 114 N. C. 385, 898, 19 S. E. 797; State v. Covington, 117 N. C. 834, 862, 23 S. E. 337; State v. Wilcox, 118 N. C. 1131, 1132, 23 S. E. 928; State v. Dowden, 118 N. C. 1145, 1150, 24 S. E. 722; State v. Locklear, 118 N. C. 1154, 1157, 24 S. E. 410; State v. Thomas, 118 N. C. 1113, 1118, 24 S. E. 481; State v.

Finley, 118 N. C. 1161, 1172, 24 S. E. 495. In this last case the eighth syllabus² is incorrect, as it differs from the opinion in asserting the presumption of murder in the first degree. Where the circumstances of the killing do not bring it within the classes which, by the statute, are made per se murder in the first degree, the state must prove deliberation and premeditation; but this it may do circumstantially, and not necessarily by express and positive evidence. If all the circumstances surrounding the killing are such as satisfy the jury beyond a reasonable doubt that the homicide was willful, deliberate, and premeditated, it is their duty to find the prisoner guilty of murder in the first degree. This is the rule deducible from all the cases above cited, and is generally approved. 1 McClain, Cr. Law, § 359; Desty, Cr. Law, § 129k, p. 399; Bish. New Cr. Law, § 728, subsec. 3. It appears from the evidence that the prisoner had some words with the deceased, went off, and came back in about an hour, armed with a loaded gun, with which he shot and killed deceased. We may well adopt the words of the court in People v. Conroy, 97 N. Y. 62, 72, and say that "we are of the opinion that the jury was justified in inferring, from the facts and circumstances proved, that the death of the deceased was the result of deliberation and premeditation on the part of the prisoner."

The several prayers of the prisoner to the effect "that, to convict of murder in the first degree, the prisoner must have used the same degree of deliberation and premeditation as would have been used if he had killed the deceased with starvation," etc., were properly refused. The law mentions certain kinds of homicide which are per se murder in the first degree, and then further provides that "any other kind of willful, deliberate, and premeditated killing" shall also constitute murder in the first degree. In the former class, deliberation and premeditation are presumed, while in the latter they must be proved. Even if we were to make the law read "any other like kind" of killing, as contended by the prisoner, we could see but little difference between the act of one who lies in wait and one who arms himself, and goes to seek his helpless and unsuspecting victim. We are always willing and anxious to give to any one charged with a capital felony the fullest protection of the law, and it is only after the gravest consideration that we ever affirm a judgment carrying with it the sentence of death. Whatever may have been his crimes, he who stands in the shadow of the gallows on the threshold of eternity receives our sincere commiseration; but we owe a duty to the majesty of the law, and to the helpless thousands who can look to it alone for protection. In the performance of that duty, the judgment must be affirmed.

¹ In official volume.

² In official volume.

(122 N. C. 100)

POWELL v. MUTUAL BEN. LIFE INS. CO.
et al.

(Supreme Court of North Carolina. Nov. 1, 1898.)

INSURABLE INTEREST—VOID POLICY—PAYMENT TO BENEFICIARY—RECOVERY.

1. A partner does not have an insurable interest in his co-partner's life.

2. Where a life policy was void because insured assigned it to one without an insurable interest, the next of kin or personal representative of the assignor cannot recover from the beneficiary what insurer may have paid him thereon.

Appeal from superior court, Craven county; Brown, Judge.

Action by Emma H. Powell, executrix, against the Mutual Benefit Life Insurance Company and another. Judgment for defendants, and plaintiff appeals. Affirmed.

Simmons, Pou & Ward and M. De W. Stevenson, for appellant. W. W. Clark, O. H. Gulon, P. H. Pelletier, and Shepherd & Busbee, for appellees.

MONTGOMERY, J. This case differs from that of *Albert v. Insurance Co.*, 122 N. C. 92, 30 S. E. 327, in one most material respect. In that case the person whose life was insured paid all the premiums, and the court did not find it necessary to decide whether the beneficiary had an insurable interest in the life of the insured person. In the case before us, at the very time when the policy was issued in which the life of the plaintiff's intestate was insured, there was an assignment of the policy to the beneficiary (the defendant Dewey), who paid the first and all of the premiums.

The first question that presents itself in the case is, did the defendant have an insurable interest in the life of Powell, the plaintiff's intestate? The defendant avers that he did, and that the policy was duly and legally assigned to him by the intestate. The ground of this averment is that the plaintiff and intestate were co-partners. No particulars of the partnership are set out. There is no averment that the deceased co-partner, Powell, was indebted to the plaintiff or to the partnership in any amount, or that the deceased was to furnish any labor, skilled, or otherwise, as his contribution in lieu of money. Upon such conditions, we are of the opinion that the plaintiff had no insurable interest in the life of the deceased partner. In the case of *Trinity College v. Insurance Co.*, 113 N. C. 244, 18 S. E. 175, this court said that "under certain conditions a partner has an insurable interest in the life of his co-partner"; and cites *Insurance Co. v. Luchs*, 108 U. S. 498, 2 Sup. Ct. 949. There, the fact was that Luchs had furnished to the co-partnership fund, for his co-partner Dillingburgh, \$5,000, which was unpaid. We suppose that was the condition referred to in the opinion in the *Trinity College Case*, under which a partner might have an insura-

ble interest in the life of his co-partner. It is true that in *Insurance Co. v. Luchs*, supra, the court said that the continuance of the partnership was also a reasonable expectation of advantage to Luchs, and gave him an insurable interest in the life of his co-partner. But we are of the opinion that that position is against the weight of authority. The policy being void, then, because the defendant had no insurable interest in the life of Powell, no action could have been maintained on it by the defendant against the insurance company. *Burbage v. Windley*, 108 N. C. 358, 12 S. E. 839. Neither can the plaintiff maintain this action; for, looking at it in any view, it has its foundation on the policy, which is void. *Burbage v. Windley*, supra. The plaintiff's counsel cited to us *Cheeves v. Anders*, 87 Tex. 287, 28 S. W. 274, and 3 Am. & Eng. Enc. Law, p. 592, to show that the next of kin or the personal representative of the assignor of a void policy could, in an action against the beneficiary in such a policy, recover the amount which had been paid to him by the insurance company. But we cannot see the principle upon which these authorities are based, and the decisions themselves do not give reasons for their existence. Besides, that position has been condemned in *Burbage v. Windley*, supra. No error.

(122 N. C. 71)

PARKER v. NORFOLK & C. R. CO.

(Supreme Court of North Carolina. Nov. 1, 1898.)

SURFACE WATER—DIVERSION—FLOWAGE—DAMAGES—REVIEW.

1. Although an upper holder of land may increase and accelerate the flow of water in its natural course upon the lower land, he cannot divert other waters upon such land.

2. A railroad company has no greater right to divert water upon other land from its right of way than a private individual has.

3. A verdict based on conflicting evidence as to damages is conclusive on the appellate court.

Appeal from superior court, Bertie county; Brown, Judge.

Action by Henry Parker against the Norfolk & Carolina Railroad Company. Judgment for plaintiff, and defendant appeals. Affirmed.

George Cowper, for appellant. Francis D. Winston, for appellee.

FAIRCLOTH, C. J. The jury by their verdict find that the defendant, in constructing its road, wrongfully damaged the plaintiff's land by diverting the waters of Long Pond and Flat Pocosin upon said land, without providing an adequate outlet for said waters. This case to some extent involves the right of the upper and lower tenants in draining land, under common-law principles. That question was settled in *Mizell v. McGowan*, 120 N. C. 184, 26 S. E. 783, in which it was held that the dominant tenant had the right

to carry off his surface water by cutting ditches, by which the flow of water naturally flowing therein is increased and accelerated, and discharged on the land of the servient tenant, and that this subserviency is one of the natural incidents to the ownership of land. The question of diverting water was not then before the court.

It had been previously held that neither a railroad nor an individual could divert water from its natural course, and throw it upon abutting lower lands, and cause damage. *Jenkins v. Railroad Co.*, 110 N. C. 438, 15 S. E. 193. It may now be stated that the upper holder may increase and accelerate the flow of the water in its natural course, but cannot divert other waters, to the damage of the lower lands. *Carter v. Page*, 30 N. C. 190. The purchase of the right of way by the defendant company could not confer any more privilege than a private individual purchasing the land would have. *Jenkins v. Railroad Co.*, *supra*.

There was conflicting evidence as to damages, and, whatever we might think as a jury, we, as the court, have no control over it. Affirmed.

(123 N. C. 134)

EDGERTON v. AYCOCK.

(Supreme Court of North Carolina. Nov. 1, 1898.)

DEEDS—TITLE CONVEYED—RULE IN SHELLEY'S CASE.

A deed providing that the grantor "do lend to [grantee] during his natural life [a tract of land], to have and to hold * * * his natural life, and, at [grantee's] death, we have given, granted, and aliened, released, and confirmed, and by these presents do give, grant, alien, release, and confirm, unto the lawful heirs of [grantee], and their heirs," etc., conveys a fee-simple title.

Appeal from superior court, Wayne county; Timberlake, Judge.

Action by E. P. Edgerton against B. F. Aycock. Judgment for plaintiff, and defendant appeals. Affirmed.

Aycock & Daniels, for appellee.

FAIRCLOTH, C. J. The controlling words of the deed from Nathan Edgerton to E. P. Edgerton are these, "Do lend to the said E. P. Edgerton during his natural life" a certain tract of land; and in the habendum, "To have and to hold the same, with the appurtenances thereunto belonging, to the said E. P. Edgerton, his natural life, and, at the death of the said E. P. Edgerton, we * * * have given, granted, and aliened, released, and confirmed, and by these presents do give, grant, alien, release, and confirm, unto the lawful heirs of the said E. P. Edgerton, and their heirs, executors, administrators, and assigns, the above-described premises," etc.; and the only question pre-

sented is whether this deed, at common law, under the rule in *Shelley's Case*, conveys a fee-simple title to the grantee, the vendor of the defendant. In England, from an early date, it was held that these and similar expressions, in wills and deeds, passed an estate in fee to the first taker (*E. P. Edgerton* here), as a rule of law, without regard to the intent of the grantor or deviser. In North Carolina the same rule was adopted by this court at its earliest existence, and has been uniformly so held in a list of decided cases too numerous to refer to now, including the late case of *Chamblee v. Broughton*, 120 N. C. 170, 27 S. E. 111. The rule has been so long and so well settled that it admits of no discussion at this day. Affirmed.

(123 N. C. 125)

In re BURWELL'S WILL.

(Supreme Court of North Carolina. Nov. 1, 1898.)

APPEAL—DISMISSAL.

A motion to docket an appeal and dismiss it for failure to comply with Sup. Ct. Rule 17 (28 S. E. v., 121 N. C. 695), requiring an appeal to be docketed before the court begins the call of causes from the district to which it belongs, was not too late because made after the week assigned to that district had passed.

Appeal from superior court, Vance county.

In the matter of one Burwell's will, H. H. Burwell, a caveator, appealed. The appellee moved to docket and dismiss the appeal, under Sup. Ct. Rule 17 (28 S. E. v., 121 N. C. 695). Motion allowed.

Thos. M. Pittman, for appellee.

CLARK, J. This is a motion by the appellee to docket and dismiss, under rule 17, an appeal which the appellant should have docketed "before the court begins the call of causes from the district" (formerly during the first two days of the call) to which it belongs. Amended Rules 5, 17 (121 N. C. 694, 695, 28 S. E. v.). This motion can be made at, or at any time after, the beginning of the call of the district, if the appeal has not then been docketed. The objection is made that this motion is made after the week assigned to that district has passed, and is too late. The objection is invalid. Under the rule, the appeal should be docketed before the beginning of the call of the district; but it can be docketed thereafter at any time during that term, and the motion to docket and dismiss can also be made at said term at any time after the beginning of the call of the district,—the only limitation being that the appeal, if not docketed in the prescribed time, must be docketed at said term, and before the appellee has moved, under rule 17, to docket and dismiss. *Packing Co. v. Williams*, 122 N. C. 406, 29 S. E. 366, and cases there cited. Motion allowed.

(123 N. C. 126)

ALLEN v. BASKERVILLE.

(Supreme Court of North Carolina. Nov. 1, 1898.)

TRUST DEEDS—SUFFICIENCY—CONSTRUCTION—AMENDMENT—TRUSTEE—APPOINTMENT.

1. Where a trust deed was executed before the passage of Code, § 1280, providing that conveyances should be construed to convey a fee unless the contrary intention should appear from express words, the word "heirs" is indispensable to convey a fee, in the absence of any showing that it was omitted by mistake, and the words, "and their successors perpetually," are insufficient.

2. When the trustees in a trust deed fail, new trustees will be appointed by the court, on application.

3. Where a trust deed fails to convey a title in fee, and the cestui que trust has no corporate existence, the court cannot supply the words, "and his heirs," after the name of the trustee, on the ground that it was omitted by mistake.

4. Code, §§ 3665, 3667, providing that the estates in lands given to religious societies vest absolutely in the trustees of such societies, or in the societies themselves where there are no trustees, and that the societies may appoint trustees to take and hold land in trust for their benefit, do not apply to educational institutions.

Appeal from superior court, Wake county; Robinson, Judge.

Action by J. S. Allen against Will Baskerville to recover possession of real property alleged to be wrongfully withheld. Judgment was for plaintiff, and defendant appeals. Affirmed.

W. N. Jones, for appellant. Battle & Moredecai and Douglass & Holding, for appellee.

CLARK, J. This conveyance was executed before the act of 1879, now Code, § 1280, and hence the word "heirs" was indispensable to convey a fee. There is no allegation that it was omitted by mistake, as was the case in *Fulbright v. Yoder*, 113 N. C. 456, 18 S. E. 713. The cestui que trust, the Forestville Female Academy, was not incorporated; but, if the conveyance had been to the trustees named and their heirs, it may be that the incorporation could now be taken out, and the courts certainly would not let the trust fail for want of trustees. New trustees could be appointed upon application. But, in the absence of the word "heirs" from both the premises and habendum, and of the averment of its omission by mistake (*Vickers v. Leigh*, 104 N. C. 248, 10 S. E. 308), the court could not enlarge the conveyance into a fee, either by a warranty in fee or by a covenant for quiet enjoyment (*Anderson v. Logan*, 105 N. C. 266, 11 S. E. 361; *Batchelor v. Whitaker*, 88 N. C. 350; *Stell v. Barham*, 87 N. C. 62; *Register v. Rowell*, 48 N. C. 312; *Buell v. Young*, 25 N. C. 379; *Wiggs v. Saunders*, 20 N. C. 480; *Roberts v. Forsythe*, 14 N. C. 26). In truth, the words in the warranty, "to the trustees aforesaid and their successors perpetually," are not sufficient as a warranty in fee. Here, neither the trustees held a conveyance in fee (as in *Holmes v. Holmes*, 86

N. C. 206), nor did the cestui que trust have any corporate existence. The liberal rule laid down in *Moore v. Quince*, 109 N. C. 85, 13 S. E. 872, therefore, cannot apply. Code, §§ 3665, 3667, apply only to religious societies, and not to educational institutions.

The statute of limitations has no application. The last trustee died within less than seven years before this action was brought, even if the conveyance had been color of title after such death. No error.

(123 N. C. 138)

OWENS v. SOUTHERN RY. CO.

(Supreme Court of North Carolina. Nov. 1, 1898.)

TRIAL—RECEPTION OF VERDICT—DISSENTING JUROR.

1. Any juror may dissent from a verdict agreed to in the jury room, any time before it is received and entered, whether it is sealed or not.

2. On a question of contributory negligence, a jury, by their verdict, answered, "No," but on a poll of the jurors one of them said that he thought plaintiff was to blame in part, and stated also that he had consented in the jury room to the answer made. *Held*, that the verdict should not have been received after the juror's partial dissent, without ascertaining whether, notwithstanding, he still adhered to his assent given in the jury room.

Appeal from superior court, Guilford county; Robinson, Judge.

Action by Sarah Owens against the Southern Railway Company for personal injuries. From a judgment in favor of plaintiff, defendant appeals. Reversed.

F. H. Busbee, for appellant. C. M. Stedman and L. M. Scott, for appellee.

CLARK, J. Any juror may dissent from a verdict, to which he has agreed in the jury room, at any time before it is received and entered up; and this is true even of a sealed verdict. *Weeks v. Hart*, 24 Hun, 181; *Root v. Sherwood*, 6 Johns. 68; *Rothbauer v. State*, 22 Wis. 468; *Bishop v. Mugler*, 33 Kan. 145, 5 Pac. 756; 2 *Thomp. Trials*, § 2635. In the present case the verdict was rendered as to the second issue (contributory negligence), "No." Before it was entered, and before the jury were discharged, the court, at the request of defendant, permitted them to be polled, whereupon one of the jurors responded to the second issue, "I think she [plaintiff] was to blame in part." This was certainly not a response of, "No." He was then asked if he had not consented in the jury room that the issue might be answered "No." To this he replied, "I did." It was error to permit the verdict to be received after the juror's dissent, in part, at least, without ascertaining whether, notwithstanding, he adhered still to the assent given in the jury room. The force of this would be better seen if each of the jurors, on being polled, had responded as this juror did. On a poll of the jury each "tub stands on its own bottom," and the dissent

of one is as fatal as that of all. Unanimity in the verdict of a jury is still required in this state, though abolished in some other jurisdictions, and the judge should have directed the jury to retire, and consider further of their verdict. For the reception of the verdict under these circumstances, over the objection of the defendant, there must be a new trial. New trial.

(123 N. C. 118)

HARPER v. COMMISSIONERS OF NASH COUNTY.

(Supreme Court of North Carolina. Nov. 1, 1898.)

ABATEMENT—PERSONAL INJURIES—DEATH OF PLAINTIFF.

Under Code, §§ 1490, 1491, providing that, on the death of any person, all demands or rights of action shall survive to his personal representatives, except actions "for * * * injuries to the person," not resulting in death, an action for personal injuries abates by the death of the person injured pending an appeal by him from the judgment rendered.

Appeal from superior court, Nash county; Bryan, Judge.

Action by S. B. Harper against the commissioners of Nash county. Judgment for defendants, and plaintiff appealed. Motion of Harper's administrator to be made party plaintiff on suggestion of the plaintiff's death. Motion denied.

O. M. Cooke, for appellant. F. S. Spruill, H. G. Connor, and Jacob Battle, for appellees.

DOUGLAS, J. The plaintiff brought his action on the 17th day of August, 1897, to recover damages for personal injuries received by him from the breaking down of a county bridge. The defendants severally demurred to the complaint, which demurrers were sustained by a judgment of the superior court rendered on the 2d day of May, 1898. The plaintiff appealed, and has since died. His administrator now asks to be made a party plaintiff and to be permitted to maintain the action. This motion must be denied, as the cause of action does not survive the death of the plaintiff, and therefore the action necessarily abates. The right of the plaintiff himself to sue for personal injuries of any kind is entirely separate and distinct from the right of his personal representative to sue for personal injuries resulting in death. The former existed at common law, while the latter is purely of statutory origin. At common law, and until the passage of Act 9 & 10 Vict. c. 93, known as "Lord Campbell's Act," no cause of action whatever arising from injuries to the person, no matter what their result, survived the death of the injured party. Those that now survive do so purely by statutory power. Section 1490 of the Code provides: "Upon the death of any person, all demands whatsoever, and rights to prosecute or defend any action or

special proceeding, existing in favor of or against such person, except as hereinafter provided, shall survive to and against the executor, administrator or collector of his estate." And in section 1491: "The following rights in action do not survive: * * * (2) Causes of action for false imprisonment, assault and battery, or other injuries to the person, where such injury does not cause the death of the injured party." This provision applies directly to the case at bar, and of course no action can be maintained where the cause of action has ceased to exist. *Hannah v. Railroad Co.*, 87 N. C. 351. The cause of action provided in sections 1498 and 1499 of the Code is not before us, and any liability of the defendants thereunder must be determined in a separate action. The motion is denied, and the action abates.

(123 N. C. 196)

MAHONEY et al. v. STEWART et al.

(Supreme Court of North Carolina. Oct. 25, 1898.)

ADMINISTRATORS—INJUNCTION—DECEDENT'S ESTATE—MORTGAGE—SATISFACTION OUT OF PERSONAL ESTATE.

1. When an administrator is solvent, injunction will not lie to restrain him from making an illegal misappropriation of his intestate's estate.

2. A debt secured by a mortgage given by an intestate on his land will be satisfied out of his personal estate before resorting to the land.

Appeal from superior court, Nash county; Brown, Judge.

Action by J. Mahoney and another against J. P. Stewart and M. C. Braswell, administrators of the estate of M. C. Stewart, to restrain the administrator from making a misappropriation of the estate. Judgment for plaintiffs, and defendants appeal. Modified and affirmed.

H. G. Connor, for appellants. Jacob Battle, for appellees.

FURCHES, J. M. C. Stewart, who was the wife of the defendant J. P. Stewart, died intestate in July, 1898, and M. C. Braswell, soon after her death, at the request of the husband, J. P. Stewart, administered on the estate of the deceased wife. At the death of the intestate wife she was the owner of real estate of the estimated value of about \$4,000, and of personal estate of the estimated value of about \$5,500, and \$5,000 of this consists of a life insurance policy, which the administrator has collected since her death. The real estate owned by the intestate wife at the time of her death was bought by her at public sale made by a commissioner under an order of court. Of the purchase money there remained an unpaid balance of \$1,055.81, which prevented her from getting a deed for the same. This sum, at the request of the intestate, T. P. Braswell & Son paid off in April last, and the intestate and her husband, the defendant J. P. Stewart, executed

to them their promissory note for the same, to be due on the 1st of December next. For the purpose of enabling the intestate to have said lands cultivated for the year 1898, and for a balance she owed them for advances made last year, she became indebted to said Braswell & Son to the amount of \$2,085.14, for which she and her husband executed their promissory note to be due on the 1st of November next. To further secure the payment of these notes they executed a deed in trust on the lands of the feme defendant to one John M. Sherrod. These two debts and a debt of \$450 due Thomas H. Battle, are all the debts the intestate owed, and are all that her estate is liable for, except funeral expenses and cost of administration. The intestate, at the time of her death, left her husband, J. P. Stewart, and three minor children; and the said M. C. Braswell has been appointed and has become the guardian of the minors. But J. P. Stewart, the surviving husband, is insolvent, and the plaintiffs have recovered several justices' judgments against him, which they have caused to be docketed, amounting in the aggregate to some \$1,200, or more. Upon these judgments they have taken out supplementary proceedings, and have had them served on the administrator. In this proceeding the plaintiffs claim that the administrator is about to pay off and satisfy the two notes above specified, due to F. P. Braswell & Son, out of the money collected on the \$5,000 insurance policy; that these debts and the debt of T. H. Battle, if so paid out of the personal estate, and the costs and expenses of administration, burial expenses, etc., will consume the whole of the personal estate of the intestate wife; and the insolvent husband, the debtor of the plaintiffs, would get nothing from said personal estate, and the plaintiffs would thereby be defrauded of their just debts. The plaintiffs say that the administrator has no right to do this; that the debts to T. P. Braswell & Son and the debt to T. H. Battle, also secured by mortgage, be paid out of the land so mortgaged as security for the payment of said debts, thereby relieving the personal assets from the payment of the same; that the insolvent husband might get the personal estate out of which the plaintiffs and other creditors of the insolvent husband might make their debts which they hold against him. There is no suggestion that the administrator is insolvent, or that he has not an abundantly good bond. In fact, it was stated and admitted on the argument that the administrator was a good man, was entirely solvent, and that his bond was in the sum of \$11,000, and was abundantly good. Upon these facts the plaintiffs ask that the administrator be enjoined and restrained from paying these debts secured by mortgage, that he be enjoined from paying the defendant J. P. Stewart anything on his distributive share, and that the defendant J. P. Stewart be enjoined

and restrained from receiving, assigning, or disposing of any part or interest he may have in his wife's estate, and for the appointment of a receiver. The court, upon the hearing, granted the orders of injunction as prayed for, and appointed a receiver, and from this judgment the defendant Stewart and the administrator appealed.

Injunctions are usually, and, so far as we remember, only, resorted to in cases of administration to protect legal rights of parties interested in the estate, where there is likely to be a misapplication—a devastavit—by an insolvent administrator or executor. But this proceeding does not seem to be based on such considerations as these, but to enjoin and restrain a solvent administrator from paying the debts due by his intestate's estate, and to prevent him from distributing the residue after paying debts and costs of administration under the statute of distributions. We do not think the court is invested with this power. The administrator is admitted to be abundantly solvent, and, if he makes a misappropriation of his intestate's estate, he commits a devastavit, and both he and his bond will be liable to those interested. There are two grounds suggested for this interference of the court in the course of this administration. One is that the notes of T. P. Braswell & Son and T. H. Battle are not the debts of the intestate. But this position was virtually abandoned on the argument of the case by the learned counsel for the plaintiffs. He says in his brief that "J. P. Stewart's wife left a considerable personal estate, and owed nothing except the debts due to T. P. Braswell & Son and T. H. Battle, which could only be paid out of the land and crop specifically charged. The indebtedness against the feme covert, Martha C. Stewart, in favor of T. P. Braswell & Son (\$2,080.14+\$1,055.81=\$3,137.95), and interest, is expressly charged by the trust deed," etc. The "real estate with the crops is abundantly sufficient to pay the debts due to T. P. Braswell & Son and T. H. Battle, these being all the debts the intestate owed." And these concessions on the part of the plaintiffs that they were the debts of the intestate are fully sustained by Farthing v. Shields, 106 N. C. 289, 10 S. E. 998, and Jones v. Craigmiles, 114 N. C. 613, 19 S. E. 638, and cases cited in these opinions. The other is that they were secured by mortgage. But these notes, being a part of the indebtedness of the intestate, they are none the less so because she gave security for their payment. A mortgage to secure the payment of a debt is not the debt, but is only a security. It does not pay the debt, nor change its nature. These notes still being the evidences of the debts, and, as it appears, were made by the intestate for her own benefit, it follows that they should be paid out of her personal estate, the primary fund for the payment of debts of intestates' estates. *Pate v. Oliver*, 104 N. C. 458, 468, 10 S. E. 700.

But while it was admitted that the general rule is that personal assets must be first exhausted in the payment of debts before real estate can be resorted to by the personal representative, it was contended that this case does not fall under the general rule, for the reason that the intestate secured these notes by mortgage. And this contention seems to be based upon *Moore v. Dunn*, 92 N. C. 67, which was cited as authority for this position. If *Moore v. Dunn* should be construed to hold what the plaintiff claims it does, it would be in conflict with the well-established principles of our law, and in conflict with all our decisions. We cannot give it this construction. Were we to do so, we would be compelled to declare it an error, and to overrule it. But we do not think it necessarily calls for that construction. It must mean to be applied in cases where the land is originally charged with a sum of money or a debt,—as where land is devised or conveyed subject to the payment of a sum of money or a debt, or as in cases of owelty of partition, and probably in other cases. In *Moore v. Dunn*, the claim of the plaintiff grew out of the surrender of a life estate in land charged with an annuity, which was afterwards attempted to be secured by a mortgage on a part of the land. In this view of the case, *Moore v. Dunn* may be sustained. In the argument before us, the appointment of the receiver and the order of injunction were not resisted so far as they relate to the said J. P. Stewart; and it may be that they were proper, so far as he is concerned, as a means of preserving what comes or would have come into his hands, from being wasted, but not as a means of putting into his hands what does not belong there. Therefore the order appointing a receiver and of injunction is continued so far as it applies to the defendant J. P. Stewart. But it was erroneously granted as to the administrator, M. C. Braswell, and his administration; and as to these, it is dissolved and vacated. But the plaintiffs will be taxed with the costs of this appeal. Modified and affirmed.

(123 N. C. 197)

**STROTHER et ux. v. ABERDEEN & A.
R. CO.**

(Supreme Court of North Carolina. Nov. 9, 1898.)

HUSBAND AND WIFE—ACTION BY WIFE—EVIDENCE—ADMISSIONS BY HUSBAND—INSULTING PROPOSALS—PROVOCATION—DAMAGES—APPEAL—ISSUE ON NEW TRIAL.

1. Where the husband was a formal, though not necessary, party to an action by his wife for a tort, evidence of a tacit admission on his part, prior to the bringing of such action, prejudicially affecting the amount of damages to which she was entitled, was incompetent, in the absence of proof that he was her agent.

2. Though the fact that an insulting proposal by the conductor of a railway train to a female passenger was provoked by an immodest remark by her to him did not justify such

conduct on his part, it might be considered by the jury in determining the amount of plaintiff's damages, in an action against the railway company for such wrongful act of the conductor.

3. A new trial having been granted on plaintiff's appeal, on exceptions applying to the verdict on the issue as to the quantum of damages, defendant not having appealed, such new trial should be confined to such issue.

Appeal from superior court, Guilford county; Robinson, Judge.

Action by John W. Strother and Minnie L. Strother, his wife, on behalf of the latter, against the Aberdeen & Asheboro Railroad Company. From a judgment on a verdict for plaintiffs, they appeal. Reversed.

J. T. Morehead, for appellants. Douglass & Simms and Shaw & Scales, for appellee.

CLARK, J. This action was brought by the wife for a tort,—an insulting proposition made to her by the conductor of the defendant corporation, while a passenger on its train. The sufficiency of the cause of action is not controverted, for the defendant does not appeal, and, besides, it is amply sustained by *Daniel v. Railroad Co.*, 117 N. C. 592, 23 S. E. 327, especially authorities cited at page 608, 117 N. C., and page 329, 23 S. E., and *Williams v. Gill*, 122 N. C. 967, 29 S. E. 879.

The plaintiff appeals for errors alleged as to the second issue,—the quantum of damages. The first exception is that the court admitted evidence, over the plaintiff's objection, of admissions or quasi admissions from the silence of the husband. The husband was not required to be made a party by Code, § 178. *Shuler v. Millsaps*, 71 N. C. 297. He has no interest or share in the recovery (Const. art. 10, § 6), and is only a formal party, and his prior admissions are not thereby made competent against the real party in interest. 2 Tayl. Ev. §§ 741, 742; 1 Greenl. Ev. 178. It is true that the husband, when joined as a necessary party, is pro hac vice agent of his wife, and she is bound by the acts of counsel selected by him, in the absence of collusion (*Vick v. Pope*, 81 N. C. 22); and therefore his admissions after action brought would be evidence against her; but this is on the ground of agency, and not of his being a party to the record, and hence his admissions made, as in this case, before action brought, being before the agency began, are not admissible (*Towles v. Fisher*, 77 N. C. 437). There are many cases holding that the admission of irrelevant or even "incompetent evidence of slight importance is not ground for new trial, unless it appear that the appellant has suffered prejudice by its admission." *Glover v. Flowers*, 101 N. C. 134, 7 S. E. 579; *Patterson v. Wilson*, 101 N. C. 594, 8 S. E. 341; *State v. Shoemaker*, 101 N. C. 690, 8 S. E. 332. But here the evidence erroneously admitted was prejudicial, being an offer of the conductor to pay \$20, and the failure of the husband to promptly and in-

dignantly reject it. All this was before suit brought, when in no sense was the husband (in the absence of evidence to that effect) the agent of the wife; and the inference sought to be drawn is his quasi admission that the sum offered was not grossly inadequate. This evidence was not made competent by the husband's being afterwards made a formal party to the action.

The other exception—that the judge erred in instructing the jury that, if the woman opened the way by an immodest or improper remark to the conductor, it might be considered in fixing the damages—cannot be sustained. Such conduct on her part, if proved, did not justify the conduct of the conductor; but certainly she is not entitled to the same award of punitive damages as one who gave no license by imprudence in speech or conduct.

The only appeal being by the plaintiff upon exceptions applying to the verdict upon the second issue, the defendant not having appealed, this is clearly a case where the new trial should be confined to that issue. *Silver Val. Min. Co. v. North Carolina Smelting Co.*, 122 N. C. 542, 29 S. E. 940; *Rittenhouse v. Railroad Co.*, 120 N. C. 544, 26 S. E. 922; *Nathan v. Railroad Co.*, 118 N. C. 1066, 24 S. E. 511; *Pickett v. Railroad Co.*, 117 N. C. 616, 23 S. E. 264; *Blackburn v. Insurance Co.*, 116 N. C. 821, 21 S. E. 922; *Tillett v. Railroad Co.*, 115 N. C. 662, 20 S. E. 480; *Jones v. Swepson*, 94 N. C. 700; *Boing v. Railroad Co.*, 91 N. C. 199; *Price v. Deal*, 90 N. C. 290; *Jones v. Mial*, 89 N. C. 89; *Lindley v. Railroad Co.*, 88 N. C. 547; *Crawford v. Manufacturing Co.*, Id. 554; *Roberts v. Railroad Co.*, Id. 560; *Allen v. Baker*, 86 N. C. 91; *Burton v. Railroad Co.*, 84 N. C. 192; *Merony v. McIntyre*, 82 N. C. 103; *Holmes v. Godwin*, 71 N. C. 306; *Key v. Allen*, 7 N. C. 523.

Error.

(122 N. C. 175)

PERKINS v. THOMPSON.

(Supreme Court of North Carolina. Nov. 9, 1898.)

DEED—DELIVERY—ACKNOWLEDGMENT—EVIDENCE.

1. Grantor's leaving a deed with the officer to take his wife's acknowledgment is not a delivery, if there was no instruction to deliver.

2. Acknowledgment of a deed is not conclusive as to delivery in an action to recover the land because the deed was fraudulently obtained.

3. On the issue whether the grantee obtained a deed through unlawful intimacy with the grantor's wife, evidence by the husband that he had been told so was hearsay.

Appeal from superior court, Orange county; Robinson, Judge.

Action by A. J. Perkins against George W. Thompson. There was a judgment for plaintiff, and defendant appeals. Reversed.

Graham & Graham, for appellant. Jas. R. Mason, for appellee.

MONTGOMERY, J. The deed, if it was delivered, conveyed the land in it described to the defendant. He got possession of the deed in some way and had it registered, although more than a dozen years had elapsed after the plaintiff had acknowledged its execution before a justice of the peace. The usual issues in actions for possession of real estate were submitted, the responses to which by the jury depended upon the fact whether or not there had been, in law, a delivery of the deed. The plaintiff offered on the trial his own deposition, in which he deposed, among other things, that in 1879 he got into trouble with the United States government on account of his having participated in illicit distilling, and that he expected to flee the state, to prevent conviction and punishment; that he made the deed to Thompson, the defendant, to save the land therein conveyed to his wife and children; that he was tried for the offense with which he was charged, convicted, imprisoned, and served his term; that afterwards he left the state,—in 1881,—leaving the deed in his trunk, with his other papers, and that he never said anything to Thompson about the deed after it was signed. Basil Andrews, a witness for the plaintiff, testified that when the plaintiff left the state, in 1881, the plaintiff's wife was in possession of the land, and that she and her children remained in possession until the defendant married her, in 1891, and for several years she rented out the land to other persons. D. M. Durham, a justice of the peace, testified that the plaintiff acknowledged the execution of the deed before him, and that his wife's signature and private examination were had afterwards at the plaintiff's request, and that he does not know what became of the deed after the wife's acknowledgment and privy examination. The defendant then moved, under the act of 1897, "for a nonsuit of plaintiff, as the evidence showed a nefarious transaction, in which the plaintiff had endeavored to defraud the government, and that the acknowledgment of the execution of the deed in August, 1879, before a justice of the peace, included signing, sealing, and delivery, and the fact of delivery had been judicially determined, and could not be controverted or impeached in this action to recover the land; also the statement of Durham, the justice of the peace, that the deed was left with him by A. J. Perkins to take the acknowledgment of Mrs. Perkins, showed a delivery by Perkins." The motion was overruled by the court, and in that ruling there was no error. The presumption was that the deed had been delivered. Its delivery was presumed, not only because it had been registered, but also because it was found in the possession of the grantee, signed by the grantor, and duly acknowledged before a justice of the peace. In *Whitman v. Shingleton*, 108 N. C. 193, 12 S. E. 1027, it is said that "the deed in question was in possession of the grantee, and such possession,

with proof of the signing by the grantor, is evidence from which the jury may presume a delivery"; and in Tied. Real Prop. p. 813, the law is declared to be, "If the deed is found in the possession of the grantee, a delivery and acceptance are presumed." The contention of the defendant, however, is that upon the plaintiff's evidence the presumption is conclusive, it appearing that the plaintiff left the deed with the justice of the peace to take the acknowledgment and privy examination of the plaintiff's wife, and that that act was such a parting with the possession of the deed as constituted a delivery to the defendant. The contention cannot be sustained. The justice who took the probate had no instruction from the plaintiff to deliver the deed to the defendant, or to do anything further with it after it was acknowledged by the grantors. There are no set rules or forms laid down as to what constitutes a delivery of a deed, but in all cases the grantor must do or say something going to show that he intends the deed to become operative, before the title can pass. The deed not having been left, after its execution, with the justice of the peace as an escrow, nor to be delivered unconditionally to the register of deeds, or to the grantee, or to some person for him, the powers and duties of that officer ceased with the discharge of his official duties. With the actual delivery of the deed, he, as an officer authorized to take the acknowledgment of deeds, had no concern. In *Robbins v. Rascoe*, 120 N. C. 79, 26 S. E. 807, to which we were referred by the defendant's counsel, it appears that the grantor had parted with the deed by delivering it to the deputy clerk of the superior court with instructions to have the same proved by the subscribing witness before the clerk of the court, who was absent from his office, and to have the same registered. In *Hall v. Harris*, 40 N. C. 303, the court, in discussing the matter of the delivery of the deed, said: "The law does not depend upon the accidental use of mere words 'trusted to the slippery memory of witnesses.' It depends upon the act that a paper signed and sealed is put out of the possession of the maker." In the case before the court, the justice who took the acknowledgment had no further connection with the deed, and, according to the plaintiff's evidence, the plaintiff kept the deed in his trunk, after his wife had acknowledged it, for years, and never mentioned the matter to the grantee afterwards. In *Ellington v. Curry*, 40 N. C. 21, which the defendant's counsel also cited, the deeds had been signed and sealed by the grantor, and witnessed, and had been ordered to registration by the grantor himself.

But the defendant further contends, in his motion to nonsuit the plaintiff, that the fact of delivery had been judicially determined, and could not be controverted or impeached in this action to recover the land, and cited as authority for the position the case of *Red-*

man v. Graham, 80 N. C. 231. We have read that case with care. It does not disclose the nature of the pleadings and the precise purpose of the action. It does appear, however, that the impeachment of the delivery was attempted to be made collaterally. The action of the probate judge was declared by the court to be a judicial act, and the fact of delivery determined therein. In the suit before us, however, the plaintiff in the amended complaint alleges that the defendant came into possession of the deed unlawfully and fraudulently, and that it was never delivered by the plaintiff to the defendant; and there is a prayer for general relief. The motion to dismiss having been properly overruled, the defendant then put in evidence tending to show the delivery of the deed to him by the plaintiff. The theory of the plaintiff was that the defendant got possession of the deed surreptitiously after the plaintiff left the state, through unlawful intimacy with the plaintiff's wife, and the undue influence which he thereby exerted over her. On the question of delivery his honor received, under objection of the defendant, a part of the deposition of the plaintiff, which, in substance, was that the plaintiff, in 1894, had written to his attorney (Mr. Mason) that he was surprised at the claim of Thompson to the land, and that he was mad, and had learned from friends that Thompson, the defendant, had taken up with his wife, that they were living together as man and wife, and that she had had two illegitimate children by him (the information was received years before). Other parts of the deposition of like tenor were introduced and received, over the objection of the defendant. This evidence tended to prove that the defendant had been unlawfully cohabiting with the plaintiff's wife, and that through that influence he had procured her to deliver to him the deed which the plaintiff had left in his trunk on his departure from the state. It was hearsay testimony on a most vital point, and ought not to have been received, and for the error in the admission of the testimony there must be a new trial. New trial.

(123 N. C. 170)

WATKINS et al. v. WILLIAMS.

(Supreme Court of North Carolina. Nov. 9, 1898.)

MORTGAGE—WHAT CONSTITUTES.

A deed absolute on its face was executed at the same time as a bond conditioned to convey on receipt of a sum advanced by the grantee to pay incumbrances, together with advances for the support of grantor's family to a certain date. *Held*, that the two instruments constituted a mortgage.

Appeal from superior court, Chatham county; Robinson, Judge.

Action by Henrietta Watkins and another against Brantley Williams. There was a judgment for plaintiffs, and defendant appeals. Affirmed.

The following issues were submitted to the jury: "(1) Was the deed executed by D. S. Watkins to defendant intended as a mortgage? Answer: Yes. (2) What sum, if any, is due defendant on said mortgage? Answer: Nothing."

Murchison & Calvert, for appellant. H. A. London, for appellee.

FAIRCLOTH, C. J. The plaintiffs are the only heirs at law of D. S. Watkins, who died, intestate, in October, 1882. It appears from the record that said Watkins, in June, 1882, had executed a mortgage on the lands in controversy, about 207 acres, to Hadley & Dixon, to secure a debt of \$50, due them, and payable December 1, 1882, and that he applied to the defendant, his brother-in-law, to take up said mortgage. Carson Johnson testified that he was a justice of the peace in 1882, and was asked by defendant to go with him to Watkins' house to prepare a deed, and further testified that, "when they got together, they discussed a mortgage of \$50, made by Watkins to Hadley & Dixon. Watkins wanted Williams (the defendant) to take up this mortgage, and hold it after being assigned to him. Williams objected to having the mortgage transferred to him, and suggested a deed to him from Watkins. That was agreed upon with the understanding that Watkins should have time to redeem his land. Williams suggested two years, but four years was agreed upon as the time that Watkins was to have to redeem. Watkins expected to get a legacy from Wales. There was a deed written by me, signed by Watkins and his wife, and probated by me, and at the same time another paper writing, according to the agreement, was drawn up by me, and signed by Williams, and probated by me, and delivered to Watkins." At another part of the trial, the same witness said: "The paper which I wrote at the time I wrote the deed provided that, when Watkins paid back the money that Williams was out to Hadley & Dixon, then Williams was to reconvey to Watkins. No money was paid at that time, nor did Williams claim that Watkins owed him anything. I have been tax assessor, and we put the land at \$700 or \$800." The condition of the bond to reconvey the land to the plaintiff was: "On receiving the sum amounting in the aggregate, to wit, one certain mortgage made to Hadley & Dixon, taken by Alfred McPherson, tax claims bid in by J. M. Stedman, together with whatsoever amount accruing or arising for the support of the family of D. S. Watkins to the date three years hence from the date of this instrument, which will be October 23, 1885." Soon after the death of Watkins, the defendant took possession of the land and of Watkins' papers, including the aforesaid bond. The defendant was notified at the trial to produce the bond, and, on failing to do so,

the parol evidence of Carson Johnson, above recited, was admitted in evidence, and, after the plaintiff rested his case, the defendant introduced the bond. His honor charged the jury that the deed and paper writing (bond), construed together, constitute a mortgage, if they believed the evidence, and that they should answer the first issue, "Yes." Defendant excepted.

We think the instruction was correct, and that conclusion ends the case. The jury say, on the second issue, that nothing is due the defendant on the mortgage, the defendant having been in possession, receiving rents and profits, since 1882. We find no copy of the deed in the record, nor any extracts from it; so we are ignorant of the recited consideration. We must infer it to be the assumption of the \$50 due Hadley & Dixon; otherwise, the deed would be without consideration, and the grantee would hold the legal title in trust for the grantor.

The plaintiffs insist that the written evidence alone discloses an agreement that their father retained the right to redeem, which is denied by defendant. It is difficult to resist the plaintiffs' contention. It is plain that the grantor so understood and intended it; and, if the grantee did not, he failed to disclose to the grantor any other purpose. The defendant's bond requires no material payment to be made, except the amount of Hadley & Dixon's \$50 mortgage, and the taxes then due. It discloses a great disproportion between that amount and the value of the land. Upon the face of these papers alone, we should hold that they constitute a mortgage, as was held upon very similar facts, and that time of payment is not of the essence of the contract, on the principle that, "once a mortgagee, always a mortgagee." *Robinson v. Willoughby*, 65 N. C. 520; *Mason v. Hearne*, 45 N. C. 88; *Adams*, Eq. 112. The contract being in writing, his honor properly held its nature and effect to be a matter of law for his decision. Whenever a transaction is substantially a security for debt, it becomes a mortgage in a court of equity, and the debtor has a right to redeem. *Coote*, Mortg. 22; *Fish*, Mortg. 68. The contract may be in several instruments, and the agreement (as between the parties) may be in writing or oral. *Robinson v. Willoughby*, *supra*; *Streator v. Jones*, 10 N. C. 423. The writings here indicate a mortgage; and the parol proof, admitted as above stated, does not contradict, but sustains, that view. When a deed is absolute on its face, nothing else appearing, the plaintiff must show by strong and satisfactory proof that a security was intended, and that the provision for redemption was omitted by reason of the ignorance of the draftsman, mistake of the parties, or undue advantage taken of the necessities of the debtor. *McDonald v. McLeod*, 36 N. C. 221; *Waters v. Crabtree*, 105 N. C. 394, 11 S. E. 240. A mortgage is a security for money loaned, and the like. There

may be neither a present loan nor an antecedent debt, but the grantee may undertake to assume some outstanding liability of the grantor, or to pay off some claim against the grantor, so that an obligation to reimburse him would rest upon the grantor, and the conveyance may be intended to indemnify the grantee, and to secure the performance of the grantor's future continuing obligation, in which case it would clearly be a mortgage. 3 Pom. Eq. Jur. § 1195, note 1; 1 Jones, Mortg. § 244.

Sincer Streater v. Jones, 10 N. C. 423, two principles have been established and uniformly followed when bills are preferred to convert a deed absolute on its face into a mortgage or security for debt: (1) It must appear that the clause of redemption was omitted through ignorance, mistake, fraud, or undue advantage. (2) The intention must be established, not by simple declarations of the parties, but by proof of facts and circumstances dehors the deed, inconsistent with the idea of an absolute purchase; otherwise, the solemnity of deeds would always be exposed to the "slippery memory of witnesses." *Kelly v. Bryan*, 41 N. C. 283. The plaintiff makes no attempt to shelter himself under the first proposition, but he insists, and we think has shown, that he is protected by the second proposition. Again, where, upon the face of a transaction, it is doubtful whether the parties intended to make a mortgage or a conditional sale, courts of equity incline to consider it a mortgage, because, by means of conditional sales, oppression is frequently exercised over the needy. *Poindexter v. McCannon*, 16 N. C. 377; 3 Pom. Eq. Jur. § 1195. The oral evidence not only sustains the writings, but shows the facts—understanding and circumstances—so fully that our conclusion seems to be irresistible. Affirmed.

(123 N. C. 181)

BAIRD v. WINSTEAD et al.

(Supreme Court of North Carolina. Nov. 9, 1898.)

WILLS—CONSTRUCTION—ESTATE CHEATED—BAR OF DOWER—BANKRUPTCY.

1. A will devised the residuary estate, "to be equally divided" between six named sons, and provided: "Should my son T. die without leaving issue, then I desire that his share as above shall be equally divided among his brothers; and, if any of his brothers be then dead, the children of the dead brothers shall take their dead father's share. If, however, T. should leave a widow, I desire her to have the use of the property during life or widowhood." *Held*, that T.'s estate was absolute, unless defeated by his dying without issue, in which event only the widow's life estate became vested as a limitation on the limitation over to the brothers; otherwise she could take only dower in such estate.

2. From 1784 until the act of 1869 restoring the common-law right of dower, a widow was entitled to dower only in lands of which the husband died seised and possessed; and therefore a sale in bankruptcy of her husband's

lands during his lifetime, acquired prior to 1860, barred her dower.

Appeal from superior court, Person county; Robinson, Judge.

Action by Lucy Baird against Charles Winstead and others. From a judgment for defendants, plaintiff appealed. Affirmed.

Upon the conclusion of the evidence in the lower court, his honor intimated that he would charge the jury, if they believed the evidence, to answer the issues in favor of defendant; and plaintiff submitted to a nonsuit, and appealed. The plaintiff offered the will of William Baird, deceased, who was the father of Thomas A. Baird, deceased; the latter having married Lucy A. Baird, the plaintiff, a year or two before the death of said William. Thomas A. Baird died on August 3, 1897, at the soldiers' home in Raleigh. He left, him surviving, two children by his said wife, Lucy A. Baird, the plaintiff, who is still a widow. Only two sections of said will bear distinctly upon the point in dispute, these being items 5 and 7. It was admitted that the defendants are in possession of the lands described in the complaint; said lands being the same which William Baird owned, and devised by will to Thomas Baird in items 5 and 7. It was also admitted that title to said lands was out of the state, and that the defendants held said lands by deeds obtained immediately or mediately from N. N. Tuck, commissioner in bankruptcy, who undertook to sell the same to pay the debts of said Thomas A. Baird, and that Mrs. Lucy A. Baird was forcibly ejected from said lands in 1876 by said C. S. Winstead, under said bankruptcy proceedings, and that said Lucy A. Baird has not at any time signed any paper or done any act to deprive her of whatever interest she has or had, if any, in and to said lands.

Winston & Fuller, for appellant. J. W. Graham, for appellees.

CLARK, J. Clause 5 of the will gives the residue of the estate absolutely, "to be equally divided" between the testator's six sons therein named; Thomas being one of them. In clause 7 there is a condition of defeasance: "Should my son Thomas die without leaving issue, then I desire that his share as above shall be equally divided among his brothers; and, if any of his brothers be then dead, the children of the dead brothers shall take their dead father's share. If, however, Thomas should leave a widow, I desire her to have the use of the property during her life or widowhood." The estate of Thomas was absolute, unless defeated by his dying without issue; and only if thus defeated did the reservation of a life estate to the widow take effect as a limitation upon Thomas' entire share going to his brothers. Should he die leaving issue, it was evidently contemplated (Code, § 2180) that the estate should go, in usual course, unless devised or sold by him,

to his issue, with the right of dower in his wife. Thomas died leaving issue, and the only contingency in which the widow could claim a life estate in the property has not arisen. The defendants hold the realty under purchase at a sale thereof by the assignee in bankruptcy of Thomas, who intermarried with the plaintiff, and also acquired the land, prior to 1860. She is therefore also barred of right of dower therein. *Sutton v. Askew*, 68 N. C. 172. In holding that the plaintiff could not recover, there was no error.

(128 N. C. 226)

BEST v. HARDY et al.

(Supreme Court of North Carolina. Nov. 9, 1898.)

FIXTURES—SEVERANCE—DEEDS.

A deed of trust to fixtures on land already deeded to the same person to secure the same debts, does not, because it expressly mentions them, effect a legal severance of the fixtures, and divest the title thereto passed by the first deed.

Appeal from superior court, Greene county; Robinson, Judge.

Action by B. J. Best against R. H. Hardy and others. There was a judgment for plaintiff, and defendants appeal. Reversed.

Geo. M. Lindsay, for appellants. Swift Gal-
loway and J. B. Batchelor, for appellee.

FAIROLOTH, C. J. In May, 1890, the plaintiff and his partner, now dead, conveyed a tract of land to a trustee to secure their indebtedness to the British & American Mortgage Company. There was at that time on the land one steam engine and boiler, one sawmill, one cotton gin, and one set of mill stones, with the attachments, pulleys, and shafting to each necessary for their proper use, all so fastened to the premises as to make them fixtures; and it is conceded that they were fixtures at that time. In June of the same year the plaintiffs executed another deed to the same trustee to secure the same debts, conveying the same engine, sawmill, cotton gin, and mill stones, etc. Under regular foreclosure proceedings, to which the plaintiff was a party, a decree of sale foreclosing the first deed was entered in 1897, and sale made, confirmed, and deed made to the purchaser, Richardson, who afterwards sold to the defendants, there being no exception of the fixtures in the deed nor at the sale. The plaintiff (trustor) now sues to recover said fixtures, on the idea that the second deed, between the same parties, severed the fixtures, and made them personalty, as a matter of law, without any agreement in fact that they should be severed. That is the only question to be considered. Since *Elwes v. Mawe*, 2 Smith, Lead. Cas. (9th Ed.) 1423, the subject of fixtures has been often before

the courts in its application to the various relations of the litigating parties, it being held therein that much depended on those relations. In *Overman v. Sasser*, 107 N. C. 432, 12 S. C. 64, this court commented on several of such relations, and it was held that attachments made by a tenant by the curtesy might be recovered by his personal representative against the remainder-man. In *Moore v. Vallentine*, 77 N. C. 188, a distinction was drawn, and it has been since followed by this court, viz.: (1) That where improvements to the land were made by the owner, mortgagor, trustor, lessor, or vendor, these improvements enhanced the value of the land, and of course increased the security; and that such attachments could not be removed by the owner to the prejudice of the mortgagee, etc. (2) That where improvements were added by the lessee, tenant for life, or other tenants, these attachments, apparently fixtures, were for the betterment of the particular estate; and that, in the interest of trade, manufacturing, and agriculture, they could be removed at the will of the tenant, as that rule worked no injury to the owner. An illustration of the first proposition is found in *Bond v. Coke*, 71 N. C. 97. A mortgaged his land to B. to secure the payment of debts, and afterwards fixed a gin and press in the usual manner, and subsequently sold his equity of redemption, including the gin and press by name, to C. B. sold the land under the first trust, excepting the gin and press at the sale, but made no exception in his deed to the purchaser. Held, that the purchaser acquired title to the gin and press, as any verbal exceptions at the sale would have no effect in controlling the provisions of the deed. Such fixtures as those in the present case are a part of the land, as much so as a house or a tree, until actual severance; and a deed conveying the land without any exception in legal effect passes the title to the steam engine, etc., to the purchaser, who received his title under the sale decreed by the court. Even if there had been a verbal agreement to revest in the plaintiff the title to the fixtures, it (the title) could not pass, except in the manner required by the statute of frauds. The second deed does not profess to work a severance, nor to assume expressly that an actual severance had occurred, but it undertakes to convey an interest that had already passed by the first deed. If the idea was to convey the equity of redemption to the same trustee, the plaintiff's equity to redeem would still remain. The second deed would have no effect on the rights of the purchaser. It was probably made under some doubt in the minds of the contracting parties whether the fixtures passed with the land under the first deed or not. Other questions were argued, but they are of no importance in the case. In any aspect of this case, we think the judgment was erroneous. Reversed.

(123 N. C. 728)

STATE v. WHITLEY.

(Supreme Court of North Carolina. Nov. 9, 1898.)

CRIMINAL LAW—MALICIOUS PROSECUTION—COSTS—APPEAL—REVIEW—EVIDENCE—SUFFICIENCY.

1. A prosecutor may appeal from an order requiring him to pay costs.

2. On appeal from an order requiring a prosecutor to pay costs, errors on the trial cannot be reviewed.

3. On appeal from an order requiring a prosecutor to pay costs, the findings of fact on which he is taxed with costs will not be reviewed.

4. A judgment on the weight and sufficiency of evidence showing that a prosecution was frivolous or malicious will not be reviewed on appeal from an order requiring prosecutor to pay costs, if there is any evidence to sustain the judgment.

5. A tenant prosecuted by his landlord for moving a crop without notice before payment of rent testified that the landlord refused to take corn for the rent, and "said he was going to indict me; that he had \$50 to spend on me." Held to be evidence that the prosecution was malicious, justifying the taxation of costs against the landlord.

Appeal from superior court, Duplin county; Robinson, Judge.

W. A. Whitley was acquitted of moving a crop without notice before payment of rent. W. H. Williams, the prosecuting witness, was adjudged to pay costs, and he appeals. Affirmed.

Stevens & Beasley, for appellant. The Attorney General, for the State.

FURCHES, J. The defendant was a tenant of W. H. Williams (the prosecutor) in 1897, and is indicted under the statute for moving the crop raised by him without giving the five-days notice required by law, and before the rental and advances made by the landlord were paid. The defendant was acquitted, and Williams was marked as prosecutor, and taxed with the costs. From this order, Williams appeals to this court; and, while the state cannot appeal from a general verdict of not guilty, a party taxed with the costs, as prosecutor, may. *State v. Morgan*, 120 N. C. 563, 26 S. E. 634; *State v. Powell*, 86 N. C. 640. But in such appeals this court cannot review and correct any errors committed by the court on the trial, if such errors should appear. Nor can this court review the findings of fact by the court upon which the prosecutor is taxed with the costs. *State v. Morgan* and *State v. Powell*, supra. Nor can this court review the judgment of the court below upon the weight of the evidence or sufficiency of the evidence, showing that the prosecution was frivolous or malicious (as either will justify the court in making the order), unless it should appear that there was no evidence.

In this case there are no specific findings of fact by the court, but all the evidence offered on the trial is sent up in the record. And the prosecutor, Williams, contends that this evidence does not prove or show malice. The defendant Whitley testified: "I was to

pay 1,000 pounds of seed cotton. Nothing said at the time about delivery at Pierce's gin. Had one and a half acres in cotton, and four or five acres in corn; all very poor. My horse gave out in May. I picked out 292 pounds of cotton. The cows ate some. I did not dispose of any. I offered him the corn. He said he did not want the corn and fodder, and said he was going to indict me; that he had \$50 to spend on me. I did not make a bale of cotton." Taking this evidence to constitute the special finding of the court, we cannot say that there was no evidence to support the order of the court in taxing the prosecutor with the costs. Such orders must depend to a very great extent upon the judgment of the court trying the case, who sees and hears all that is said and done. The judgment is affirmed.

(38 S. C. 533)

SPENCER OPTICAL MFG. CO. v. JOHNSON et al.

(Supreme Court of South Carolina. Nov. 12, 1898.)

LIMITED PARTNERSHIPS—REQUISITES OF CERTIFICATE—GENERAL PARTNERS—NONSUIT—QUESTIONS OF LAW—LEADING QUESTIONS.

1. The provision in Rev. St. § 1410, that a certificate to form a limited partnership shall contain, *inter alia*, a statement of the amount of capital which each special partner has contributed to the common stock, is not substantially complied with by a statement of the aggregate sum contributed by all the special partners.

2. Where the statements required by statute to be made in a certificate to form a limited partnership are not substantially complied with, the special partners are liable as general partners.

3. In an action against the members of a limited partnership, it is not error for the court to state to the jury his construction of the contract of partnership, and his views whether it complied with the statute, since such matters are purely questions of law.

4. The overruling of objections to leading questions does not constitute reversible error unless there is an abuse of discretion.

5. It is not an abuse of discretion to permit leading questions in regard to matters which the witness had before testified to in a more specific manner.

6. Evidence is not admissible to show how the special partners in a limited partnership paid their contributions,—i. e. whether individually or as a firm,—since the certificate required by Rev. St. § 1410, must speak for itself in regard thereto.

Appeal from common pleas circuit court of Greenwood county; James Aldrich, Judge.

Action by the Spencer Optical Manufacturing Company against H. W. Johnson and others, doing business under the firm name of H. W. Johnson. From a judgment for plaintiff, defendants other than Johnson appeal. Affirmed.

Giles & Magill, for appellants. W. K. Blake, for respondent.

JONES, J. This appeal is from a judgment on verdict in favor of plaintiff in a

suit on account of goods sold and delivered. The defendant H. W. Johnson did not answer. The defendants J. K. Durst and W. L. Durst interposed an answer, denying that they were partners of H. W. Johnson, and denying generally the allegations of the complaint. It was not questioned on the trial that judgment should go against H. W. Johnson. The contention by defendants Durst was that they were not liable as general partners with defendant Johnson. Plaintiff offered in evidence a contract purporting to be a contract of limited partnership between defendant Johnson, as general partner, and defendants J. K. Durst and W. L. Durst, as special partners; then offered evidence of the admission of defendant Johnson that the account sued on was correct with promises to pay, and of a partial payment on said account out of the proceeds of the sale of the stock of the firm of H. W. Johnson, defendant. The liability of the defendants J. K. Durst and W. L. Durst depends upon the construction of the contract of partnership introduced in evidence, or rather whether said contract was made in compliance with the statute; and most of the exceptions hinge on this question. Our statute regulating limited partnerships (sections 1407-1434, Rev. St.), in section 1410 provides as follows: "The persons desirous of forming such partnership shall make and severally sign, in the presence of two subscribing witnesses, a certificate, which shall contain: First. The name or firm under which such partnership is to be conducted. Second. The general nature of the business intended to be transacted. Third. The names of the general and special partners interested therein, distinguishing which are general and which are special partners, and their respective places of residence. Fourth. The amount of capital which each special partner shall have contributed to the common stock. Fifth. The period at which the partnership is to commence, and the period at which it will terminate." Section 1413 provides: "At the time of the filing the original certificate, with the evidence of the execution thereof, as before directed, an affidavit of one or more of the general partners shall also be filed in the same office, stating that the sums specified in the certificate to have been contributed by each of the special partners to the common stock have been actually and in good faith paid in cash." Then section 1414 provides: "No such partnership shall be deemed to have been formed until a certificate shall have been made, proved, filed, and recorded, nor until an affidavit shall have been filed, as above directed; and if any false statement be made in such certificate or affidavit, all the persons interested in such partnership shall be liable for all the engagements thereof, as general partners." In 13 Am. & Eng. Enc. Law, p. 809, it is stated: "These requirements, being conditions precedent to the formation of such partnership are mandatory, and if they are

not strictly, or at least accurately and substantially, complied with, the special partners are not entitled to immunity from the debts of the firm, but will be liable as general partners." This statement is supported by the authorities cited. See, also, *Jenning's Appeal* (Pa. Sup.) 2 Lawy. Rep. Ann. 43, note (s. c. 16 Atl. 19); *Refining Co. v. Wyman*, 3 Lawy. Rep. Ann. 508, note (s. c. 38 Fed. 574); *Bank v. Colgate* (N. Y. App.) 8 Lawy. Rep. Ann. 712, note (s. c. 24 N. E. 799). The circuit court ruled in favor of plaintiff's contention that the contract of limited partnership in this case did not comply with the statute, because both in the certificate and in the affidavit it did not appear what sum each special partner had contributed and paid into the common stock. It appears in the certificate "that the said J. K. Durst and W. L. Durst have contributed the sum of one thousand (\$1,000.00) dollars as capital to the common stock," and in the affidavit is this statement: "That the sum specified in the said certificate to have been contributed by the special partners to the common stock has been actually and in good faith paid in cash." We do not think it either a strict or a substantially accurate compliance with the statute merely to state what all the special partners in the aggregate contribute. The statute, for reasons of its own, insists that the amount each special partner contributes shall be specified. As the limitation of the liability of a special partner, under the limited partnership statute, must depend upon compliance with the statute, it follows, if the statute be not complied with, that the special partner becomes liable as a general partner. It follows that there was no error in refusing the motion for a nonsuit, for there was evidence tending to establish the liability of the defendants as general partners by proof of the contract of limited partnership and its noncompliance with the statute, followed by evidence of the admission of H. W. Johnson, the general partner, as to the correctness of the account sued on.

But, independent of this, in section 1431, Rev. St., it is provided that "any creditor of a limited partnership may, at his option, include in his suit against the same the special partner or partners who may become liable as general partners by failing to comply with the provisions of this chapter; and all the facts necessary to affirm or negative the liability of such special partner or partners may be given in evidence under the general issue; and the failure of the plaintiff to establish such liability shall not be cause of nonsuit." As the construction of a written contract is exclusively within the province of the court, and as the question whether the contract in question complied with the statute is purely a question of law, it was, of course, not a charge in respect to facts for the judge to state to the jury his construction of the contract, and his views whether the same complied with the statute. This is all

that he said in reference to the fourth, fifth, sixth, seventh, and eighth exceptions, imputing error in the charge in respect to matters of fact. It follows also that the ninth, tenth, eleventh, and twelfth exceptions must be overruled, because the charge of the judge to the jury on the question whether the certificate and affidavit complied with the statute was in accord with the views of the court. Under the twelfth exception it is argued that, unless there was some false statement made in the certificate or affidavit under the limited partnership act, the special partner would not be liable as a general partner. But, as has been shown, the test is not whether any statement is false or not, but whether the statements made comply with the requirements of the statute. If the statements made are upon their face in conformity with the statute, under the last clause of section 1414 above quoted, it may be shown that the certificate or affidavit is false in some required statement, in which case the special partner is liable as a general partner, notwithstanding, on their face, the certificate and affidavit comply strictly with the statute. The falsity of some requisite statement is an additional, not the sole, ground upon which the liability of the special partner becomes general.

The exceptions relating to the admission of certain testimony and the refusal to admit other testimony will be briefly noticed. The first exception alleges error in permitting the following questions and answers: "Q. You say you paid Mr. Giles out of this a certain amount of money? A. Yes, sir; I have your receipt for it. Q. And myself a certain amount? A. Yes, sir." Waiving the objection that the question is too general, we may say the testimony was relevant as tending to show a partial payment of the account sued from the proceeds of the assets of the firm of H. W. Johnson. In so far as the questions are said to be leading, we may say that leading questions are largely within the discretion of the trial court, and will not constitute reversible error, unless there was abuse of discretion to the harm of the appellant. In this case the questions were mere repetitions of what the witness had already testified to in a more specific manner. The second exception imputes error in allowing W. K. Blake to testify to the effect that defendant Johnson told him that no more than \$1,000 had been paid in on the contract of partnership. We fail to see what possible harm such testimony could do the appellants. The alleged statement by Johnson did not differ from his affidavit attached to the certificate, which was introduced in evidence. The thirteenth exception assigns error in refusing to allow J. K. Durst, one of the defendants, to testify how the \$1,000 paid into the limited partnership business by J. K. Durst and W. L. Durst was contributed,—whether individually or as a partnership firm under the name of J. K. Durst and W.

L. Durst. The ruling was correct. The certificate, under the act, must speak for itself. Besides, the act, as shown, does not permit any joint contributions by special partners. The contributions by special partners are several, and the amount contributed by each one must be specified. The judgment of the circuit court is affirmed.

(45 W. Va. 179)

HARMISON v. BALLOT COMRS.

(Supreme Court of Appeals of West Virginia.
Sept. 26, 1898.)

COURTS — REVIEW — CONSTITUTIONAL LAW — APPORTIONMENT OF DELEGATES.

1. An unconstitutional act forming a delegate district or apportioning delegates for the house of delegates may be declared void by the courts, although the act is the exercise of political power, since in such case the question is judicial.

2. When, after a census, the legislature has, by law, created delegate districts, and apportioned delegates for the house of delegates among the counties and districts, section 10 of article 6, of the constitution forbids any change until after the next census. An act making earlier change is void.

(Syllabus by the Court.)

Error to circuit court, Jefferson county; R. Boyd Faulkner, Judge.

Application by Frank H. Harmison for a writ of mandamus directed to the ballot commissioners of Jefferson. Judgment for petitioner, and the commissioners ask for a writ of error. Denied.

Jacob Engle, for petitioners. Forrest W. Brown, for respondent.

BRANNON, P. In 1891, the legislature made an apportionment of delegates among the various counties and districts to constitute the house of delegates, giving Berkely and Jefferson counties each one delegate, and erecting a delegate district, called the "Seventh delegate district," out of Berkely, Jefferson, and Morgan counties, with two delegates. In 1897 the legislature passed an act (chapter 78) taking Morgan county out of said district, and giving it one delegate, and giving Berkely and Jefferson each one delegate, and making them the Seventh delegate district, with one delegate. It reapportioned and redistricted the state as to delegates. A convention called by the Democratic party, claiming that the act of 1897 was unconstitutional, and that the Seventh district stood as it was under the act of 1891, composed of Berkely, Jefferson, and Morgan counties, nominated R. W. Morrow, a resident of Jefferson county, and Frank Harmison, a resident of Morgan county, as candidates for the house of delegates, to represent said district; but the ballot commissioners of Jefferson county, acting under said act of 1897, refused to put said Harmison's name on the ballots to be used in the election to be held in November, 1898, and then Harmison asked and obtained, by the judgment of the circuit court of Jef-

person county, a peremptory writ of mandamus, commanding said commissioners to put his name on such ballots; and said commissioners now ask this court for a writ of error from said judgment.

A question occurred to my mind whether this court could consider the case,—whether this matter was in its nature a judicial matter cognizable by the courts, or a matter of purely a political, legislative, or governmental nature, to be left absolutely to the legislature, since the power to erect districts and apportion delegates was vested in it by the constitution; but I find that the subject has been discussed in various cases, and it has been held that the constitutionality of apportionment acts is a subject of judicial inquiry, not merely political. This is based on the consideration that the judiciary must hold an act contrary to the constitution as no law for any purpose. *Denny v. State* (Ind. Sup.) 42 N. E. 929, and cases there cited. See, also, *State v. Wrightson* (N. J. Sup.) 28 Atl. 56. I find it so held in the six states of Indiana, Wisconsin, Michigan, New York, Illinois, and New Jersey. Further search shows that Massachusetts, Ohio, North Carolina, Nebraska, and Kansas supreme courts hold the same doctrine, as will be seen in the opinions in *State v. Cunningham* (Wis.) 51 N. W. 724 (full discussion). Chapter 25, Acts 1893, gives the writ of mandamus to control ballot commissioners, as held in *Marcum v. Commissioners*, 42 W. Va. 263, 26 S. E. 281. Of course, this would not give jurisdiction if the matter were not of judicial character; but, being of such character, that act applies mandamus. Wherever the question of constitutionality arises in the administration of rights, the courts have power to pass on it. The case, then, turns upon the question of the constitutionality of the act of 1897. If that act is constitutional, Harmison is ineligible to represent the district, and has no right to go upon the ballots, because a resident of Morgan county, which, under that act, is no part of the district; whereas, if that act is unconstitutional, the district stands as under the act of 1891,—Morgan a part of it. Section 7 of article 6 provides that “after every census the delegates shall be apportioned as follows,” giving a mode of apportionment. Then section 10 says: “The arrangement of the senatorial and delegate districts, and the apportionment of delegates, shall hereafter be declared by law as soon as possible after each succeeding census taken by authority of the United States. When so declared, they shall apply to the first general election for members of the legislature to be thereafter held, and shall continue in force unchanged until such districts shall be altered and delegates apportioned under the succeeding census.” We plainly see that both sections contemplate one apportionment and arrangement of districts after each census, not a changing one every session of the legislature. This provision, fixing one apportionment

after a certain event,—the taking of a census,—plainly contemplates that there shall be but one after each census. This provision is mandatory, not simply directory, for the reason that it manifestly designed to have a fixed apportionment, lasting from census to census, not varying and unstable. The nature of the subject tells us that this must be so, as it ought to be so. Another reason is that constitutional provisions are mandatory, not merely directory. *Cooley, Const. Lim.* 93. A case strongly supporting this position is the Indiana case of *Denny v. State*, 42 N. E. 929. The constitution of Indiana provided that an enumeration of voters should be taken every six years, and that an apportionment of representatives should “be made at the session next following each period of making such enumeration”; and that case held that the mere fact that the constitution provided for an apportionment after each enumeration implied that, when such apportionment was once made, it forbade another until another enumeration, although there was no prohibition in the constitution against a change of apportionment, and that but one apportionment could be made in the six years. So, it was held in *Slauson v. City of Racine*, 13 Wis. 398, and *Opinion of Justices*, 6 Cush. 575, and *State v. Cunningham*, supra. But when we see that our constitution expressly says that an apportionment, when once made, “shall continue in force unchanged until such districts shall be altered and delegates apportioned under the succeeding census,” the case is made conclusive against any earlier change of district. The provision for one apportionment and districting after each census is mandatory, not by mere construction, but because there is a prohibition against any change until the next census. There is no room here to construe and doubt. We must simply obey the constitution. If there were any escape, I would not declare the act void; but there is no other alternative. We therefore refuse a writ of error, as we regard the decision of the circuit court plainly right.

Note by BRANNON, P.: I call attention to the case of *People v. Hutchinson*, 172 Ill. 486, 50 N. E. 599, published since I delivered the above opinion. The constitution of Illinois provides that “the general assembly shall apportion the state every ten years” for senators, and so forth, and that case held said provision mandatory, and as prohibiting any second apportionment within the 10 years after the legislature had once made an apportionment after a census. The case strongly supports the above opinion.

(105 Ga. 555)

EQUITABLE MORTG. CO. v. BUTLER.
(Supreme Court of Georgia. Oct. 17, 1898.)

DEED—DELIVERY—ESTOPPEL—NEW TRIAL.

1. The presumption of the delivery of a deed which arises from the fact that it has been recorded is not conclusive, and, between the parties to the instrument, may be rebutted; yet when it appears that such deed was duly recorded at the instance of the grantor, and

then delivered to a third person as an escrow, the grantor may, as to third persons who purchase for value on the face of the record, and without knowledge or notice of nondelivery to the grantee, be estopped from denying delivery.

2. The case having been made to turn on the question of delivery or nondelivery of the deed under which the claimant's grantors asserted title, without reference to the law of estoppel as indicated, a new trial must be granted.

(Syllabus by the Court.)

Error from superior court, Troup county; S. W. Harris, Judge.

Action by H. C. Butler against E. T. Winn. Judgment for plaintiff, and levy on lands, to which the Equitable Mortgage Company filed a claim. Verdict finding property subject, and claimant brings error. Reversed.

Payne & Tye and Ohas. E. Hawker, for plaintiff in error. Longley & Longley, for defendant in error.

LITTLE, J. In May, 1895, H. C. Butler recovered a judgment for \$2,590.47 against E. T. Winn, as administrator of the estate of Willis Miller, deceased. On the 1st day of June, 1895, a *fi. fa.* issued, and was by the sheriff levied on certain lands, as the property of Willis Miller, which included 202½ acres, "whereon Henry Miller now lives, and known as the 'Old Dred Davis Place,'" and which was further described in the levy by metes and bounds. To this levy the Equitable Mortgage Company filed a claim, in which it averred that 202½ acres, known as the "Dred Davis Place," embraced in said levy, was not the property of the deceased, but was the property of the claimant. On the trial of the issue made, the claimant introduced in evidence three deeds, the material portions of which are as follows: (1) Deed from Joel E. Davis to Willis Miller, dated August 26, 1850, recorded September 3, 1850; the same conveying the land in dispute, and containing a general warranty of title. (2) Warranty deed to same land from Willis Miller to Henry W. Miller and Mary J. Miller, dated January 6, 1886, and recorded January 30, 1886. (3) Deed from Henry W. Miller and Mary J. Miller to the Equitable Mortgage Company, the claimant, dated July 17, 1889, and recorded July 24, 1889, made under the provisions of the Code of 1882, and carried title to secure a debt of \$483.50. H. C. Butler testified that he was the plaintiff in *fi. fa.*; that he wrote the deed from Willis Miller to Henry W. Miller and Mary J. Miller at the request of Willis Miller, who was present in the clerk's office at the time the deed was recorded; and that it was recorded by direction of Willis Miller. The witness further testified: "This deed has been in my possession ever since it was recorded, and never was in possession of Henry Miller or Mary J. Miller. Willis Miller owed me money at the time this deed was made, and we met to have a settlement. The settlement was never made. The deed was

never delivered to Henry W. Miller or Mary J. Miller. It was executed in the clerk's office. Willis Miller and Henry Miller were present. Willis Miller owed me several thousand dollars at the time. After executing the deed, he handed it to me, to be held pending a settlement between me and Willis Miller. It was suggested that the deed ought to be recorded, to keep it from getting lost, and it was recorded and handed back to me by the clerk. * * * Willis Miller instructed me to hold the deed, and never deliver it to Henry or Mary J. Miller, until a settlement was made, which settlement has never been made. The deed was a deed of gift by Willis Miller, and was executed in view of a settlement which he was to make with me, * * * but the settlement failed, and Willis Miller instructed me to hold the deed, and never deliver it, until such settlement was had. Willis Miller was then in possession of said land, and had been for years, and he died in possession, and this deed has never been out of my own possession." The jury rendered a verdict finding the property subject. The claimant's motion for a new trial was overruled, and it excepted. The motion was upon the grounds that the verdict was contrary to law and the evidence, and, in addition, that the court erred as follows: (1) In charging: "If you believe from the evidence that the deed executed by Willis Miller to Mary J. Miller and Henry W. Miller was never delivered, then I charge you that the land is subject, because in that event the title never passed out of Willis Miller; the law being that, to make a valid deed, delivery is essential." It is alleged that this was error, because: (a) The charge fell short in not submitting to the jury the question of notice that the deed was not delivered at the time the movant acquired its deed from Henry W. and Mary J. Miller. If it was recorded, and the movant was an innocent purchaser, and without notice of its not having been delivered, the movant had the legal right to assume it was duly delivered, and the parties would be estopped from saying it was not delivered. (b) The court should have charged, in addition to what it did charge, that, unless the Equitable Mortgage Company had notice of the nondelivery of the deed, it would not be affected by the fact that the deed was not actually delivered, provided some authorized person had the deed recorded, as was done prior to the making of the deed of Henry W. and Mary J. Miller to the company. (c) The court should have gone further, and charged that if the plaintiff, who had the deed from Willis Miller recorded, put it in the power of Henry W. and Mary J. Miller to have it recorded, and it was in fact recorded, and movant advanced its money on the faith of the deed's having been delivered because recorded, and having no notice that the deed was not actually delivered, plaintiff would be estopped from claiming, as against the movant, that the deed was not delivered,

as he, and not the movant, should suffer. (2) In admitting in evidence, over objection of movant, the following testimony of Butler: "The deed was never delivered to Henry W. Miller." It is alleged that this was error, because: (a) The question of nondelivery of the deed could be raised only by the grantor, Willis Miller. (b) The evidence was inadmissible unless it was shown that the movant had notice of the nondelivery of the deed. (3) In allowing Butler to testify, over the objection of movant, "The deed has been in my possession ever since it was recorded." It is alleged that this was irrelevant, and did not illustrate any issue before the court for determination. (4) In allowing Butler to testify, over objection of movant, that Willis Miller owed him (witness) money at the time the deed was made, and they were to have a settlement, and that the settlement was never made. It is alleged that this was error, because it was not shown that the movant had notice of any private transaction between these parties, and should not be bound by alleged equities existing between Willis Miller and the plaintiff. (5) In permitting Butler, over objection of movant, to testify in regard to the nondelivery of the deed from Willis Miller to Henry W. and Mary J. Miller, and in regard to the debts due by Miller to Butler, because it was not attempted to be shown that movant had notice of the nondelivery of the deed.

As will be seen, the rights of the respective parties in the trial before were made to turn exclusively on the question as to whether there had, in fact and in law, been a delivery of the deed from Willis Miller to Henry W. Miller and Mary J. Miller. The trial judge instructed the jury that, if such deed had not been delivered, then the title did not pass out of Willis Miller, and they should accordingly find the land subject to the execution. We agree with the contention of counsel for claimant that the issues raised in the case involve the application of another principle of law, not included in the question of the actual delivery of the deed. It cannot be questioned, in the light of the evidence, that the deed from Willis Miller to Henry W. and Mary J. Miller was an escrow, and that, treating the deed as a muniment of title, the grantees could take nothing by the deed. Civ. Code, § 3603. It is freely conceded, too, that as between those parties the registry of the deed was only presumptive evidence of its delivery, and such presumption might be rebutted, and the grantor allowed to show by competent evidence that notwithstanding such registry the deed was never in fact delivered, and consequently passed no title. *Wellborn v. Weaver*, 17 Ga. 275; *Harvill v. Lowe*, 47 Ga. 214; *Ross v. Campbell*, 73 Ga. 309; *Gordon v. Trimmer*, 91 Ga. 472, 18 S. E. 404. It is equally true, however, that where a grantor executes a deed in escrow, but at the same time, for any reason, directs that it be spread upon the records, and it is

duly recorded, and is absolute and unconditional on its face, and nothing appears on the record to indicate that the grantee holds other than an unconditional, fee-simple title, and no facts appear sufficient to put a prudent person upon inquiry as to the real truth of the transaction as between the grantor and the grantee, such grantor will ordinarily, as against an innocent purchaser, who, upon the faith of such record, and for value, takes a subsequent conveyance from the person named in the deed as grantee, be estopped to set up the nondelivery of the deed to his grantee, and thus defeat the conveyance taken by such innocent purchaser from such grantee. As is said in *Wade*, Notice, § 96, the registry acts are intended to furnish the best and most easily accessible evidence of the titles to real estate, to the end that those desiring to purchase may be fully informed of instruments of prior date affecting the subject of their contemplated purchases, and also that, having availed themselves of this means of knowledge, they may rest there and purchase in absolute security, provided they do so without knowledge, information, or such suggestions from other facts as it would be gross negligence to ignore, of some antecedent conveyance or equitable claim. If the owner or a person having an interest in property represents another as the owner, or permits him to appear as such, or as having complete authority over it, he will be estopped to deny such ownership or authority, against persons who, relying on his representations or silence, have purchased or acquired an interest in the property; and generally where a person, by word or conduct, voluntarily induces another to act on a belief in the existence of a certain state of facts, he will be estopped, as against him, to allege a different state of facts. 7 Am. & Eng. Enc. Law, p. 18 et seq. In the case of *Greer v. Mitchell* (W. Va.) 26 S. E. 802, it is said: "A party who by his acts, declarations, or admissions, or by failure to act or speak under circumstances where he should do so, either designedly or with willful disregard of the interests of others, induces or misleads another to conduct or dealings which he would not have entered upon but for this misleading influence, will not be allowed afterwards to come in and assert his right, to the detriment of the person so misled. That would be a fraud." And, applying this principle, it was held in that case that where the owner of a tract of land conveys the same to his brother by a deed absolute on its face, and allows the said deed to remain for years on the record of the county in which the land lies, thus giving notice to the world of the title thereto in said brother, and third parties extend credit to that brother, and allow him to become indebted to them, and obtain judgments against the brother for the debts thus created, and docket the same in the county where the land is situated, such creditors

thereby acquire a valid lien on the land; and the party who conveyed said land to his brother, and allowed the deed to so remain recorded, is estopped from claiming title to the land, as against said creditors. In the case of *Lawrence v. Investment Co.* (Kan.) 32 Pac. 816, where ignorant and illiterate owners conveyed by absolute deed certain property, supposing, however, that they were executing a mortgage, merely, and such grantee placed the deed upon record, and procured from the investment company, which was ignorant of the facts, a loan thereon, it was held that where such owner negligently allowed the legal title to go to another, and clothed him with apparent power to convey and incumber the same, and such person mortgaged the property, as security for a loan, to one who took the mortgage in good faith, and without notice of the fraud, the mortgage would be held valid and in force, as against the original grantor. The principle was applied by this court in the case of *Taylor v. Street*, 82 Ga. 723, 9 S. E. 829, where it was ruled: "It appearing that the plaintiffs' intestate, under whom they claim, sold the land in dispute to his father, made him a deed thereto, and had it recorded, and lived several years afterwards, and after his death his father went into possession, and exercised acts of ownership for years, and then sold to the defendant, who purchased without notice of any claim of plaintiffs, and in good faith, the plaintiffs are, as their intestate would be, estopped from setting up title. Whether the deed was ever actually delivered or not, the placing of it upon record by the intestate gave notice to the world that the title passed out of him into his father."

It must be clear, therefore, that the claimant having shown that the deed to its immediate grantors was put on record at the instance of the original grantor, and that the conveyance so recorded apparently clothed such intermediate grantors with the unqualified legal title to the property, and the right to convey the same, in the absence of evidence that the claimant had actual notice of the nondelivery of the deed, or notice of any fact sufficient to put it upon inquiry, a case was made in its favor, which *prima facie*, at least, estopped the original grantor from setting up the nondelivery of the deed, and thereby defeating the conveyance to the claimant. If such original grantor was estopped, it must follow that a creditor, whose judgment was obtained subsequent to the conveyance to the claimant, would likewise be estopped, as the priority of his lien, under such circumstances, must depend on the title of the grantor. Besides, before the creation of his lien, this creditor, to whom the deed was delivered, consented to and participated in the act of having the deed placed upon the record; and it would seem that the same

law of estoppel which would prevent the grantor from attacking the validity of the deed for want of delivery ought to similarly affect him.

There is evidence in the record that, although the original grantor had the deed put upon record, he was in possession of the property at the time he executed the deed, and died in possession of the same. The original deed was made in 1886, and the deed from the grantees in that instrument to the claimant was not made until 1890. The record does not show when Willis Miller died, nor does it show who was in possession of the property at the time Henry W. and Mary J. Miller conveyed to the claimant. The record does show that at the time the execution was levied, in 1895, Henry W. Miller was residing on the land. It is generally incumbent on the person invoking an estoppel to show that he was ignorant of the facts concerning which he invokes the estoppel; and, if it appear that he either knew or ought to have known such facts, no estoppel will arise. Section 3931 of the Civil Code provides that "possession of land is notice of whatever right or title the occupant has," etc. Whether, where a grantor, although he executes a deed and has the same recorded, remains in possession of the property, and is in actual possession of the same at the time his grantee conveys to another, he can, in view of this provision of the Code, be held estopped, as against such subsequent purchaser, to deny delivery of the deed to his grantee, and prove its nondelivery, so as to show that title has never passed out of him, is a question which the present record does not render it necessary to decide.

2. The principle of the law of estoppel not having been considered by the court in the charge to the jury, but, as has been said, the case having been made to turn on the question of delivery or nondelivery of the deed to claimant's grantors, there must be a new trial, in view of what has been above ruled.

We find no error in the rulings of the court or the admissibility of evidence, as set out in the remaining grounds of the motion for a new trial. The defendant in error insisted that the title to the land was in Willis Miller, his debtor, and that title did not pass out of him by his deed to H. W. and Mary J. Miller, because the deed had not been delivered. He was entitled to show these facts, and, if true, as a general proposition, the instrument would not have the effect of passing title. Such facts having been shown, if the claimant had notice, this would still be the effect; hence it was competent to show the facts which would under some circumstances render the title of claimant invalid. But whether its title was valid or invalid, the fact of nondelivery being shown, depended on other facts, as above indicated. Judgment reversed. All the justices concurring.

(105 Ga. 665)

JOHNSON v. STATE.

(Supreme Court of Georgia. Oct. 12, 1898.)

HOMICIDE—JUSTIFICATION—REASONABLE FEARS.

1. In a trial for murder, where one of the theories of the defense, based either upon the prisoner's statement or the sworn testimony, is that the accused, at the time of the killing, was acting under the fears of a reasonable man, believing that, in order to save his own life, it was necessary to take the life of the deceased, such fears being occasioned partly by threats of the deceased to kill the accused, coupled with the drawing of a deadly weapon, it was error for the court, in charging the jury upon the subject of reasonable fears, to state that "a mere threat is not sufficient; the mere drawing of a weapon or show of a weapon is not sufficient." While provocation by words, threats, menaces, or contemptuous gestures is not sufficient to justify the excitement of passion, and reduce a homicide below the grade of murder when the killing is done, not on account of any fear in the mind of the slayer, but solely to resent the provocation given, it is, nevertheless, true that such acts may in some instances be sufficient to arouse the fears of a reasonable man that his life is in danger; the same being a question to be determined by the jury.

2. The charge of the court, except as above pointed out, was a fair presentation to the jury of the law upon the issues involved.

(Syllabus by the Court.)

Error from superior court, Richmond county; E. H. Callaway, Judge.

Humphrey Johnson was convicted of murder, and he brings error. Reversed.

The following is the official report:

Humphrey Johnson was indicted for murder in the slaying of Clarence Merian, and was found guilty of manslaughter. His motion for a new trial was overruled, and he accepted. In Judge Callaway's charge to the jury appears a comprehensive summary of the respective contentions of each side of the case, in substance as follows: The state contends that on the night of the day charged in the indictment, at Dan Bowles' store, the defendant and Merian started to play, and, while engaged in playing and tussling, became angered, or some words passed between them; that Merian cursed the defendant, and in the scuffle he threw defendant off the veranda where they were playing, after which they were separated, and defendant went into the store; that Merian sat upon a bench on the veranda, and there remained; that defendant went to a boy who was in the store, and got from him a pistol, went to the door, and made some remark to Merian, asking him if he thought he had the advantage of him, or something of that kind, and, immediately or shortly thereafter, the defendant began firing upon the deceased, and shot him twice, one bullet taking effect in his breast, the other in his wrist, and a third striking the bench or floor where he was sitting, defendant firing four or five shots; that he then ran off, and Merian also ran off; and that, in four or five days, Merian died from the effects of the wound in his breast. The defendant contends that, in the

play or scuffling, Merian became angered, cursed defendant a number of times, calling him a most opprobrious name, and threw him from the veranda to the ground (Merian being much the stronger man); that, when defendant endeavored to apologize or beg his pardon, Merian cursed at him, stating that he wanted none of his damned pardon; that defendant then left him, went into the store, and got the pistol, but, when he came to the door, he had no intention of renewing the difficulty, and had no such idea when he still bantered Merian; that Merian replied to him with curses again, arose, and put his hand behind him as if drawing a pistol, and started towards defendant; that Merian was in the act of drawing a pistol when defendant fired on him, which firing was done in self-defense; that defendant was soon afterwards seen running with a pistol in hand to the house of defendant's mother; and that he carried the pistol in there, and carried it to the house where he finally went.

In addition to the general grounds, the motion for new trial makes the following assignments of error: The court charged the jury in the language of Pen. Code, § 65. It is contended that the latter part of this charge should have been qualified by an instruction that this rule applies only where the homicide is committed for the purpose of resenting provocation given; that threats and menaces may under some circumstances (to be determined by the jury) be sufficient to excite the fears of a reasonable man that a felony is about to be committed upon him; and that such rule applies only in the event the jury believe that, at the time defendant fired, the deceased was not attempting to commit a felony on him; and that the circumstances did not cause defendant, as a reasonable man, to believe that such was the purpose of deceased, even if in fact it was not. The court charged: "If the defendant inflicted the wound by shooting a pistol, which resulted in the death of Merian, and, at the time he shot Merian, his own life was not in actual danger, but the circumstances as they appeared to him were sufficient to excite the fears of a reasonable man that his life was in danger,—the circumstances were sufficient to excite the fears of a reasonable man that Merian was trying to shoot him,—and he acted under the excitement of such fears as that, and not in a spirit of revenge, then he had the right to shoot him; and, if you find that to be the truth of this case, it would be your duty to acquit the defendant. Now, as I stated to you, a bare fear is not sufficient; a mere threat is not sufficient; the mere drawing of a weapon or show of a weapon is not sufficient." The last sentence is assigned as erroneous, for that the jury should have been left free to determine whether a threat or the drawing of a weapon would have been sufficient, under the circumstances, to excite the fears of a reasonable man that a felony was about to be committed upon him. The

court charged: "If, in the investigation of this case, you have a reasonable doubt as to whether or not, at the time the defendant fired the shot which inflicted the wound that caused Merian's death (if you are satisfied beyond a reasonable doubt that he shot Merian or inflicted the wound which subsequently resulted in his death), he was acting in self-defense, or whether or not he was acting under the fears of a reasonable man,—I say, if you have any reasonable doubt as to the truth of either of these propositions, it would be your duty to give the defendant the benefit of that doubt, and acquit him." The error specified is that the court expressed an opinion as to what had been proved, to wit, that it was the wound inflicted by defendant that caused the death of Merian, which under the evidence was not conceded by defendant. The court charged: "If you believe that a witness has not sworn to the truth as to some material matter in the case,—if you believe that a witness has sworn willfully and knowingly false as to some material matter in the case,—you ought not to consider the testimony of that witness at all, unless it is corroborated by other evidence; but you are the judge as to whether or not a witness has been impeached, and as to whether or not you will believe the testimony of any single witness, or whether you will discredit it, or what weight you will give it." It is insisted that this fails to make clear to the jury that, as to the false testimony, the witness cannot be restored to credibility at all, nor corroborated; and that the charge does not point out that corroboration of such a witness, in order to restore him to credibility as to any part of his testimony, must be as to some material point in the case. It is further contended that the court ought to have charged the jury to the effect that if they believed that defendant, after going into the store and procuring a pistol, came out and merely bantered the deceased, with no intention of forcing him into a difficulty, and that conduct alone provoked deceased to make a murderous assault on defendant, then such conduct on defendant's part did not outlaw his right of self-defense, and he would be justified if he then killed deceased under the fears of a reasonable man that his own life or person was in danger. It is insisted that this was the theory of the defense; that the evidence demanded such a charge; and that, by the failure of the court to give the same, the legal questions in the case were not fairly and fully presented, and defendant was thereby prejudiced. There was a ground of newly-discovered evidence, which was abandoned; and a ground setting up alleged misconduct of the bailiff in charge of the jury. To support this ground, an affidavit of the bailiff himself was offered, tending to show improper communications made by him (innocently) to the foreman of the jury. The statements to this effect in the bailiff's affidavit were contradicted by an af-

fidavit of the foreman, and an affidavit of seven others of the jury.

E. B. Baxter and Russell & Rosenfield, for plaintiff in error. Wm. H. Davis, Sol. Gen., and Anderson, Felder & Davis, for the State.

SIMMONS, C. J. The official report states all the facts necessary to a clear understanding of the case. We have carefully read and considered the whole record, and the only error in the able and admirable charge of our learned young brother on the circuit bench is found in that ground of the motion for new trial which is dealt with in the first headnote. That error is so material and of such a nature that we are compelled to grant a new trial. The charge upon the point indicated is in direct conflict with the ruling of this court in the case of *Cumming v. State*, 99 Ga. 662, 27 S. E. 177. We presume the attention of our learned brother, the trial judge, was not called to this case pending the trial below. It fully covers the case now under consideration. It shows that while threats, menaces, contemptuous gestures, etc., cannot reduce the crime of murder to that of manslaughter, they may act upon a man so as to arouse his fears, and make him believe himself in imminent danger. It covers the present case, and we deem further elaboration unnecessary. Except the above-mentioned error, there was nothing to warrant the grant of a new trial in any of the points made in the motion for new trial. Judgment reversed. All the justices concurring.

(105 Ga. 653)

STEPHENS v. STATE.

(Supreme Court of Georgia. Oct. 13, 1898.)

MURDER—EVIDENCE.

The verdict was contrary to law and the evidence, and the refusal of a new trial was error.

(Syllabus by the Court.)

Error from superior court, Bibb county; W. H. Felton, Jr., Judge.

John Stephens was convicted of murder, and brings error. Reversed.

John R. Cooper, for plaintiff in error. Roland Ellis, Robt. Hodges, Sol. Gen., and J. M. Terrell, Atty. Gen., for the State.

FISH, J. John Stephens was convicted of murder, with recommendation of life imprisonment. A motion for a new trial was overruled, and he excepted. The motion set forth that the verdict was contrary to law, decidedly against the weight of the evidence, and contrary to specified portions of the judge's charge; the last objection, of course, being equivalent to the second,—that the verdict was contrary to law. We gather from the testimony of the witnesses for the state that Kershaw, the deceased, and Carr, Adams, and Morrissey were in Randall's bar, where the accused was an employé. Kershaw call-

ed for beer for the party, and deceased was requested to draw it. As he started to do so, Kershaw, according to one of the witnesses, said something about the accused being slow. Carr told the accused to get a move on him, and, upon the accused asking him, in what Carr termed an insolent manner, what he said, Carr reached over the bar counter behind which the accused was standing, and struck or punched at him with his fist. Without waiting to get the beer, Kershaw and his friends started out, and Kershaw said to Carr, "son of a bitch," or, as one of the witnesses testified, "damn yellow son of a bitch, and didn't want to wait on us." The accused said, "You are narry one," or "You are not a son of a bitch." Adams testified: "When he [the accused] said that, Kershaw turned to go back, and I caught hold of him, and says, 'Jim, come on, and let's go; don't go back there;' and he pulled loose, and started back, and I caught him as he was going back from behind the grocery department to the bar, and as we walked behind [the counter?] I had hold of his right arm, and the negro had his gun to his shoulder, and both barrels cocked, and he was standing about center way of the bar, and he backed towards the cooler, and he says, 'If you come on me, I will shoot you;' and I turned him [deceased] loose, and he [the accused] shot." Carr testified: "When he [the accused] said that, Kershaw turned around, and started towards him. I started to the door, and was in the act of stepping out of the door, when I heard some one say, 'If you come on me, I will shoot you,' and Kershaw says, 'Yes, you will shoot me,' and kept on going. In the meantime I turned around, and started back to him, and he turning around the corner of the counter and grocery when I first had a glimpse of him, and I went on back there as quick as I could. Kershaw was turning the corner. He was standing there just as I turned around after the remark, 'If you come on me, I will shoot you,' had been made. That is the best of my recollection. I started back towards him. Kershaw went on back behind the bar. He got about 4 feet, I suppose, in the bar,—3 or 4 feet. The bar was about 20 feet deep between the partition side and the other side. I say he got about 4 feet when he was shot down." Kershaw, when shot, was about 10 feet from the accused. In the opinion of the witnesses Kershaw weighed from 116 to 125 pounds. According to the testimony of the witnesses for the state Kershaw made no effort to draw a weapon, and none was found upon his person, or near him, by those who searched him some half hour after he was shot. Carr, Adams, and Morrissey were the only eyewitnesses to the homicide. Morrissey testified in behalf of the accused, and his testimony and the statement of the accused differed materially from the testimony of Carr and Adams. We do not think the evidence for the state authorized a verdict for mur-

der. The deceased began the altercation, was the aggressor in the difficulty, and at the time he was shot was advancing upon the accused, who was where he was employed to be, and who was backing from the deceased, and warning him that he (the accused) would shoot if the deceased came on him. Under the state's evidence, and the law, which the court correctly gave in charge, the homicide was not murder. Justice to the accused demands that a new trial be granted. Judgment reversed. All the justices concurring; SIMMONS, C. J., dubitante.

(104 Ga. 116)

**BIBB LAND-LUMBER CO. v. LIMA
MACH. WORKS.**

(Supreme Court of Georgia. Nov., 1898.)

Dissenting opinion. For majority opinion, see 30 S. E. 676.

LITTLE, J. (dissenting). In this case the defendant pleaded a set-off, and alleged that the plaintiff was indebted to the defendant upon an open account as herein set forth, and that the defendant sold and delivered to the plaintiff certain specified goods at the dates shown in a bill of particulars attached. It appeared from an inspection of the bill of particulars, which was attached to the plea, that the same was made out in the defendant's favor against a corporation having a name different from that of the plaintiff. The majority of the court hold that, on a special demurrer to such plea (to which the bill of particulars was attached), the same should be stricken. From this I must dissent. Pleadings are the mutual altercation between the parties. The plaintiff alleged that the defendant was indebted to it in a certain amount, and defendant filed a plea of set-off, and in that plea distinctly averred that the plaintiff was indebted to it in a certain amount and for certain items as shown by the bill of particulars. There was no mistake in the averments of the plea, but the fact of the indebtedness by the plaintiff in this suit was distinctly alleged in the plea. As showing the items of merchandise, the dates of purchase, and the prices, a bill of particulars was attached to the plea. The heading of the paper upon which these items were shown purported to show an account made out in a name different from that of the plaintiff, but the items were there, the dates were there, and the prices.

So far as I am concerned, I think that the pleadings proper represent the matters of difference, and that it is a matter of no concern as to the heading of the paper on which the items pleaded as a set-off were placed, but that when the defendant distinctly averred that the plaintiff was indebted to him for certain articles purchased, according to a bill of particulars attached thereto, that reference to the bill of particulars was not

to the heading, because such was wholly immaterial, and not involved in the case, but to the items of goods, the dates of the purchase, and the prices, all of which were material and a part of the case. Suppose, on special demurrer, the defendant had, without adding to or taking anything from his plea, run a pencil mark through all of the heading preceding the item; it would not have changed the plea nor any issue. It would, of course, have incumbered the record less not to have had any heading at all; nor was it necessary that one should be there, because the fact of liability was averred, not by the heading which preceded the bill of particulars, but in the averments of the plea. In my opinion, the special demurrer should not have been sustained because of the heading which preceded the items of the bill of particulars.

(108 Ga. 36)

PAPWORTH v. STATE.

(Supreme Court of Georgia. Nov. 26, 1897.)

STATUTES—SPECIAL ACTS—PARTIAL INVALIDITY— INTOXICATING LIQUORS.

1. There being on the 26th day of September, 1879, a general law in force in this state rendering lawful, in any county thereof, sales of domestic wines, in quantities of not less than one quart, by the manufacturers of the same (Acts 1877, p. 33), and such wines being "intoxicating liquors," an act approved on the day above mentioned, which by its terms undertook to "entirely prohibit the sale of spirituous or intoxicating liquors" within the limits of a designated county, was unconstitutional. As its effect would be to render penal, in that county, all sales of domestic wines, it was violative of that clause of the constitution prohibiting special legislation in any case for which provision has been made by an existing general law.

2. Such an act cannot be held valid and constitutional in so far as it relates to sales of liquors other than domestic wines, or to sales of such wines by the manufacturers thereof in forbidden quantities, or to sales of the same by persons not manufacturers. This is true because so holding would not give effect to the real legislative intent, which apparently was to entirely prohibit, in the specified county, all sales of spirituous or intoxicating liquors, including domestic wines, no matter by whom, or in what quantities, the latter might be sold, and it does not appear that the general assembly designed or contemplated the passage of an act having a less comprehensive scope.

Little, J., dissenting.

(Syllabus by the Court.)

Error from superior court, Irwin county; O. C. Smith, Judge.

Frank Papworth was convicted of an illegal sale of liquor, and he brings error. Reversed.

Outts & Lawson and Ryman & Kennedy, for plaintiff in error. Tom Eason, Sol. Gen., for the State.

LUMPKIN, P. J. On the 27th of February, 1877, the general assembly passed an

act legalizing the sale of domestic wines, by the manufacturers thereof, in quantities of not less than one quart, anywhere in the state of Georgia. See Acts 1877, p. 33. This act expressly declared that it should have the effect stated, notwithstanding the provisions embraced in a number of designated sections of the Code relating to unlawful sales of liquors, and notwithstanding "any provision, or provisions, of law requiring any license or oath, or other regulation or condition, prohibition, or penalty." It was therefore plainly the intention of the general assembly, in enacting this statute, to place sales of domestic wines by the manufacturers thereof, in quantities of not less than one quart, upon the same footing as sales of other commodities, and to exempt such sales of such wines from the operation of all laws in force in this state regulating or prohibiting traffic in spirituous or intoxicating liquors. It will not be questioned that domestic wines are "intoxicating liquors," and the general assembly, therefore, deliberately intended to put, within the limits indicated, this class of intoxicants upon the "free list." The act with which we are now dealing was certainly a general law, and it follows that the general assembly could not constitutionally vary its provisions in any locality in Georgia by special legislation. Nevertheless, while this act was in full force, the general assembly, on September 26, 1879, attempted to do this very thing by passing "An act to entirely prohibit the sale of spirituous or intoxicating liquors within the limits of Irwin county." Acts 1878-79, p. 388. This latter act, in general and universal terms, declared that "the sale of all spirituous or intoxicating liquors is prohibited within the limits of Irwin county," and rendered any violation of its provisions a misdemeanor. The language of this act is too plain to admit of any doubt as to its meaning. It is not susceptible of more than one construction, and therefore must be taken to mean that any sale of domestic wine in Irwin county should be an indictable offense. But for the constitutional provision forbidding special legislation in a case for which provision has been made by an existing general law, no one could for an instant doubt that a sale of domestic wine, by any person or in any quantity, in Irwin county, would be obnoxious to the provisions of this act, and would subject the offender to punishment; and it will not do to hold that, merely because the general assembly could not constitutionally pass such an act, it meant less than it unequivocally said in framing the terms of the act in question. As was remarked by Simmons, J. (now C. J.), in the case of Elliott v. State, 91 Ga. 696, 17 S. E. 1004: "The courts cannot construct from a defective statute a law which the lawmaking body did not intend to enact, and which it cannot be presumed it would have been willing to enact." In the present case, the general assembly attempted, though it could not

constitutionally accomplish its purpose, to put in force in Irwin county an entirely new policy as to the sale of domestic wines, and to put an end to all traffic in that class of intoxicants and all others. In other words, the scheme of the act was total prohibition for Irwin county; "and," again quoting Justice Simmons, "It cannot be assumed that the legislature would have been willing to enact the statute, if its effect would be to establish a scheme of partial prohibition, and permit the traffic to continue as to all but one class of liquors." It seems to us that the Elliott Case, and the authorities there cited, are directly in point in the case now under consideration, and that the decision of it should be thereby absolutely controlled.

We, of course, recognize, and are anxious to follow, the fundamental and thoroughly established rule that, if any legislative act is capable of such a construction as will permit it constitutionally to stand, the courts should adopt that construction and save the statute. As an instance in point, see *Manufacturing Co. v. Wright*, 97 Ga. 114, 25 S. E. 249, where it was held that the words, "every sewing-machine company," occurring in a tax act attacked as being unconstitutional, could properly be said to comprehend and include "individuals" manufacturing and selling sewing machines; it appearing that it was the intention of the general assembly to lay a tax upon the business itself, and not upon any given class of persons engaged therein. Where, however, the language of a statute is capable of receiving but one construction, it is not permissible to either extend or restrict its obvious meaning, and thus, for the purpose of maintaining its constitutionality, impute to the general assembly a purpose which it neither expressly nor by implication professed to have in view in enacting the law. In other words, we do not think a statute which is irreconcilably unconstitutional can be saved by giving it a signification at variance with its plainly-expressed terms. An instance of this kind is here presented. Judgment reversed.

LITTLE, J. (dissenting). I am unable to agree with my brethren in the conclusion which has been reached by them in this case. In 1877 the general assembly of Georgia, for the purpose of encouraging grape culture in this state, passed an act by the terms of which it was declared that it should not be unlawful for any person "who shall manufacture or cause to be manufactured in this state any wine from grapes, the product of any vineyard in this state belonging to such person, to sell or offer to sell any where in the state such wine at wholesale, or in quantities not less than one quart." It is freely conceded that this was a general law, and in force in the state of Georgia since the year 1877. On the 26th day of September, 1879, an act passed by the general assembly was duly approved, which declared that "from

and after the passage of this act the sale of all spirituous or intoxicating liquors is prohibited within the limits of Irwin county." The act also provided a penalty to be inflicted on persons who were guilty of a violation of its terms. An individual was indicted for the violation of this last act, and the question which arose was whether, in view of the terms of the act of 1877, the latter act was unconstitutional, in that the general law authorized the sale of domestic wines by the manufacturer of such wines without license, and without incurring any penalty for such sale, in quantities of one quart or more, and the act of 1879, being a special act, varied the terms of the general act of 1877. My brethren rule that, domestic wines being intoxicating liquors, a general act which authorized the sale of such wines in Irwin county was in conflict with the special act which undertook to entirely prohibit the sale of spirituous or intoxicating liquors in Irwin county, and that the latter act was therefore unconstitutional. I cannot agree in this ruling. It must be remembered that, at the time of the passage of the act of 1879, the act of 1877, which authorizes the sale of domestic wine, was in force, of which fact we are bound to assume the legislature had full notice and knowledge, and that the act of 1879 prohibiting the sale of spirituous or intoxicating liquors was passed with reference to the act of 1877. It will be noticed that in the opinion it is held that domestic wines are intoxicating liquors, and by the passage of the act of 1877 the general assembly intended to put this class of intoxicants upon the free list. I am not able to hold the general proposition that domestic wines are intoxicating liquors. I presume that they are, but this court in a recent case ruled that it could not, as a matter of law, hold that blackberry wine was an intoxicating liquor, and yet blackberry wine is a domestic wine. But, aside from this, we are, I think, bound to assume that, in the passage of the act of 1879, while it was the intention of the general assembly to prohibit the sale of all spirituous or intoxicating liquors in Irwin county, it was also the intention of the lawmaking power of the state that this prohibition should be in force subject to any general law of the state which qualifiedly permitted the sale of a particular character of wine made from grapes, the culture of which had theretofore been attempted to be fostered by the legislature. The act of 1877 does not, as a general proposition, authorize the sale of domestic wines made from grapes. Only such wines which were the product of a vineyard in this state might be offered for sale by the person manufacturing or causing the same to be manufactured, in quantities not less than one quart. The object of the first act was to foster and encourage grape culture. The object of the latter was to prohibit spirituous or intoxicating liquor to be sold in a particular county. So far as I am concerned, I see not

the slightest conflict in the two acts. If, in the consideration of the act of 1879, it should be held that the provisions of that act forbid the sale of domestic wines as contemplated by the act of 1877, then the effect of the act, at most, would be to render the act unconstitutional, when applied to the sale of domestic wines, as contemplated by the general law. But, if it were unconstitutional when applied to the sale of domestic wines, it would by no means follow that it is unconstitutional when applied to the sale of whisky, brandy, gin, rum, etc.

It will sometimes be found that an act of the legislature is opposed in some of its provisions to the constitution, while others, standing by themselves, would be unobjectionable. In any such case the portion which conflicts with the constitution must be treated as a nullity. Whether the other parts of the statute must also be adjudged void because of the association must depend upon a consideration of the object of the law, and in what manner and to what extent the unconstitutional portion affects the remainder. It would be inconsistent with all just principles of constitutional law to adjudge these enactments void because they are associated in the same act, but not connected with, or dependent on, others which are unconstitutional. *Cooley*, Const. Lim. 211, and a great number of authorities cited in note on page 212. The supreme court of Illinois (*Newland v. Marsh*, 19 Ill. 376) states the rule of construction thus: "Whenever an act of the legislature can be so construed and applied as to avoid conflict with the constitution and give it the force of law, such construction will be adopted by the courts." And in *New Hampshire* the supreme court held it to be a duty so to construe every act of the legislature as to make it consistent, if it be possible, with the provisions of the constitution, and to so examine the statute, "without stopping to inquire what construction might be warranted by the natural import of the language used." *Dow v. Norris*, 4 N. H. 18. In *People v. Supervisors of Orange Co.*, 17 N. Y. 235, the court of appeals ruled that "a legislative act is not to be declared void upon a mere conflict of interpretation between the legislative and the judicial power. Before proceeding to annul by judicial sentence what has been enacted by the lawmaking power, it should be clearly made to appear that the act cannot be supported by any reasonable intentment or allowable presumption." And Judge *Cooley* says in his work on *Constitutional Limitations* (top page 222): "And this, after all, is only the application of the familiar rule that in the exposition of a statute it is the duty of the courts to seek to ascertain and carry out the intention of the legislature in its enactment and give full effect to such intention; and they are bound so to construe the statute, if practicable, as to give it force and validity, rather than to avoid it and render it nugatory." Looking to the intention of the

legislature in the passage of the act of 1879, I am bound to conclude that the provisions of that act were enacted with due reference to the terms of the act of 1877, and that sales of spirituous and intoxicating liquors, not including the sale of domestic wines as contemplated by the act of 1877, are lawfully forbidden in Irwin county.

(104 Ga. 561)

BLACK v. MIDDLE GEORGIA & A. RY. CO.

(Supreme Court of Georgia. May 26, 1898.)
INJURY TO EMPLOYEE—QUESTIONS FOR JURY—DIRECTING VERDICT.

It was erroneous, on the trial of an action brought by a mother against a railroad company for the homicide of her minor son, a youth of 16 years, to direct a verdict for the defendant, when, under the evidence submitted, the following were disputable questions, viz.: Whether or not the parents of the deceased consented to his employment by the company in the work in which he was engaged when killed; whether or not the deceased was familiar with the duties incident to his employment, and, if not, whether he was or was not properly instructed and warned as to the dangers attendant upon a performance thereof; whether or not he was free from negligence as to the occurrence by which his death was occasioned; and whether or not the same was caused by the negligence of the company or its employees.

(Syllabus by the Court.)

Error from superior court, Putnam county; J. S. Candler, Judge.

Action by Sarah C. Black against the Middle Georgia & Atlantic Railway Company. Verdict directed for defendant, and plaintiff brings error. Reversed.

W. F. Jenkins & Son, for plaintiff in error.
W. B. Wingfield and L. A. Dean, for defendant in error.

LITTLE, J. Mrs. Sarah C. Black instituted in Putnam superior court an action against the Middle Georgia & Atlantic Railway Company to recover damages for the homicide of her minor son, James Black, which she alleged was occasioned by the negligent handling and operation of the defendant's cars. In her petition she alleged that, by the consent of her husband, her minor son, James Black, was on the 19th day of February, 1896, employed by the company, through its track foreman, Frank Newman, to assist in loading a pole or hand car with rock, and in hauling same from a field near by, to what is known as "Mud Out," situated on the line of railroad between Eatonton and Willard station. She alleged that the boy was 16 years of age, and that the employment or service above referred to, and in which his father permitted him to engage, was a safe one, accompanied with no unusual hazard or danger, and was such a service as a boy 16 years of age could well and safely render. She alleged that no other contract or agreement was made by the par-

ents of the minor, or by either of them, with the company or its agent, touching his service, and that under the agreement the company had no right to place her minor son at any other kind of labor, or at any other place; that neither of the parents ever consented in any way that their minor son should work elsewhere for the company. She alleged that notwithstanding her son had never had any experience as a train hand prior to the 19th day of February, 1896, and by reason of said fact, and by reason further of his tender years, immature judgment, and undeveloped intellect, he was less able to judge of the danger to which he was exposed by the act of the company hereafter mentioned, the company, without the knowledge or consent of the parents, did on the 22d day of February following, through its general manager, J. W. Preston, who had authority to direct and control its employees, to control its trains and locomotives, and to manage its business generally, assign plaintiff's son to labor as a brakeman on a construction train, consisting of a Mogul engine and several box cars, heavily loaded with cross-ties and bridge timber. She alleged that it was only a few minutes before the injury from which her son died occurred that she or her husband knew that their son had been assigned to duty as a brakeman, and that there was no means or opportunity on their part of terminating such service before the injury occurred; that the labor thus assigned to her son was one of great peril, risk, and danger, requiring skill and experience in its performance; that, while the construction train was at Willard station, it became necessary to propel the same backward along the main line for the purpose of placing it on a side track, and that, while the construction train was being thus moved backward, Preston was present, and directing its movements, and her minor son was standing upon the top, and within a few feet of the end of the box car nearest the approaching passenger train; and that, while the train was so moving backward towards the switch at the entrance of the side track, it was checked with such great and unusual suddenness and violence that her son was unable to remain upon the top of the box car, but was thrown therefrom with great violence to the track, ahead of the moving train, and was dragged along the track by the moving car for a distance of about 70 feet, and sustained certain described injuries, from which he died on the morning following. She alleged that the conduct of the company in thus assigning her son to duty, being without the consent of his parents, or either of them, was unauthorized and illegal; that the contract for such service, if any was made between the minor and the company, was null and void, and of no legal effect. She alleged that the company was guilty of gross negligence and want of care, in the following particulars: (1) In assigning the

minor to duty as a brakeman on the top of the car,—such service being accompanied with great peril, hazard, and risk,—all of which was without the consent of his parents, or either of them. (2) In assigning the minor to such perilous service, when he had had no experience previously, nor any training in such work, and was therefore less able to judge of the danger surrounding him, and to protect himself therefrom. (3) In checking the train with such great suddenness and violence as to throw or jerk the deceased off of the top of the box car, where he had been placed by the company. (4) In placing the Mogul engine under the care and management of S. W. T. Bozeman, as engineer, who had had no experience in operating a Mogul engine; said engine being very large, of great power, and requiring skill and experience to properly and safely operate it. (5) In not attempting to place the construction train on the side track at an earlier time, when it could have been done with safety and ease, instead of waiting, as was done, until the near approach of the passenger train, which was running rapidly; thereby requiring the movement of the construction train to be more rapid. (6) In assigning the deceased to labor as a brakeman on the top of the box car, which was a perilous service, requiring the full use of all the physical energies and mental faculties, while the deceased was in a run-down and worn-out condition, resulting from labor performed by him for the company almost the entire preceding night, without sleep, rest, or food. She alleged that it was well known to the company that the deceased was a minor, and had no experience in train service of any kind; that he was never married, and therefore left no wife or child; that he contributed materially to her support, and that she was dependent on him for a support; that her son was of sound mind, well developed, in good health, capable of doing valuable labor, and was rapidly becoming more capable of earning money; that the full value of his life was \$6,000; that he was without fault, and did not contribute to his death, etc.

In the answer filed by it, the defendant admitted that James Black, on the day named, and at the place specified in the petition, received certain injuries, from which he died on the following day. It admitted that its general manager, J. W. Preston, had assigned Black to labor as a brakeman on a construction or repair train, but denied that James Black was hired by it for the particular purpose specified in the petition, and alleged that, on the contract, he was hired, with the consent of his father, and with the knowledge and consent of his mother, to do general work on the track or repair gang of defendant, under which contract it was his duty to labor, on or off its repair train, at any work which might have been assigned him by defendant, or its agents or officers

in charge. It alleged that his father was himself a railroad man, of long experience and familiarity with railroad work and the duties of railroad employes, and knew that the duties of an employe on the track or repair gang would frequently require such employe to be assigned to labor as brakeman on repair trains. It alleged that it was unable to say whether or not James Black had much or little experience as a train hand, but averred that, before he was assigned to labor as a brakeman or train hand, he was thoroughly examined by defendant's agent as to his knowledge of and familiarity with such duties, and it was ascertained that he was informed thereon. The defendant further denied all other allegations contained in the petition tending to impute negligence to it.

The evidence introduced by the plaintiff tended to show that on the morning of the 19th of February, 1896, Newman, who was an extra foreman on defendant's road, engaged in ballasting the road at "Mud Cut," sent one of his hands to the house of William V. Black, father of the deceased, to employ James Black to help him in loading and carrying rocks on a pole or hand car from a field nearby to the cut. The father never made any contract with any one, nor did he or his wife consent to the working of their son as a brakeman on a construction or freight train. The deceased was 16 years old. His appearance was that of a boy, and not that of a man, and any one could readily tell that he was a boy of that age by looking at him. Labor as a brakeman on a construction train is as dangerous a place as there is on a train. It would be a great deal more dangerous than work on a pole car. The parents did not know that their son had gone to work at any other place than that to which they had consented he should go until they saw him pass their home, on top of a box car situated in the moving train, on February 22d, the day the injury occurred; and they then had no opportunity of preventing him from further performing such service. The deceased had never had any experience as a train hand, and his parents, in response to a request from him to allow him to work on a train, had declined to grant him permission to do so. He had been rendering valuable service to his mother and other members of the family, amounting to the value of \$10 or \$15 per month, and his mother was dependent on him for a support. It was also shown by witnesses for the plaintiff who saw the accident at Willard station that the train was backing at the rate of six or eight miles an hour; that the deceased was on top of the rear box car; that, in undertaking to stop the train, the engine was reversed; the coupling links began to jerk and make an unusual noise; the stopping of the train was a pretty sudden jerk,—violent and more sudden and a great deal quicker than usual. Another witness testified that he had seen many cars stop, and that this was the hardest and most

violent jerk of any he had ever seen; that the deceased was standing within five or six feet of the end of the car, and he saw him do nothing to cause the fall; and that his fall was caused by the jerk. It was further shown that the deceased was giving signals properly when he was thrown off, and that this was the proper thing for a brakeman to do in the line of his duty. For the defendant, Frank Newman testified that, as track foreman, his duties were to do anything required of him by the railroad officials, from one end of the road to the other; that he went with the construction train, distributing material and supplies for the road, such as cross-ties, loading and unloading wood, filling up bad places, etc.; that the employes hired by him were not hired for any particular job, but were hired to do anything there was to do, and to go with him on the train when necessary; that on the 19th of February he was hauling rock to ballast the track at "Mud Cut," using a hand car for this purpose; that that was the work he wanted the deceased to do (that is, pick up the rock from the field and put them on the hand car); that the hand car was pushed along the track by hand, moving about 10 miles an hour down grade, and was a safe business, unless the car was wrecked, but, if wrecked, would not hurt a man pushing it. Witness had orders to take the construction or freight train out on the road to distribute ties. And it was shown by J. W. Preston, general manager of the road, that on the day of the accident the deceased came to him, and requested permission to go on top of the box cars, as a brakeman. Preston asked him what he knew about it, to which the latter replied, "All about it." He then asked him if he had experience, to which he replied, "Yes." He was then examined as to the meaning of one, two, and three blasts of the whistle, respectively; and, upon answering these questions satisfactorily, Preston stated to the deceased that he could go up, but enjoined him to be careful. It was shown that the train on the occasion of the injury was backing slowly,—about as fast as a man could walk; that the deceased was transmitting the signals from Preston, who was in charge of the train, to the engineer; that there was a brake on the end of the car upon which deceased stood; that the jerk was not unusual; that the deceased seemed to be familiar with the signals, and witness did not think it necessary to ask him what he knew about the danger of braking on a car, because he gave the witness the impression that he had had experience in that line, and knew all about it. Preston further testified that he had a conversation with the father of the deceased after the accident,—either on the day of the accident or the next,—in which the father said he was sorry his boy had gone to work for the road, but that the deceased was very anxious to go, and he and his mother consented for him to

go. From this conversation the witness gathered the impression that the father had allowed the deceased to go, but against his judgment. There was also evidence tending to show that the engineer in charge of the engine was a fit and proper person to handle and operate it, and that the stop was made, not by reversing the engine, but by applying vacuum brakes. It was also in evidence that one standing as near the end of the car as was the deceased ought either to have held onto the brake, or been walking against the motion of the car; it being improbable that even an experienced brakeman could have withstood the jerk attendant upon the stop (which was a usual one, considering the length of the train) without resorting to the one or the other of these methods. It was also in evidence that the deceased was well developed for his age, and would have been taken by witness, from his size, to have been 21 or 22 years old. At the conclusion of the evidence, the material portions of which are set out above, the court directed a verdict for the defendant, and the plaintiff excepted.

Inasmuch as, under the view we take of the case, a new trial must be had, and in consideration of the fact that at such hearing the pleadings will be subject to amendment, and the introduction of other testimony not appearing in this record, and consequently that the present aspect of the case may be materially changed, we deem it unprofitable at this time to formulate and announce at length the principles and rules of law which control the various issues and questions raised and made in the case. In this action the plaintiff, who is the mother of the deceased, bases her right to recover against the defendant for the homicide of her son on the provisions of section 3828 of the Civil Code, which declares: "A mother, or, if no mother, a father, may recover for the homicide of a child minor or sui juris, upon whom she or he is dependent, or who contributes to his or her support, unless said child leave a wife, husband or child. Said mother or father shall be entitled to recover the full value of the life of said child." It is obvious from the statement of the pleadings and evidence set out above that it was a disputed question of fact whether or not the parents of the deceased minor consented to the employment by the company for the particular work the minor was engaged in doing when injured. It was also a disputed question of fact whether or not the deceased was familiar with the duties incident to his employment, and whether he had sufficient discretion and experience to enable him to understand and appreciate the dangers attendant upon a performance of those duties, and, if not, whether he was or was not properly instructed and warned concerning such dangers. It was also a disputed question of fact as to whether or not the deceased was free from negligence as to the occurrence by

which his death was occasioned, and also whether or not the same was caused by the negligence of the company or its employees. Upon each of these material issues of fact the evidence was more or less conflicting. Section 5331 of the Civil Code provides that "where there is no conflict in the evidence, and that introduced with all reasonable deductions or inferences therefrom demands a particular verdict, the court may direct the jury to find for the party entitled thereto." Applying this rule of the Code, the action of the court, directing a verdict for the defendant, was erroneous. The cause should have been submitted to a jury to determine the various issues of fact involved, under appropriate instructions from the court touching the rules of law applicable. Judgment reversed.

(104 Ga. 509)

CARTER et al. v. DUBLIN BANKING CO.
(Supreme Court of Georgia. May 28, 1898.)

TRIAL.—FINDINGS.

1. Where, on the trial of an equitable petition against several defendants, the court, after preparing for submission to the jury several distinct questions, the purpose of which was to have them find a special verdict of the facts only in the case, instructed them that, if they answered the first question in the affirmative, they need not consider or answer the remaining questions; and where the jury did answer the first question in the affirmative, and, following the direction of the court, made no answer to the other questions; and where the sole finding of fact thus rendered did not warrant a judgment in favor of the plaintiffs as to the relief prayed for against one of the defendants,—it was erroneous to enter upon such a verdict a judgment granting such relief.

2. In view of the ruling above announced, a new hearing in the present case is essential, in order that the various questions at issue between the parties may be adjudicated and determined.

(Syllabus by the Court.)

Error from superior court, Laurens county; John O. Hart, Judge.

An execution in favor of the Dublin Banking Company was levied on property of W. J. Carter & Bro., and George W. Moore interposed a claim. An equitable petition was then filed by the company against the firm and claimant. The causes were consolidated, and, from a judgment for plaintiff, defendants bring error. Reversed.

Anderson, Felder & Davis, for plaintiffs in error. A. F. Daley and Wade & Wade, for defendant in error.

LITTLE, J. W. J. Carter & Bro., being the owners of lots of land, Nos. 123 and 138 of block No. 80 in the town of Dublin, Laurens county, Ga., erected a machine shop on what they supposed to be a portion of lot No. 138; and on March 28, 1893, they executed and delivered to the Dublin Banking Company their promissory note for \$1,500, payable September 18, 1893, and also a mortgage to secure the same, on lots of land Nos. 123

and 188 of block No. 80 in plan of the town of Dublin, Laurens county, lying east of ditch that runs easterly across said block, the said lots being further bounded on the north by Madison street, east by Decatur street, and south by line parallel to the Macon, Dublin & Savannah Railroad, and 20 feet distant therefrom, measured at right angles thereto. To the levy of an execution issued on the foreclosure of this mortgage, a claim to a part of the land described was interposed by George W. Moore. The banking company thereupon filed an equitable petition against the firm of Carter & Bro. and G. W. Moore, alleging that, in the execution of the mortgage, there was a mistake on the part of the petitioner, and a fraud perpetrated on them by the mortgagors, in this: The mortgagors were doing a large business in the manufacture of machinery, and, in carrying on their business, had erected a machine shop of the value of \$2,000; and they represented to petitioner that the shop was located on the land embraced in petitioner's mortgage, which representation petitioner believed to be true, and acted on by loaning to the mortgagors the money which is the consideration of the note, secured by the mortgage; but, as petitioner afterwards ascertained, the shop was not located on the land embraced in the mortgage, but was located on lot No. 139, and was known to the mortgagors at the time to be located on that lot; and, after they had procured the loan and executed the mortgage, they then procured their brother-in-law, G. W. Moore, a resident of Charleston, S. C., to purchase the lot of land upon which the shop was located, from one M. M. Green, who was the owner of such lot. The shop was placed upon said lot of Green for the deliberate purpose on the part of the defendants to injure, damage, and defraud petitioner, defendants intending at the time to borrow money from petitioner on the lots which they owned, by inducing petitioner to believe that the shop was located thereon, and further intending, after they had succeeded in this, to buy the lot of land upon which the shop was located; and this they have accomplished through their agent and brother-in-law, who is now holding the same in trust for their benefit. The lots described in the mortgage are not worth over \$150, and would have been worth \$2,000 if the shop had been located thereon. Petitioner would not have loaned the money to defendants if it had not believed that the shop was located on the land embraced in the mortgage. The price paid by Moore for the land was grossly inadequate, the value of the building not being taken into account by Moore and Green in their contract of sale of the land; and defendants Carter & Bro. have continued in the possession of the same from the time of the pretended purchase up to the present time, using it as their property. While the number of the lot upon which the building is located is not properly set forth in the mort-

gage, yet it is embraced in the description given by metes and bounds, provided the street described as Decatur street is located where petitioner believes it to be, and where defendants represented it to be. There is some confusion in reference to the location of this street, the first survey representing it to be in one place, and a more recent survey representing it to be in a different place. The description in the mortgage would properly embrace the lot upon which the shop is located if the same were to be determined by reference to the recent survey of the town. The contract was made with reference to the recent survey, and, in describing the land, it was understood by both petitioner and the defendants that the description by metes and bounds referred to the street as located by that survey. There was no mistake as to the numbers of lots embraced in the mortgage, but the mistake made by petitioner and the fraud perpetrated by defendants consists in this: that the strip of land, about 40 feet by 100 feet, of lot No. 139, lying between new Decatur and old Decatur, and on which the shop is located, was represented by defendants to be a portion of lot No. 138; in other words, lot 138 was represented as being bounded on the east by Decatur street, when in fact it was not a portion of lot 138 by the old survey, but was a strip which had been cut off by new Decatur street from lot 139. If it should be pretended by defendants that they executed the mortgage believing that the shop was located on one of the lots described in the mortgage, it would have been a mutual mistake. Petitioner did not discover the mistake until after the foreclosure of the mortgage, and has just discovered it. Moore purchased the land upon which the shop was situated, for the purpose of assisting in the consummation of the fraud, and with full notice of plaintiff's rights in the premises. Moore is insolvent. If the property is sold under a mortgage *fi. fa.*, with this cloud hanging over the title, the price realized would be vastly inadequate. Petitioner, waiving discovery, prayed that it have a special lien on lots Nos. 139 and 138, that lot 138 be decreed to extend to new Decatur street, and to embrace that portion of lot 139 on which the shop is located, and that the same be decreed to be sold by the sheriff, together with the land embraced in the mortgage, and the proceeds of the sale applied to the payment of the mortgage debt; also, for general relief.

W. J. and J. J. Carter answered, denying the allegations as to fraud or mutual mistake, and alleged that as soon as they discovered that M. M. Green claimed title to the lot on which the shop was erected, and for which she soon after brought a suit in ejectment against them, they notified petitioner of such claim, and offered petitioner the opportunity of protecting itself under its mortgage, offering to borrow money of petitioner with which to purchase the land

from Mrs. Green, and take title to themselves, and secure petitioner by other and additional security, thereby making good petitioner's first mortgage lien on the land, defendants being unable themselves to raise the funds necessary to purchase the land from Mrs. Green; and petitioner agreed to make the loan, whereupon defendants proceeded to contract for the purchase of the land from Mrs. Green, and a deed was drawn by her to defendants in accordance with the above understanding and agreement with petitioner, the price agreed upon being \$375; but, when defendants called on petitioner for the promised loan, petitioner refused the same, and defendants thereupon notified said Moore of the claim by Mrs. Green, that he might, if he saw fit, purchase the land for his own protection, under a mortgage then held by him against defendants on said shop; and Moore immediately sent to W. J. Carter \$400, with instructions to purchase the land for him, which said Carter did, and took the deed therefor, and sent it to Moore, after putting it on record; and the deed, so far as they know, has remained in Moore's possession until now, these defendants not having or claiming any interest in the deed. Moore answered, denying the charges of fraud or collusion on his part, also the allegation of insolvency, and alleging that his purchase and claim were made in good faith.

The cases were, by consent of the parties, consolidated, and the following questions were submitted to the jury: "(1) Does the original mortgage given by Carter & Bro. to the Dublin Banking Company actually cover the land on which the shops are located? (2) Was the money paid to Mrs. Green for the land the money of Moore, or the money of W. J. and J. J. Carter? (3) Was [plaintiff] notified by W. J. Carter, before the renewal of the mortgage, that he had discovered the shop was on the land of Mrs. Green? (4) Did Carter & Bro., or either of them, assure plaintiff that they were buying up the title of Mrs. Green to protect plaintiff's mortgage?" The court, in charging the jury, instructed them that, if they should answer the first question in the affirmative, they need not go further. The jury rendered a verdict dealing only with the first question, and answering that in the affirmative. On this finding, the court rendered a decree in favor of the plaintiff, which will be more specifically referred to hereafter. The defendants made a motion for a new trial, which was overruled, and they excepted. Such of the grounds only as are deemed material to an adjudication of the questions raised will be hereafter set out and considered.

On the trial of the cause, the plaintiff put in evidence the note and mortgage; the *fi. fa.* issued upon the foreclosure of the mortgage; the claim filed by George W. Moore to that portion of the property levied on, on which the machine shops were located; deed dated January 10, 1893, and recorded April 6, 1893,

from Mrs. M. M. Green to G. W. Moore, conveying $1\frac{1}{2}$ acres, more or less, in the town of Dublin, Laurens county, Ga., being two town lots containing three-quarters of an acre each, and known by the plan of the town as town lots Nos. 123 and 139, bounded on the north by Madison street, west by Decatur street, south by Marion street, east by Weaver lands. There was oral testimony on behalf of the bank to the effect that the mortgage involved in this action was a renewal of an original mortgage executed in September, 1892, covering the same described property; that W. J. Carter, representing his firm, wanted to borrow the money, and offered the two lots and buildings, which he estimated as being worth \$2,500, as security. Carter represented that he bought the land from Fuller & Jocelyn. At the time of the execution of the mortgage, nothing was said as to any adverse claim to the land; and notwithstanding the bank had notice of such adverse claim within a month after the original mortgage was executed, in 1892, it took no steps to protect its mortgage, as it relied upon Carter's assurance that there was nothing in the adverse claim, and that its mortgage would be protected. Between the 10th and 20th of January, 1893, Carter paid Mrs. Green some money in the presence of the cashier of the bank, and told the cashier he did not want the bank's mortgage disturbed or his credit hurt, and he was therefore paying the money to have the claim "hushed up." Carter said nothing about anybody else purchasing Green's claim, and the bank did not know that Moore claimed to be purchaser of the land until about the time the mortgage was put in judgment. Carter never made any application to the bank for a loan to buy the property claimed by Mrs. Green. When the cashier found that Moore had a mortgage on record, and asked Carter why he did not state in it that the bank's was the first mortgage, Carter replied, "That is all right, and Moore knows that," and assured witness that the paper was all right, and that the bank had a first mortgage on the property. When witness learned that Moore had some claim to the property, he went to Carter to ascertain exactly what part of the lot he claimed. He and Carter went to the shop together, and witness first understood that the dividing line would cut off only a part of the boiler house; but, about the time the rule absolute was granted on the mortgage, a survey was made, and witness was then pointed to a line which embraced within Moore's claim all the land on which the shops were located. The shops were situated between a ditch and Decatur street, and were located on a part of lot No. 139. The description contained in the mortgage referred to new Decatur street and to the new map of Dublin, and would have left the shops on the land covered by the mortgage according to that description. The value of the lots covered by the mortgage, outside of the buildings, is

from \$120 to \$125, while the whole property, including the buildings, is worth \$2,500. Mrs. Green lives in Dublin, was living there at the time the loan was negotiated, and had the same opportunity to know the building was being erected on her land as anybody else would have that owned property. When the shops were being built, neither Mrs. Green nor her husband knew that they were being erected on her land; but, after they were completed, the husband of Mrs. Green had the land "run out," and Carter was at once notified that they were on Mrs. Green's land. There was testimony in behalf of the defendants to the effect that Carter did not know at the time the shops were built, nor at the time the loan was originally procured, that Mrs. Green claimed title to the land on which they were situated, but, on the contrary, believed that such land belonged to Carter & Bro. As soon as Carter learned of Mrs. Green's claim, he notified the bank, and endeavored to borrow from it sufficient funds to settle the claim, stating to the bank that the firm of Carter & Bro. was unable financially to pay off the claim. Upon the refusal of the bank to make the loan, Carter communicated with G. W. Moore, a brother-in-law, who lived at Charleston, S. C., and who had loaned to the firm of Carter & Bro. from time to time sums aggregating \$5,000, and took a mortgage on property to secure the same, in which communication Carter advised Moore of the adverse claim; whereupon Moore sent to Carter \$400 with which to buy the property, and take title thereto for Moore. Carter and his brother are now in possession of the shops for Moore, receiving salaries for their services, and there is no agreement between themselves and Moore by which they can ever get the property back at any time. The transaction by which Moore bought the property from Mrs. Green was not kept concealed by Carter from the bank or its officers. The deed was recorded, and sent immediately to Moore. The bank first promised to lend the money with which to buy the land from Mrs. Green, whereupon Carter notified Green to make out a deed; but, the bank having failed to comply, it became necessary to have the deed changed, and executed in the name of Moore. Defendants put in evidence original suit between Mrs. M. M. Green and W. J. and J. J. Carter, filed in Laurens superior court, December 22, 1892, to recover lots of land in the city of Dublin, Nos. 123 and 139, and especially a strip, the width of 65 feet, west of new Decatur street, and up to the east side of old Decatur street; and it was agreed that this suit was settled or dismissed about the date of the deed from Green to Moore. There was evidence that Moore had made a short visit to Dublin three or four months before the trial, and that that was the only time he had ever been in Dublin. There was also evidence tending to show the solvency and good character of Moore.

1. On the levy of the mortgage *n. fa.* in

favor of the Dublin Banking Company, the defendant Moore filed a claim to that part of the land on which the execution had been levied, and on which the machine shop was located. The issue to be tried under this levy and claim was the title to that part of the land. On the interposition of the claim, however, the defendant in error, as will be seen from the preceding statement of the case, filed its equitable petition, in which, after alleging in detail the facts of the loan of the money by the bank to Carter & Bro., and the execution of the mortgage given to secure the payment of such loan, it set out certain facts, detailed in the foregoing statement, as entitling it to equitable relief, and prayed that "petitioner have a special lien on lots 139 and 138, and that the same be decreed to be sold by the sheriff of said county," and that "lot of land number 138 (one of the lots mortgaged) be deemed to extend to new Decatur street, and to embrace such portion of lot number 139 (on which the shop is alleged to be located) as is necessary to make said lot conform to the agreement of the parties to the contract," etc., so as to include the machine shop. Under this petition, it was sought, because of alleged mistake on the part of the mortgagees and fraud on the part of the defendants Carter and Moore, to have a special lien decreed to exist on lot No. 139, in favor of the plaintiff below, for the security of its debt, notwithstanding that lot was not embraced in the mortgage; but in no part of the petition was paper title to the land, on which the special lien was sought, denied to have been in Moore. On the contrary, the theory of the plaintiff is that such title was in Moore, but that, for the causes alleged, it ought to be held by him subject to an equitable lien for the payment of the plaintiff's debt. So that the two issues raised by the claim case and the petition are (1) whether the land claimed by Moore is, at law, subject to the execution; (2) whether the defendant Moore, who holds the title to that part of lot No. 139 on which the machine shop is located, by reason of fraudulent or collusive conduct with the debtors, in equity, holds the land subject to the petitioner's mortgage. The two cases were consolidated at the trial, and much evidence was introduced to support the various contentions of the parties. The case was submitted to the jury by propounding certain written questions for their answer. The first of which was: "Does the original mortgage given by Carter & Bro. to the Dublin Banking Company actually cover the land on which the shops are located?" To this question the jury returned an affirmative answer, which was the full extent of their finding, they having been instructed, if they answered this question in the affirmative, not to consider any other question. On this finding of the jury, the court decreed that the property in dispute, including the improvements thereon, "be and the same is hereby declared subject

to the mortgage *fi. fa.*," etc., "and that the said *fi. fa.* do proceed against the same." The plaintiffs in error made a motion for a new trial on several grounds, one being that the court erred in charging the jury as follows: "Does the original mortgage given by Carter & Bro. to the Dublin Banking Company actually cover the land on which the shops are located. The plaintiffs in this case insist that the description in their mortgage actually covers the property in dispute; that it is upon the land as set forth in their mortgage. The defendants deny that, and that makes the first issue you are to pass upon. If you should find to the first inquiry that this property is actually covered by the mortgage given by Carter & Bro. to the Dublin Banking Company, you need go no further. If you should find in favor of the defendants, in that case that it does not actually cover the property, you would pass to the second question."

From the view we take of the case, it is only necessary to place our decision on this ground of the motion. As we have seen, on the levy of the execution, Moore asserted his title to a part of the land levied on, through the medium of a claim. Then the petitioner, admitting that Moore held title to the part claimed, set out certain facts of a fraudulent and collusive nature, which it alleged rendered the land claimed by Moore subject to the lien of its mortgage, notwithstanding Moore's title. The jury only ascertained the fact that the mortgage covered the land on which the shops were located. Both the petitioner and Carter testified that, at the time the mortgage was given, they in fact believed it actually covered the land on which the shops were located; but petitioner distinctly avers that at that time title to the land on which the shops were and are located was in Mrs. Green. As both the mortgagee and the mortgagors agreed on this fact in the pleadings, the question at issue was not what the mortgage covered. Suppose it did in fact cover that part of the land, under the admissions in the petition, title was shown not to be in the mortgagors, at the time of the execution of the mortgage. This finding does not adjudicate the rights of the defendant Moore under the pleadings; and, as the pleadings now stand, he is entitled to have his title passed on by the jury in some appropriate manner before the execution creditor can proceed to sell the land pending his claim. It may be, as there was some confusion existing in relation to the lines of the lots, it was understood that this finding settled the location of the shops on one of the lots originally purchased, and described in the mortgage. How this is we cannot say. We cannot gather such an understanding from the record, and we dispose of it as we find it. The finding of the jury was not sufficient to authorize the decree rendered. The question made by the claim and the petition as it stands is whether the land claimed is subject; and this de-

pends on the determination, under the claim, whether the mortgagors had title, and, under the petition, whether Moore, the admitted holder of the title, was guilty of such fraud in the purchase as made the land, in equity, subject to the lien of the mortgage.

2. We are not to be understood as passing on the merits of the case under the evidence. They are not under review. We send the case back because the ascertained facts do not determine the issues made by the parties in their pleadings, and, without more, do not support the decree which was rendered. Judgment reversed.

(104 Ga. 482)

COKER et al. v. McCONNELL, Sheriff.
(Supreme Court of Georgia. July 18, 1898.)
EXECUTION SALE—RECOVERY OF PRICE—ACTION
BY SHERIFF.

Where a sheriff, under an execution against administrators, sold realty belonging to the estate of their intestate for more than enough to satisfy the execution, and, with the acquiescence and consent of one of the administrators, permitted the purchaser at the sale to account for the excess by crediting the amount thereof upon a debt due to him by such administrator individually, the sheriff could not thereafter recover this amount in an action at law brought by him against the purchaser for the use of the administrators.

Little, J., dissenting.

(Syllabus by the Court.)

Error from city court of Floyd county; G. A. H. Harris, Judge.

Action by J. P. McConnell, sheriff, for the use of J. S. Howell and others, against W. H. Coker & Co. Judgment for plaintiff. Defendants bring error. Reversed.

M. B. Eubanks, for plaintiffs in error.
Fouché & Fouché, for defendant in error.

LUMPKIN, P. J. The sheriff of Floyd county, under a mortgage execution in favor of P. H. Hardin against J. S. Howell, as administrator, and Catherine H. Howell, as administratrix, of the estate of W. C. Howell, sold certain land to W. H. Coker & Co. at the price of \$600, which sum exceeded the amount due upon the execution. The administrator and administratrix upon the estate of W. C. Howell brought an action against Coker & Co. to recover a balance alleged to be due by the latter upon the purchase of this land. By an amendment to the plaintiffs' petition, the name of the sheriff was inserted as suing for their use. The defendants, without raising any question as to the right of the original plaintiffs to bring the action, or objecting to the introduction of the sheriff as the party plaintiff, set up as a defense that the balance due upon the price of the land had been settled with J. S. Howell, as administrator; he having received from the defendants \$90 in cash, and they, at his request, having entered a credit of \$110.24 upon notes due by J. S. Howell individually and by his brother W. S. Howell to

the defendants. The answer further alleged that the two Howells last mentioned were heirs of W. C. Howell, deceased, each being entitled to one-fifth of his estate, and that the settlement referred to was acquiesced in by the sheriff, who, in pursuance thereof, conveyed the land to the defendants. By an amendment to their answer the defendants, in substance, alleged that they had paid to the sheriff a sufficient amount to satisfy the Hardin *fi. fa.*, and, with his consent and that of J. S. Howell, as administrator, had reserved a specified amount with which to satisfy a *fi. fa.* in the sheriff's hands in favor of McHenry, Nunnally & Neel against the estate of Howell, deceased, leaving \$200.24 as a balance due by them, \$90 of which they had paid to J. S. Howell in cash, and that the remaining \$110.24 had been settled by them in the manner stated in their original answer. The amended answer further alleged that all of the foregoing had been done with the knowledge and consent of the sheriff, and that he permitted J. S. Howell to make the settlement, and acquiesced therein. Upon these allegations the plaintiffs requested the court to direct a verdict in their favor for \$110.24. The court inquired of defendants' counsel if he intended to prove that the estate of W. C. Howell owed no debts. Counsel replied that the suit not having been brought by a creditor, and the plaintiffs not alleging the existence of any debts, "he did not deem the existence or nonexistence of debts as material to the defense." Thereupon the court, without hearing any evidence, directed a verdict in the plaintiffs' favor for the sum last mentioned, and this is now complained of as error.

We will remark in the first place that the representatives of the estate of W. C. Howell could not, as against a proper defense, have maintained this action, as originally brought. There was no privity between them and the purchasers at the sheriff's sale. Though this administrator and administratrix were entitled to the balance of the purchase money of the land in excess of the amount required to satisfy the *liens* thereon, it was the duty of the sheriff to collect and pay the money over to them. As he was, without objection, made the party plaintiff in the present case, it should be treated as if he had brought it in the first instance. That the administrator and administratrix were the original plaintiffs is of no consequence. They could not, as above stated, have maintained the action in their own right, and therefore they figure in the case as mere usees. That they are such cannot give to the sheriff, the real plaintiff, any better footing than he would occupy were he suing alone. This being an action at law, he must show in his own behalf a legal right to have a verdict, or else be cast in the suit. He undoubtedly had, at the outset, a perfect legal right to recover from Coker & Co. the balance due upon the land; and, after so doing, it would, as already stat-

ed, have been his duty to pay the money over to the representatives of the estate of W. C. Howell. But taking as true the allegations of the answer and amended answer filed by Coker & Co., which we must do for the purpose of testing the correctness of the judgment now under review, we are satisfied that the sheriff's original right of action was lost because of the facts set up and relied upon by the defendants as their defense to the action. The amount in dispute is a balance of \$110.24; for it seems to have been conceded that Coker & Co. could not, in any event, have been held accountable for more. We do not think they are liable to the sheriff for this balance. The law holds sheriffs responsible for the proceeds of sales conducted by them, and they are bound to pay over such proceeds to the persons entitled thereto. To this end, these officers have a clear and undoubted right to demand the cash from all purchasers at these sales. If a sheriff for any reason chooses not to require a purchaser to pay cash, but accepts something else in settlement of the purchase money, and releases the purchaser, he does so at his own peril, so far as any liability over to him on the part of the purchaser is concerned. If he fails to collect purchase money, and thus incurs personal liability, he has no right to relieve himself from the consequences of his own breach of duty by proceeding against the purchaser, whom he had discharged. We repeat that the sheriff's case in the present instance derives no additional strength from the fact that the representatives of W. C. Howell are named as usees, and that he must recover, if at all, in his own right. We are not now called upon to decide whether the sheriff has incurred liability to them or not. That is a question not made in this case; but, if he has, he cannot escape it by bringing an action of this sort against Coker & Co., and naming these representatives as usees, any more than he could by bringing the suit without so naming them. It must not be overlooked that this is a plain action at law. There are no equitable pleadings, and no principles of equity are involved. The beneficiaries of the Howell estate, whether heirs or creditors, are not concerned in this litigation. There is no charge of any fraud or collusion, or of insolvency, on the part of any of the persons who participated in the transaction disclosed by the defendants' answer. Of course, all who misappropriate, or participate in the misappropriation of, trust funds, are liable to the person or persons ultimately entitled to receive the same. We by no means wish to be understood as holding that the heirs or creditors of W. C. Howell, if it were essential to the preservation of their rights in the premises, could not, by instituting a proper equitable proceeding, and supporting the same by sufficient proofs, compel an accounting to themselves by any and all of the persons whose unauthorized acts had caused a misapplication of the assets of the estate.

There is not, however, any case of this kind now before the court.

The trial judge erred in directing a verdict for the plaintiffs. Conceding the truth of the defendants' allegations, the verdict ought to have been in their favor. Judgment reversed. All the justices concurring, except LITTLE, J., dissenting.

LITTLE, J. (dissenting). One who buys land sold under execution by the sheriff is bound to pay for the same. The fund arising from such sale cannot be distributed by the sheriff, except at his own risk. That officer is bound to bring it into court for distribution. Nor can the purchaser retain in his hands a part of the purchase money, under an arrangement made with one of the administrators of the defendant in execution to allow such part of the purchase money to be applied by the purchaser on a debt due to him by one of the administrators individually, without showing that there were no creditors of the intestate who were entitled to prior payment. Funds in the hands of an administrator are not his individual funds, and this is true even if the administrator is an heir at law, and would be entitled to a part of the fund remaining over after payment of the execution under which the land was sold. In this case the plaintiffs in error bought a tract of land for \$600 at sheriff's sale under an execution against the estate of Howell. By an agreement with one of the administrators of the estate, the plaintiffs in error appropriated to the payment of an individual debt due to them by the person who was administrator a part of the purchase money; and, on a suit brought by the sheriff to recover the amount of the purchase money, they set up as a defense that this balance had been settled with J. S. Howell as administrator, who was one of the heirs at law of the intestate, and entitled to one-fifth of his estate, and that the sheriff acquiesced in such settlement. It is sufficient for my purpose to say that primarily the administrator had no right to appropriate any part of this fund to the payment of his individual debt, and the plaintiffs in error had no legal right to receive it, and they were liable to the sheriff for its payment. If it be true that Howell, the administrator, was entitled to a particular part of the purchase money, I see no reason why, upon proper proceedings in the court, that part might not be awarded to a creditor of the heir at law. But, in order to authorize this to be done, it was necessary to show that there were no creditors of the intestate who were entitled to this fund before the heir at law could receive any part of it. The record in this case is ominously silent as to whether there are any such creditors, and in the argument it was neither asserted nor admitted that there were none. No part of the purchase money of this land belonged to the heirs at law until the creditors, as well as the expenses of the adminis-

tration, had been paid. And I am therefore of the opinion that a recovery against the purchaser was right and legal, and that the fund should have been brought into court for distribution according to law.

(104 Ga. 619)

STEVENS v. STEMBRIDGE.

(Supreme Court of Georgia. May 27, 1898.)

JUDGMENTS — RES JUDICATA — ILLEGALITY PROCEEDINGS—PROVINCE OF COURT.

1. It was, on the trial of an action upon promissory notes, erroneous to strike a paragraph of the defendant's answer alleging, in substance, that the notes sued upon were secured by a mortgage on personalty; that the same had, before the bringing of such action, been foreclosed by the plaintiff; that, in defense to the foreclosure proceeding, the defendant had filed an affidavit of illegality, setting up partial payment of the notes; that a verdict was had thereon finding in the plaintiff's favor a specified amount, less than that apparently due upon the notes; that the plaintiff had entered up a judgment for this amount, which had never been reversed or set aside; that after the rendition of this judgment the defendant tendered to the plaintiff the amount thus recovered; and that, by reason of these facts, it had been adjudicated that the defendant was not indebted to the plaintiff in any greater sum than the amount specified in such judgment.

2. It was the duty of the court, instead of striking this portion of the answer, to allow the defendant an opportunity to introduce competent evidence in support of the same, and, upon the introduction of such evidence, to have submitted the case to the jury for their determination, under proper instructions.

(Syllabus by the Court.)

Error from superior court, Baldwin county; S. Reese, Judge.

Action by W. H. Stembrige, administrator, to use, etc., against B. P. Stevens. There was a judgment for plaintiff, and defendant brings error. Reversed.

Whitfield, Allen & Moore, for plaintiff in error. D. B. Sanford, for defendant in error.

LITTLE, J. Stevens executed to Stembrige five promissory notes, and at the same time delivered a mortgage to secure their payment on certain real and personal property. Being indebted to the Milledgeville Banking Company, Stembrige indorsed and delivered two of the notes to that company as collateral to secure his indebtedness. Subsequently Stembrige, for the use of the Milledgeville Banking Company, brought suit against Stevens upon these two notes. To this action the defendant filed a plea in bar, alleging that on January 15, 1895, plaintiff, for the use of the Milledgeville Banking Company, recovered against the defendant, in the superior court of Baldwin county, a verdict and judgment for \$125 principal, and \$29.30 interest to date of judgment, on an issue joined between the defendant and plaintiff on an illegality filed to the levy of a mortgage *fi. fa.* in favor of Stembrige,

for the use of the Milledgeville Banking Company, the mortgage having been made to secure the payment of the same notes that are sued on in this action, and that the defendant, in her affidavit of illegality to the mortgage *fi. fa.*, averred partial payment of the notes secured by the mortgage, and tendered the balance due (as she has done in this plea), and the jury, on this issue, after the introduction of evidence and argument of counsel, returned a verdict as above stated. On a judgment entered on the verdict, a *fi. fa.* issued, and defendant tendered plaintiff the amount recovered, but plaintiff refused to accept the same, notwithstanding the verdict and judgment are still subsisting and in force, and therefore conclusive between the parties. On motion of counsel for the plaintiff, the court struck so much of the plea as set up the fact of *res adjudicata*, on the ground that the plea raised no issue other than such as the court could pass upon without the aid of a jury; the court holding that the issue made is one of law, and not of fact, and that the issue disposed of in a trial under an affidavit of illegality to the issuance of a chattel mortgage *fi. fa.*, wherein payment was pleaded, would not be *res adjudicata* as to a common-law suit on the notes secured by the mortgage, between the same parties, and that so much of the plea as related to the former recovery did not raise an issue which should be submitted to a jury. To this ruling the defendant excepted *pendente lite*, and in her bill of exceptions assigns this action of the court as error. After the introduction of evidence on other issues raised, the court directed a verdict for the plaintiff, and the motion for a new trial is based on various grounds, in addition to that assigned on the striking of the plea above mentioned. Under the view which we take of the case as presented here, it is not deemed necessary to deal with any of the questions, except that which is involved in the action of the court striking the plea of *res adjudicata*.

We are of the opinion that the trial judge erred in holding that the issue raised by the plea is one of law, and not of fact, and that he was authorized to pass on it without the aid of a jury; and also erred in holding that the issue of partial payment of the debt determined by a judgment fixing the amount due, on the issue made by the affidavit of illegality to the mortgage *fi. fa.*, was not *res adjudicata* as to the amount due, in a common-law suit brought to recover a judgment on the same debt, in the same court, and between the same parties. In the case of *Robinson v. Wilkins*, 74 Ga. 47, this court ruled: "The issue made by a plea of former recovery should be submitted to the jury, under proper instructions from the court as to the effect of the adjudication pleaded in bar." In that case it appeared that a former adjudication was pleaded, and the trial judge overruled a motion to strike the plea,

but sustained a motion to dismiss the plaintiff's action on the ground of the former adjudication. This court, in rendering the opinion, held that the motion to strike the plea was properly overruled, but disapproved (though, for other causes stated in the opinion, it did not reverse) the judgment of the court dismissing the plaintiff's action, the court saying: "According to our practice, however, the issue made by the plea should have been submitted to the jury, to be passed upon by them under the evidence adduced, and the court should not have ordered the case dismissed, even when it was apparent that the plea was fully sustained by the production of the record upon which it was founded, but the jury should have been directed to find for the defendant upon that plea." That case is controlling upon the question that, where a proper plea of *res adjudicata* is filed, the court is not authorized to settle the issue raised without the intervention of a jury, though, in a proper case, it might direct a verdict.

The remaining question to be determined is whether the judgment rendered in the case which was made by the levy of the mortgage *fi. fa.* and the affidavit of illegality filed by Stevens, as set out in the plea, constituted an adjudication of the right of the plaintiff to recover in the present action; and whether the plea was sufficient in form and substance, if supported by the record of the former action, to render the doctrine of *res adjudicata* or former recovery applicable. Section 5348 of the Civil Code provides that "a judgment of a court of competent jurisdiction is conclusive between parties and privies as to the facts which it decides, until reversed or set aside"; while section 3741 of that Code declares that "an adjudication of the same subject-matter in issue, in a former suit between the same parties, by a court of competent jurisdiction, should be an end of litigation." In his work on Judgments, Mr. Freeman says: "To make a matter *res adjudicata*, there must be a concurrence (1) of identity of the subject-matter; (2) of the cause of action; (3) of persons and parties; (4) in the quality of the person against whom the claim is made." *Freem. Judgm.* § 252; *Benz v. Hines*, 8 Kan. 397; *State v. Jumel*, 30 La. Ann. 861; 2 Bouv. Dict. tit. "Res Adjudicata." Under the rule laid down in Massachusetts, which seems to be both clear and comprehensive, the court will inquire (1) whether the subject-matter of the controversy has been brought in question and within the issue in the former proceeding, and has terminated in a regular judgment on the merits; (2) whether the former suit was between the same parties, in the same right or capacity, or their privies claiming under them; (3) whether the former judgment was before a court of competent jurisdiction. *Bigelow v. Windsor*, 1 Gray, 299; *Miller v. McManis*, 57 Ill. 128; *Tucker v. Rohrbach*, 13 Mich. 75. The supreme court of the Unit-

ed States, in considering the effect of a judgment upon a subsequent action involving the same issues, but a different, though similar, subject-matter, reached the conclusion that, when an issue is in fact litigated and determined, such determination is conclusive upon parties and privies in any subsequent action in which the same issue is in question, though the subject-matter of the action be different; but held that, to invoke this rule successfully, it must be shown that in the former action the issue was in fact litigated and decided. It is not sufficient that it is there so involved that it might have been litigated. *Cromwell v. County of Sac*, 94 U. S. 351; *Davis v. Brown*, Id. 423; *Russell v. Place*, Id. 606. Section 2765 of the Civil Code provides that "when an execution shall issue upon the foreclosure of a mortgage on personal property, as hereinbefore directed, the mortgagor or his special agent, may file his affidavit of illegality to such execution, in which affidavit he may set up and avail himself of any defense which he might have set up, according to law, in an ordinary suit upon a demand secured by the mortgage, and which goes to show that the amount claimed is not due." Under this provision of the Code it is apparent that the defendant in the present action was authorized to set up, in her affidavit of illegality to the levy of the mortgage execution, any defense which she could set up to the notes sued on. She alleges in her plea that, in the affidavit of illegality, she did plead partial payment of the notes covered by that mortgage and involved in this action; that, under the issue raised by that affidavit, the jury rendered a verdict finding that she was owing on the notes \$125 principal and a given amount as interest; that the plaintiff took a judgment for that amount; and that judgment has never been excepted to, and now stands unreversed, as an adjudication by a court of competent jurisdiction of the amount due by her on the notes involved in this controversy. Applying the rules which govern under the preceding citations, it must follow that the court erred in striking the plea, and that, instead, it was the duty of the trial judge to have allowed the defendant an opportunity to introduce competent evidence in support of the same, and, upon the introduction of such evidence, to have submitted the case to the jury for their determination, under proper instructions. Judgment reversed.

(104 Ga. 477)

MARIETTA PAPER MFG. CO. v. BUSSEY
et al.

(Supreme Court of Georgia. July 19, 1898.)

PLEADING—AMENDMENT—SALE—BREACH OF CONTRACT.

1. Though a petition alleged that a written instrument therein set forth was a perfect and complete contract for the sale of goods, and prayed for the recovery of damages for a breach thereof, there was no error in allowing an amendment to such petition in effect aver-

ring that the instrument in question was an offer or proposal to sell to the plaintiffs the goods therein described, and that the same had been accepted in writing by them before its withdrawal.

2. The court did not err in overruling the demurrer to the plaintiffs' petition as amended.

Little, J., dissenting.

(Syllabus by the Court.)

Error from superior court, Cobb county; George F. Gober, Judge.

Action by Bussey & Carswell against Marietta Paper Manufacturing Company. Judgment for plaintiffs, and defendant brings error. Affirmed.

Clay & Blair, for plaintiff in error. R. H. Holland, for defendants in error.

LUMPKIN, P. J. Bussey & Carswell brought an action against the Marietta Paper Manufacturing Company for damages for an alleged breach of a contract. The petition alleged: The plaintiffs entered into a written contract with the defendant, through its agent, Heffernan, by which the defendant agreed to deliver to plaintiffs at once 500 bundles of ties, at 65 cents per bundle, delivered at Augusta, Ga. The written agreement was as follows: "We, the Marietta Paper Manufacturing Company, agree to deliver to Bussey & Carswell 500 bundles of ties, at 65 cts. per bundle, delivered at Augusta. [Signed] Marietta Paper Mfg. Co. Jno. Heffernan. 7/26/96." The defendant failed and refused to carry out its agreement, or any part thereof, though requested so to do by plaintiffs. Said ties were to be delivered at once, so plaintiffs could have them for the fall trade of their customers. On July 30, 1896, plaintiffs asked F. W. Coffin, freight agent at Augusta, to send the following telegram to defendant: "To Marietta Paper Co., Marietta, Ga.: When will ties for Bussey & Carswell move? [Signed] F. W. Coffin. 7/30/96." In reply to this telegram, which was duly received by the defendant, the following letter was written to said Coffin on the same day: "Marietta, Ga., 7/30/96. F. W. Coffin, Esq., S. Agt. Ga. R. Rd., Augusta, Ga., Dr. Sir: Answering your telegram of this date, we ship next Wednesday some of the ties for Bussey & Carswell; also some for Jackson & O'Connor. Yours truly, [Signed] Marietta Paper Mfg. Co., per Heffernan." Defendant has never delivered the said ties as it promised to do, or any part of the same. The petition then set forth the damages alleged to have accrued from defendant's breach of its contract. The defendant demurred to the petition as follows: "The allegations made by plaintiffs do not set forth any cause of action, or furnish any ground for recovery, against this defendant. It does not show any contract between plffs. and dft., nor does it show any breach of any contract by dft." Pending the argument upon the demurrer, the plaintiffs offered an amendment to their petition in the following words: "Petitioners allege that the contract made by the defend-

ants July 26, 1896, was accepted by the plaintiffs in writing, immediately after said paper was signed by defendant and delivered to plaintiffs; that plaintiffs' written acceptances were by letter and telegrams, written and sent by plaintiffs to defendants, and that said writings are now in the possession of defendants; that they allude specifically and fully to their agreeing to purchase 500 bundles of ties, at 65 cents per bundle, and constituted a specific acceptance of the written offer made July 26, 1896; that the said writings constituted such an acceptance as would fully bind plaintiffs, and was such as to enable defendants to fully enforce said contract; that said acceptances and telegrams were written by plaintiffs, and delivered to defendants, during the months of August, September, and October, 1896, and at other dates; the exact dates being now unknown to plaintiffs, said acceptances being in the possession of defendants, said acceptances being made and said contract fully made prior to bringing said suit. Plaintiffs further say that said written offer made by defendants July 26, 1896, was never withdrawn by them before plaintiffs accepted the same in writing; neither have they ever withdrawn said offer, nor have they ever attempted to do so." The defendant objected to this amendment "because it failed to set out the language of the alleged acceptances, the date when made, and because the same was insufficient in law." The amendment was allowed, and the defendant's demurrer overruled. It excepted, and, in its bill of exceptions, complains that the court erred in allowing the amendment to the petition, and in overruling the demurrer.

In our opinion, neither of these rulings was erroneous. The amendment alleges a sufficient reason for not setting forth the "acceptances and telegrams" therein referred to, or stating their dates, viz. that the same were in the possession of the defendant. While it is true that the original petition treated the instrument therein set forth as evidencing a perfect and complete contract, and prayed for the recovery of damages for an alleged breach of the same, we think the amendment was allowable. The words of the written instrument are susceptible of two constructions, viz. the one placed upon it in the first instance, and that set forth in the amendment. Indeed, it would be perfectly fair to assume that the real object of the plaintiffs in setting forth the writing executed by Heffernan was merely to allege that it furnished the evidence of the contract relied upon. This being so, it would surely seem legitimate to permit the plaintiffs to make further allegations amplifying the petition in this respect, and showing that there were other writings evidencing the existence of the contract entered into between themselves and the defendant. It is quite certain that the amendment referred to the identical transaction mentioned in the original petition, and it was manifestly the purpose of the pleader in

the beginning to allege that the defendant company had made and had broken a valid contract, whereby it sold to the plaintiffs a stated number of ties at a specified price. Under the doctrine of the *Ellison Case*, 87 Ga. 691, 13 S. E. 809, it was the right of the plaintiffs to complete and make perfect the structure which beyond question it was their intention at the outset to erect. If the amendment was properly allowed, it cannot be seriously doubted that the petition as amended stated a good case. Its allegations, taken all together, certainly alleged a complete and binding contract, and a breach of the same, with resulting damages. On the whole, we think the trial judge properly concluded that enough was alleged to carry the case to the jury, and to warrant a verdict in favor of the plaintiffs in case they sustained their allegations by competent evidence. Judgment affirmed. All the justices concurring, except LITTLE, J., dissenting.

LITTLE, J. (dissenting). If, in contemplation of law, the instrument declared upon by the plaintiffs, taken in connection with subsequent writings between the parties as set out in the petition, as amended, constitutes a valid and binding contract, the petition contained a good cause of action. If, on the other hand, there was no contract, then there could have been no breach, no damage, and the plaintiffs would have no cause of action. It is a fundamental principle that, to constitute a valid contract, there must be parties able to contract, a consideration moving to the contract, the assent of the parties to the terms of the contract, and a subject-matter upon which it can operate. Civ. Code, § 3637. Under the allegations made in the petition, there appear to have been parties able to contract, there appears to have been a subject-matter upon which such agreement could operate, and the defendant appears to have assented to the terms of the contract. If, therefore, there was a consideration, all the essential elements to constitute a valid and binding contract would be found in the obligation to which the defendant subscribed. The alleged contract upon which the plaintiffs declared was of an executory character. If a contract at all, it was one in which something remained to be done by one or more of the parties. Id. § 3662. An executory contract, without consideration, is a mere nudum pactum, and is not binding upon the party making the promise. Id. § 3656. The allegations of the petition show that the plaintiffs parted with nothing as a consideration for the promise of the defendant; that, at the time the promise was made, the plaintiffs did nothing or undertook no act from which benefit accrued to the defendant, or any injury resulted to the plaintiffs. The doctrine is universally recognized that mutual promises, or a promise for a promise, afford a sufficient consideration to support a contract. As was said, however, by this court, in the case of

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Morrow v. Express Co. (Ga.) 28 S. E. 998: "A promise is not a good consideration for a promise, unless there is an absolute mutual-ity of engagement, so that each party has the right at once to hold the other to a positive agreement. 1 Pars. Cont. *449; McKinley v. Watkins, 18 Ill. 140; Lester v. Jewett, 12 Barb. 502; 6 Barn. & C. 255; 5 Mees. & W. 241; 9 Exch. 507; Dorsey v. Packwood, 12 How. 126; Stiles v. McClellan, 6 Colo. 89; Cool v. Cunningham, 25 S. O. 186. And in case of mutual promises, where the promise of one party is relied on as a consideration for the other, the promises must be concurrent and obligatory upon each at the same time in order to render either binding. Road Co. v. Snediker, 18 Barb. 817; Railroad Co. v. Brinckerhoff, 21 Wend. 139; Burnet v. Bisco, 4 Johns. 235; 3 Term. R. 653; Clark, Cont. p. 168; Story, Cont. § 569; Keep v. Goodrich, 12 Johns. 397; Tucker v. Woods, Id. 190; Buckingham v. Ludlum, 40 N. L. Eq. 422, 2 Atl. 265."

At the time the alleged contract was made, so far as the allegations of the petition show, the plaintiffs in no manner bound themselves to take and pay for the ties. The instrument purported to be a contract from its inception. It did not undertake to embody an offer or proposal for acceptance or rejection by the plaintiffs. Not being a binding contract when made, by reason of its unilateral character, it was not within the power of the plaintiffs, by subsequent writings treating it as a contract binding upon them, or indeed by express promises to take and pay for the goods, to thereby render the alleged contract a binding obligation upon the defendant. Of course, although the original promise of the defendant was without consideration, if, upon subsequent promise made by the plaintiffs to take and pay for the goods, the defendant had expressly or by implication renewed its original promise, this would be equivalent to a new promise, and the promises would then be concurrent. Clark, Cont. p. 166. As has been said, the alleged contract could not be construed as an offer to sell goods, and therefore the law relating to offer and acceptance is not applicable. If the writings referred to by the plaintiffs in their amendment to the petition had embodied an absolute promise to take and pay for the goods, it does not appear that the defendant, either upon the receipt of such writings or at any time thereafter, renewed, expressly or otherwise, the original promise. Indeed, its refusal to ship the goods is inconsistent with any such intention on its part. It follows, we think, that the amendment seeking to construe the instrument as a mere proposal, and averring that such proposal had been accepted in writing by the plaintiffs before its withdrawal, was improperly allowed; and also that, inasmuch as the alleged contract declared upon was of no force and effect, the court, as I think, erred in not sustaining the defendant's demurrer.

81 S.E.—27

PARROTT v. DYER.

(Supreme Court of Georgia. July 22, 1898.)

TRUSTS — EXECUTION — ESTOPPEL — PLEADING — AMENDMENT — EJECTMENT — EVIDENCE.

1. Where a deed conveyed land to a woman and her minor children in trust for the joint use and benefit of herself and them, with the power to "sell any portion or all of said property, and to make a deed to the same, without any petition or order in chancery, the proceeds of such sale or sales to be invested in other property, to be held subject to this trust," *held* that, upon the arrival of the minor beneficiaries at majority, the trust became executed, and the trustee could no longer exercise the power of sale, so as to convey to another the interest of the original cestuis que trustent in the land.

2. An answer filed to an action instituted to recover land, which avers that the plaintiff knew of, and consented to, a conveyance of the land by D., trustee, to B., and is therefore estopped from setting up title in himself as against B.'s successor in title, is not supported by evidence that the plaintiff knew of, and consented to, a conveyance of the land made by R., assignee of B., to P.; nor would an amendment to the answer setting up the latter state of facts be allowable when offered after the time for answer has expired, unless accompanied by an affidavit of the want of knowledge of the facts, as provided by section 5057 of the Civil Code, this section being in force at the time of the trial of the case.

3. Where a plaintiff sues to recover an undivided one-third interest in land, and the defendant, by his answer, in general terms, denies plaintiff's title thereto, it is incumbent on the plaintiff to show his title to that interest before he can recover. When, therefore, in a given case, the evidence showed that plaintiff had an interest in the land, but did not definitely and specifically show what that interest was, it was error for the court to direct a verdict "for the premises in dispute." Such a verdict, being, under the pleadings, a finding for the plaintiff of an undivided one-third interest in the land, was not supported by the evidence.

(Syllabus by the Court.)

Error from superior court, Gordon county; J. S. Candler, Judge.

Action by R. M. Dyer against E. L. Parrott. There was a judgment for plaintiff, and defendant brings error. Reversed.

W. H. Dabney, O. N. Starr, and T. W. Skelly, for plaintiff in error. J. O. Harkins and R. J. McCamy, for defendant in error.

LITTLE, J. The first assignment of error is that the court erred in holding that the trust in the deed from Hood to Narcis Dyer became an executed trust on the arrival of the children at the age of 21 years, and title to the land was then vested in her and her children as tenants in common, free from the power of sale given, and that neither Boaz, nor those claiming under him, acquired title to the interest in the land which the defendant in error, by virtue of the deed from Hood to Narcis Dyer, trustee, held in his own right after attaining his majority. We think that the ruling of the court, as complained of in this ground of the motion for a new trial, was a correct construction of the law. By section 3149 of the Civil Code, it is pro-

vided that a trust estate may be created for the benefit of any minor or person non compos mentis, etc. In the deed from Hood to Narcis Dyer, under which she held the property, the following trust was declared: "To be held by the said Narcis Dyer as trustee, in trust for the use and benefit jointly of herself, the said Narcis, and the children of Daniel R. Dyer, deceased, formerly the husband of the said Narcis." It is fair to assume that, at the time of the execution of this deed, the children referred to were minors, and such, we presume, was the case. If not, then, immediately on the execution and delivery of the deed, the children referred to took a fee in the land as tenants in common with Narcis Dyer. Assuming, however, that they were minors, then the beneficial interest in the land described in the deed was in the children, the trustee holding the legal title for them. A further provision of section 3149 of this Civil Code is in these words: "Provided also if at any time the grounds of such trust shall cease, then the beneficiary shall be possessed legally and fully of the same estate as was held in trust," etc. So that, when these minor children became of age, the trust created by the deed became executed, and the legal title to their respective interests in the property vested in them. Civ. Code, §§ 3156, 3157; *Glover v. Stamps*, 73 Ga. 209; *Knorr v. Raymond*, Id. 749. It being admitted that the defendant in error was one of the children named as a beneficiary in the deed to Narcis Dyer, trustee, and that such deed was properly executed and delivered, and that at the time of the execution and delivery of the deed made by Dyer, trustee, to Boaz, the defendant in error was of full age, it must be held that the trustee had no authority, under the power of sale given in the deed from Hood, to convey to a purchaser title to the property which vested in the defendant in error when he became of age. When the trust became fully executed by the arrival at majority of the beneficiaries, the power of sale given to the trustee could not thereafter be exercised. *Beach, Trusts*, § 438; 2 *Perry, Trusts*, § 496.

2. The second error assigned is that the court erred in holding that a certain plea filed by the defendant was not good so as to admit evidence hereinafter set out. A portion of the plea is as follows: "Defendant avers that, at the time of the sale of said property by Narcis Dyer to Boaz, Narcis Dyer was arranging to remove with her daughter, who was then a single dependent female, to the state of Texas, and, in pursuance of the terms of the trust deed made to her, to take the proceeds of the sale of the property, and invest them in a home in that state,—all of which was known at the time of the sale of the property to Boaz by the plaintiff; and, with a full knowledge of what was occurring between his mother and Boaz, he made no objection to the sale, but acquiesced in and consented to it, and therefore is estopped from

setting up any claim to the same." As it appears in full, such surplus language is contained in the plea, but the fact is averred that, at the time of the sale by Dyer to Boaz, the defendant in error had full knowledge of the same, and that he acquiesced in and consented to such sale. If, as a matter of fact, this be true, then the defendant in error would be estopped from contesting the validity of the deed made by Narcis Dyer to Boaz. But, under this plea, evidence showing that the defendant in error consented to the execution of the deed from Rankin, assignee of Boaz, to the plaintiff in error, would not be admissible; and the difficulty, we apprehend, in the admission of this evidence, was that there was no pleading which authorized it, and no evidence offered to substantiate the plea that he consented to the execution of the deed from Narcis Dyer, trustee, to Boaz. So that, while the plea was good, no evidence was offered to support it, and, while the evidence offered would have been admissible, there was no plea filed to authorize its admission.

3. The next ground of error assigned is that the court erred in refusing to allow an amendment to the plea. This amendment, in substance, sets out the fact that, a short time before the plaintiff in error purchased the land from Rankin, the assignee of Boaz, he was informed by his sister, Mrs. Johnson, that she saw the defendant in error at the car shed in the city of Atlanta, and had a conversation with him in regard to the purchase of the property from Rankin, assignee, and that defendant in error stated that he would be glad for Parrott (plaintiff in error) to buy it, and that he would never give him any trouble about it, and, relying upon this statement of the defendant in error told to him by his sister, he purchased the property in good faith. There are two objections to this amendment. The first is that it is not germane to the original plea. The original averred that the defendant in error was estopped from denying the deed made by Narcis Dyer to Boaz. The amendment offered refers alone to the deed made by Rankin, assignee, to Parrott, and, not being germane to the original, it was not admissible as an amendment. This amendment set up new facts not stated in the original plea, and of which the original plea could not have given notice to the defendant in error. At the time of the trial of this case, the provisions of section 5057 of the Civil Code were in force, subsequently amended by the act of 1897 (Acts 1897, p. 35), which declares: "The defendant, after the time allowed for answer has expired, shall not in any case by amendment, set up any new facts or defenses of which notice was not given by the original plea or answer, unless at the time of filing such amended plea or answer containing the new matter, he shall attach an affidavit that at the time of filing the original plea or answer, he did not have notice or knowledge of

the new facts or defenses set out in the amended plea or answer."

4. The next error assigned is that the court erred in directing a verdict, without specifying and describing with sufficient certainty the plaintiff's interest in the land sued for. It will be remembered that the land was conveyed to Dyer as trustee, for the use of herself jointly with the children of Daniel R. Dyer, who was formerly the husband of the trustee. The effect of the conveyance was to vest title to the property in Mrs. Dyer and all of the children of Daniel R. Dyer, taking in equal interests. The pleadings show an admission on the part of the defendant that all of such children were dead at the time of the institution of the suit, except Mrs. Simmons and the defendant in error, and that, at the time of the execution of the deed by the trustee to Boaz, these two children were of full age. There is no proof as to the number of children who originally took a beneficial interest under the deed from Hood, nor is there any proof or admission as to whether those of the children who were deceased died testate or intestate, nor whether they had lineal descendants who would be entitled to take their estate in preference to the mother, brother, and sister. It cannot, therefore, be determined, as a matter of law, in the absence of proof, what interest the defendant in error had in the land. If Mrs. Dyer, Mrs. Simmons, and himself were the heirs of the deceased children, the result would be that each was entitled to an undivided one-third interest in the land; but the burden was on the defendant in error to show this fact, and, he having failed to do so, the verdict is not supported. It is undoubtedly true that, under the evidence, the defendant in error had an interest, but the evidence leaves the quantum of that interest uncertain. The action was brought for the recovery of an undivided one-third interest, and the petition distinctly alleged that the plaintiff (below) owned an undivided one-third interest in the land. This allegation was denied in the answer. So that it was incumbent on the plaintiff, in the absence of any admission by the defendant of such ownership, to prove his interest in the land. This not having been done, he was not entitled to recover, and the court erred in directing the verdict.

5. We find no error in the other assignments made in the grounds of the motion for a new trial. Judgment reversed.

(106 Ga. 135)

PEGRAM v. HANCOCK.

(Supreme Court of Georgia. July 23, 1898.)

HOMESTEAD—MARRIED WOMEN—APPLICATION.

1. A homestead set apart in 1875 upon the application of a married woman, unless made under the third section of the act of October 28, 1870, did not constitute a valid exemption of land belonging to the husband, where it did not affirmatively appear from the application

that the homestead was claimed out of his property; nor could a married woman at that time, if not living separate and apart from her husband, have a homestead of realty or an exemption of personalty allowed out of her own property, unless set apart under the section of the act above mentioned.

2. In order to render valid under that section a homestead and exemption set apart in the year stated upon the wife's application, it was essential for it to show that the property out of which the homestead and exemption were sought originally belonged to the wife, and had been relinquished, assigned, or set over to the husband, in order that he or she, as the case might be, might apply for and have the realty set apart as a homestead, and the personalty exempted.

3. Consequently, where a married woman on the 6th day of November, 1875, made an application for a homestead and exemption, reciting therein that "she is the wife of [a named person], who is the head of a family; * * * that she desires to avail herself of the benefit of an act to provide for setting apart a homestead and exemption of personalty; * * * and petitioner shows that the schedule hereto attached is a correct schedule of her personal property,"—to which petition was attached a schedule of personalty, and at the end thereof a lot of land was described, without stating the ownership thereof, a homestead and exemption allowed upon this application were void.

(Syllabus by the Court.)

Error from superior court, Whitfield county; A. W. Fite, Judge.

Proceeding between Margaret Pegram and Frances I. Hancock. There was a judgment for the latter, and the former brings error. Reversed.

Thos. R. R. Cobb, R. J. & J. McCamy, and Rosser & Carter, for plaintiff in error. Jones, Martin & Jones, for defendant in error.

LITTLE, J. The only question which arises in this case is whether or not the proceedings instituted to have a homestead set apart on the petition of the claimant in the year 1875, and the subsequent action of the ordinary approving the same, were sufficient in law to create a valid homestead for the benefit of the claimant in the property levied on.

1, 2, 3. Under the law as it stood in the year 1875, the wife, upon the refusal of the husband to do so, might apply for and have set apart a homestead for the benefit of herself and minor children. Code 1873, § 2022. Or when the husband, being the head of the family, had no property, or, having property, if it was not sufficient in value out of which to set apart a homestead, and the wife had separate property, whether real or personal, subject to her debts, she might relinquish, assign, or set over the same to her husband; and then he or she, as the case might be, under the law might apply for and have realty set apart as a homestead, and the personalty exempted as prescribed by the laws of force. Id. § 2018. Or "when husband and wife are in a state of separation, and the minor children reside with the wife, or by the law she is entitled to their possession, or the court so awards them to her, she, the wife, is the

head of the family in the contemplation of the homestead and exemption laws, and as respects her separate property, may have it set apart without the relinquishment or assignment mentioned in the preceding section." Code 1873, § 2019.

If the land belongs to the husband, the fact of such ownership must appear in the application of the wife, together with the averment that the husband refuses to apply. *Mapp v. Long*, 62 Ga. 568. In the case of *Coffee v. Adams*, 65 Ga. 347, it was held: "The record of the application for an exemption under the homestead laws of the state must affirmatively disclose as whose property—whether of the husband or wife—the exemption was claimed. For failure in this respect the exemplification of the proceedings in securing the exemption was properly excluded." This ruling was approved in the case of *Wilder v. Frederick*, 67 Ga. 669, and the same principle was ruled in the case of *Langford v. Driver*, 70 Ga. 588.

While the law favors the granting of homesteads for the protection of women and children, the exemptions created are in derogation of the common law, and their benefits are restricted to the terms of the statute; and inasmuch as the application in this case did not show out of whose property the homestead was sought to be set aside, and before the wife was entitled to have any portion of her real or personal property set aside or exempted the law in force at the time her application for a homestead was approved required that she should relinquish, assign, or set over such of her property as was sought to be exempted before the application for a homestead should be approved or the exemption granted, which confessedly was not done in this case, the approval of her application by the ordinary did not have the effect of setting apart the property included in her application as a homestead for her benefit, and, this failing, the land was subject; and the judgment of the court below must be reversed. All the justices concurring.

(105 Ga. 134)

AUGUSTA SOUTHERN R. CO. v. McDADE.
(Supreme Court of Georgia. July 23, 1898.)

JURORS—JUDGES—DISQUALIFICATION—MASTER AND SERVANT—ASSUMPTION OF RISK—NEGLIGENCE—EVIDENCE—DEATH BY WRONGFUL ACT—APPEAL.

1. Neither the stockholders nor the employes of a railroad company which had leased the property and franchises of another such company, after it had incurred a liability, are, because of their being such stockholders and employes, and for this reason alone, disqualified from serving as jurors on the trial of an action against the latter. In order to render these persons incompetent, it should further appear that because of their connection with the lessee company, or otherwise, they have some interest in the result of the trial. (a) Were this not so, it does not appear that any juror in the present case was excluded from the panel by reason of alleged disqualification.

2. The fact that the judge of a city court manages the financial affairs of his county does not disqualify him from presiding in an action against a railroad company of which that county is a stockholder, the judge himself having no personal or pecuniary interest in the result of such an action.

3. Unless the defendant's nonliability followed as a necessary legal conclusion from a given state of facts, it would not, in the trial of an action, be proper for the judge to instruct the jury that, under such a state of facts, there could be no recovery for the plaintiff.

4. What risks are usually incident to a given business must be determined by the jury under the facts and circumstances of each case; and while the judge may properly instruct the jury that, as a general rule, an employe assumes such risks, a refusal to specify particular dangers or perils, and inform the jury that these are within the rule, is right.

5. Proof that a deceased employe of a railroad company, who was killed by the running of its train, was without fault, raises a presumption that the company was in fault. Proof that the servants of the company who were operating the train were in fault puts upon the company the burden of showing that the deceased himself was negligent. (a) Certain charges complained of in the present case were, though not so worded, in effect as above stated.

6. So much of section 2321 of the Civil Code as is embraced in the phrase "the presumption in all cases being against the company" is inapplicable to a case where a railroad company is sued for the killing of an employe, unless the plaintiff affirmatively shows that the deceased was free from fault; and consequently, on the trial of such a case, the law embodied in this section should not, either literally or substantially, be given in charge to the jury without plainly and distinctly stating the qualification herein indicated.

7. In order to warrant a recovery, under section 3828 of the Civil Code, by a mother for the homicide of her child, it must appear, not only that the child contributed to her support, but also that she was dependent upon the child for such support. (a) A charge which eliminates from the consideration of the jury the latter element is inaccurate.

8. Assignments of error relating to the rejection of evidence cannot be considered when it does not appear what, if any, objection was made thereto when offered. The evidence in the present case requiring a finding that the deceased was an employe of the defendant, the charges relating to this matter, and complained of in the motion for a new trial, were not prejudicial to the latter, and the requests to charge which assumed that the deceased was a volunteer were properly refused.

(Syllabus by the Court.)

Error from city court of Richmond; W. F. Eve, Judge.

Action by Ophelia D. McDade against the Augusta Southern Railroad Company. There was a judgment for plaintiff, and defendant brings error. Reversed.

Leonard Phinizy and J. R. Lamar, for plaintiff in error. Boykin Wright and J. O. Black, for defendant in error.

FISH, J. 1. It appeared that, after plaintiff's son had been killed by the defendant, the Augusta Southern Railroad Company leased in perpetuity its property and franchises to the South Carolina & Georgia Railroad Company. The latter company was not

a party to the suit. The trial judge asked the panel of jurors if any of them were stockholders or employes of the lessee company. Certainly, stockholders and employes of the lessee company were not disqualified from serving as jurors on the trial of an action against the lessor company, it not appearing that, by reason of their connection with the lessee company or otherwise, they had any interest in the result of the trial. As no juror, however, was set aside for the supposed disqualification, no harm was done, and there can be nothing in the assignment of error on this point.

2. One of the grounds of the motion for new trial was that Judge Eve, who presided at the trial of the case, was disqualified by reason of the fact that he was judge of the city court of Richmond county, and commissioner of roads and revenues for it, and that such county was the owner of 13⁷/₁₆ shares of the capital stock of the defendant company, and that these facts were unknown to defendant's counsel at the time of the trial. It was not pretended that Judge Eve had any personal or pecuniary interest in the result of the action, and the mere fact that he, by virtue of being the judge of the city court of Richmond county, managed its financial affairs, did not disqualify him from presiding in the case. Even if it had, there was no showing that the officers of the defendant company were ignorant of the facts when the case was tried.

3. Another ground of the motion was the refusal of the judge to give in charge to the jury the following written request: "If you believe from the evidence that plaintiff's son met his death by being tripped or thrown in passing out between the cars, after the coupling had been made, and that it was impossible to have stopped the engine and prevent the homicide, then I charge you that the plaintiff cannot recover in this case, and your verdict should be for the defendant." There was no error in refusing to give this request in charge. The nonliability of the defendant was not a necessary legal conclusion from the hypothetical facts stated. Such facts may have existed, and yet the defendant may have been liable. The negligence of the defendant may have caused plaintiff's son to trip and fall, or it may have been defendant's fault that the engine could not be stopped and the homicide prevented. These were matters for the jury's consideration.

4. Another ground of the motion for new trial was the refusal to give in charge the following written request: "I charge you, further, that the danger of being tripped up or thrown down by the rail in coupling cars is one of the risks incidental to such service; and, when plaintiff's son attempted to make this coupling, he assumed all the risks and dangers incident to the same; and if his death resulted from his taking such risk, and defendant's agents were guilty of no

negligence, or neglect, or omission of duty, then the plaintiff cannot recover in this case, and your verdict should be for the defendant." The court was right in refusing to charge this request. It is a familiar rule that "a servant assumes the ordinary risks of his employment, and is bound to exercise his own skill and diligence to protect himself." Civ. Code, § 2612. But what particular perils are incident to a given business must be determined by the jury, and not by the judge, under all the facts and circumstances of each case. See *Railway Co. v. Barnett* (Ga.) 80 S. E. 771.

5. The court charged the jury as follows: "I charge you that, if plaintiff shows that McDade was not to blame, then the law presumes that the railroad was to blame; or, if the plaintiff shows that the railroad company or any of its servants were to blame, then the law presumes that McDade was not to blame, and such presumptions in favor of the plaintiff remain until they are rebutted and overcome by evidence." Also, "if you believe that McDade did not cause the injury by his fault, the onus is shifted to the railroad company to show that its agents were in the exercise of all reasonable care and diligence; otherwise, the statutory presumption of negligence would be against the railroad company." Plaintiff in error contends that these charges were erroneous in a suit against a railroad company for the homicide of one alleged to be its employé. A concise statement of the rule as to the burden of proof in cases of this character is that proof that a deceased employé of a railroad company, who was killed by the running of its train, was without fault, raises a presumption that the company was in fault, and proof that the servants of the company who were operating the train were in fault puts upon the company the burden of showing that the deceased himself was negligent. *Railroad Co. v. Kenny*, 58 Ga. 485; *Railroad Co. v. Bryans*, 77 Ga. 429; *Railroad Co. v. Small*, 80 Ga. 519, 5 S. E. 794; *Johnston v. Railroad Co.*, 95 Ga. 685, 22 S. E. 694. The above charges were substantially in accordance with the rule stated.

6. The court charged the jury as follows: "Now, gentlemen of the jury, under the laws of Georgia, a railroad company is liable in damages where a person is killed or injured by the running of its trains, unless the company shows that its agents and employes were at the time exercising all ordinary care and diligence." Plaintiff in error contends that this charge was not applicable in a suit for the homicide of an employé of the railroad company. This court has several times held that, in an action against a railroad company by an employé for personal injuries alleged to have been occasioned by the negligence of a co-employé, no presumption of negligence arises against the company until the plaintiff has affirmatively shown that he himself was free from fault. *Railroad Co.*

v. Hicks, 95 Ga. 301, 22 S. E. 613; Railroad Co. v. Burney, 98 Ga. 1, 26 S. E. 730; Railway Co. v. Davis (Ga.) 30 S. E. 262. In the case at bar the burden of proof was upon the plaintiff to make out her case by proving either that the deceased himself was entirely free from fault, or that his death was caused by the negligence of his co-employees. Unless a prima facie case was made out by the proof of one or the other of these two propositions, no presumption could arise against the company, and to charge, without qualification, that the company was liable, unless it showed that its agents and employees were at the time exercising all ordinary care and diligence, was error. Following Railroad Co. v. Hicks and Railway Co. v. Davis, supra, we must rule that such error was not cured by the court subsequently charging the correct rule on the subject, without calling attention to the error already committed.

7. Error is assigned upon the following charge of the court: "This suit is brought by the mother of the young man that is claimed to have been killed through the negligence of the company. If the evidence discloses that he substantially contributed to her maintenance, she is entitled to maintain the suit." It is settled that, under the proper construction of section 3823 of the Civil Code, a mother cannot recover for the homicide of her child unless it appear, not only that the child contributed to her support, but also that she was dependent upon the child for such support. Clay v. Railroad Co., 84 Ga. 345, 10 S. E. 967; Railway Co. v. Gravitt, 93 Ga. 369, 20 S. E. 550; Smith v. Hatcher (Ga.) 29 S. E. 162. As the charge entirely eliminated from the consideration of the jury the necessary element of the mother's dependence upon the child for support, such charge was manifestly erroneous.

8. An elaboration of the eighth headnote would not be profitable.

Judgment reversed. All the justices concurring.

(105 Ga. 171)

HOGANS v. DIXON.

(Supreme Court of Georgia. July 23, 1898.)

TROVER—SUMMONS—DESCRIPTION—AMENDMENT—APPEAL—PARTIES.

1. A security on a forthcoming bond in a bail-trover proceeding is not a necessary party to a writ of error brought by the plaintiff, assigning error in the ruling of the court dismissing plaintiff's action.

2. In a trover suit brought by summons in a justice's court, where the property is described as 75 cords of wood in the possession of the defendant, it was error for the court to refuse to allow plaintiff to amend the summons so as to describe with more precision the property sued for, and to dismiss the action on the ground of insufficiency in the describing of the property.

(Syllabus by the Court.)

Error from superior court, Glascock county; S. Reese, Judge.

Action by W. H. Hogans against C. P. Dixon. There was a judgment for defendant, and plaintiff brings error. Reversed.

T. W. Hardwick and K. J. Hawkins, for plaintiff in error. B. F. Walker, for defendant in error.

LEWIS, J. 1. A motion was made by counsel for the defendant in error to dismiss this writ of error upon the ground that the security on the forthcoming bond given in the bail-trover proceeding was not served with the bill of exceptions, nor made a party defendant thereto. Parties to the litigation in the court below, who are interested in sustaining its judgment, are necessary parties to a writ of error sued out to this court. Civ. Code, § 5562. The security on this forthcoming bond cannot be considered a party to the litigation that is the subject-matter of review in this case. His signature to the bond gave him no right of a hearing on a motion by the defendant to dismiss the plaintiff's case. The law imposes upon neither party the obligation of serving such security with notice of any proceedings that might be had after the giving of the bond, and before final trial. Should interrogatories, for instance, have been sued out by plaintiff, service upon the defendant alone would have been sufficient. The security could file no plea in answer to the plaintiff's petition in trover. It is true, he was interested in the result of the suit. In the event of a verdict for the plaintiff, judgment could be entered thereon against the defendant, and also his surety. But not until the rendition of such a judgment, or at least until it is proposed to hold the surety liable by entering up such a judgment, can he become a party to this litigation. In Crawford v. Jones, 65 Ga. 523, it was held that, where a defendant in bail trover brings the case to this court, he is not compelled to make the security on his bail bond a party to the bill of exceptions. We think the principle there decided necessarily controls the question now before us; for, if it was unnecessary in a bill of exceptions by the defendant to make the security a party, it necessarily follows that such surety is an unnecessary party when the plaintiff brings his writ of error to this court. In Maynard v. Hunnewell, 65 Ga. 281, it was held that the sureties on a reply bond given in a distress-warrant case were necessary parties to the writ of error. But it appears that the sureties had become parties in the litigation below by resisting a motion made by the plaintiff to enter up judgment for the eventual condemnation money found against the defendant and the securities on a reply bond given by the defendant. Issue was formed on this motion, and objections filed thereto, and a verdict returned in favor of the defendants; that is, the principal and the sureties on his bond. The plaintiff excepted to certain rulings of the court, but failed to serve one of the sureties. The writ of error

was accordingly dismissed. That ruling was manifestly correct, for the sureties were unquestionably parties to that litigation. In *Dill v. Jones*, 2 Ga. 79, *Morris v. Wiley*, Id. 287, and *Long v. Strickland*, Id. 348, it was held that, where there had been a judgment entered up against the sureties on an appeal in the court below, they should be made parties plaintiff to the writ of error, and, if they are not so made parties, the writ of error will be dismissed. Those cases, however, are to be distinguished from the case at bar, and the one cited in 65 Ga. 523, in that judgment had already been rendered against the sureties on the appeal bond, and the court might properly have ruled that they had thus become parties to the litigation. The motion to dismiss the writ of error is therefore overruled.

2. We think the court erred in refusing to allow plaintiff to amend his summons, and in dismissing the action for the want of a sufficient description of the property sued for. Even if the giving of the bail bond was not a waiver of imperfect description of the property, as indicated by Justice Simmons in his opinion in the case of *Commission Oo. v. McElhannon*, 98 Ga. 394, 25 S. E. 558, we think the summons, if defective, contained enough upon which to predicate an amendment,—certainly, in view of the liberal and loose rules of law touching pleadings in a justice's court. No question as to the jurisdiction of the justice's court to entertain an action of trover was made in this case. Judgment reversed. All the justices concurring.

(105 Ga. 178)

ALGER v. TURNER.

(Supreme Court of Georgia. July 23, 1896.)
EVIDENCE OF AGENCY—DECLARATIONS OF AGENT
—ATTORNEY AS WITNESS—PRIVILEGE.

1. Agency cannot be proved by declarations of the alleged agent.

2. There is, under our law, no "privilege as attorney" giving an attorney at law the right to refuse to answer pertinent questions asked for the purpose of proving that he was not employed by a designated person to institute a given proceeding.

3. There was no evidence to warrant some of the charges of which complaint is made.

(Syllabus by the Court.)

Error from superior court, White county;
J. J. Kimsey, Judge.

Action by B. H. Turner against R. A. Alger. Judgment for plaintiff. Defendant brings error. Reversed.

J. L. Oakes and H. H. Perry, for plaintiff in error. Boyd & Lilly and J. S. Kytile, for defendant in error.

LUMPKIN, P. J. The plaintiff below brought an action against the defendant, Alger, to recover damages alleged to have been occasioned to his property by reason of certain mining operations which he alleged had been conducted at the instance of the defendant upon a specified tract of land. The suit

was begun by attachment, and the controlling question was whether or not one Baker, in carrying on the mining operations complained of, was doing so as the agent of the defendant.

1. A witness for the plaintiff was permitted, over proper objection made by the defendant, to testify that Baker told the witness that the defendant had sent him (Baker) a check for \$300, and that he was the defendant's agent. Over a like objection, the witness was further permitted to testify that he saw a letter purporting to have been signed by the defendant, which Baker said was written by the latter. This testimony ought to have been excluded. Its only purpose was to prove that Baker was Alger's agent, and it is quite certain this could not be done by the mere declarations of Baker. The proposition that agency cannot be proved by declarations of the alleged agent is as well settled as any principle known to the law, and requires no citation of authority to establish its correctness.

2. The plaintiff introduced in evidence an application purporting to have been filed with the ordinary for the purpose of condemning a right of way for a drain over the plaintiff's land. This application was signed by J. W. H. Underwood as attorney at law for Alger. Upon the assumption that Alger authorized this proceeding, it had some relevancy to the case, for the reason that the drain in question was to be used in connection with the mining operations. The defendant's counsel offered Underwood as a witness, and asked him whether or not he had authority from the defendant to institute the condemnation proceeding. The witness refused to answer. Thereupon defendant's counsel stated to the court that they expected to prove by this witness that the proceeding in question was begun at the instance of Baker, and without any authority from Alger. To this end, counsel requested the court to compel the witness to answer the above and other questions which they propounded to him for the purpose indicated. The witness claimed his "privilege as attorney," and the court ruled that he could not be required to answer any of these questions. We think this ruling was erroneous. The witness was not asked as to any communications between himself and a client; nor was there any effort to compel him to testify "to any matter or thing knowledge of which he may have acquired from his client by virtue of his relations as attorney, or by reason of the anticipated employment of him as attorney." On the other hand, the defendant's counsel was simply endeavoring to prove that the relation of attorney and client had never in fact existed between Underwood and Alger, and no reason occurs to us why this was not permissible. Certainly, there is nothing in either section 5199 or section 5271 of the Civil Code which can be fairly said to render testimony of this kind illegal, or to confer upon an attorney at

law any "privilege" exempting him from answering questions the purpose of which was to prove that he did not represent a designated person in a given proceeding. See *Weeks, Attys. (2d Ed.)* § 151.

8. Some of the charges complained of in the motion for a new trial were evidently predicated upon the assumption that the alleged agency had been proved. There was no evidence showing such agency at the time the damage complained of was done, and for this reason these charges were unwarranted. Judgment reversed. All the justices concurring.

(105 Ga. 163)

S. T. COLEMAN & BURDEN CO. v. RICE.
(Supreme Court of Georgia. July 23, 1898.)

PRESUMPTIONS—TITLE TO PROPERTY.

Title to property in a certain person, once proved or admitted, is presumed to continue until the contrary is proved. It was therefore error, in the trial of a claim filed to the levy of a *fi. fa.* upon land, for the court to dismiss the levy on the ground that the plaintiff had not made out a *prima facie* case, after claimant admitted title in the defendant in *fi. fa.*, though the admission related to a period antedating the judgment.

(Syllabus by the Court.)

Error from superior court, Bibb county; W. H. Felton, Jr., Judge.

Trial of property between Ira A. Rice and the S. T. Coleman & Burden Company. Judgment for claimant, and the company brings error. Reversed.

Smith & Jones, for plaintiff in error. Smith & Winship and Hardeman, Davis & Turner, for defendant in error.

LEWIS, J. When property is levied on by an execution, and claimed by a third party, the statute imposes the burden of proof upon the plaintiff in *fi. fa.* in all cases where the property levied on is at the time of such levy not in the possession of the defendant in execution. Civ. Code, § 4624. The law recognizes two ways in which the plaintiff may make out his case: First. By showing possession in the defendant in *fi. fa.* since the judgment. This simply raises a presumption of title in the defendant, which, of course, can be rebutted by proof. Secondly. Where no such possession is shown, then it is incumbent upon the plaintiff to prove title in the defendant in *fi. fa.* If such title is shown or admitted after the judgment, then the proof becomes conclusive; but, if it is shown to have existed in the defendant before the judgment, it is then presumed that it remains in the defendant until the contrary is shown. "A seisin, once proved or admitted, is presumed to continue until a disseisin is proved." 1 Greenl. Ev. § 42. In the case of *Anderson v. Blythe*, 54 Ga. 508, Bleckley, J., lays down this sound rule of evidence: "The doctrine that a state of things once existing is presumed to continue until a change, or some

adequate cause of change, appears, or until a presumption of change arises out of the nature of the subject, is an element of universal law. Without such a principle we could count upon the stability of nothing, and to assure ourselves of a set of conditions at one period of time would afford no ground for inferring the same conditions at any other period. This presumption of continuance is a well-recognized principle of evidence. 1 Greenl. Ev. § 41." Had this been a suit in ejectment, the plaintiff would unquestionably have made out a *prima facie* case after showing title in himself, it matters not at what time the proof indicated the title accrued. *Watts v. Starr*, 86 Ga. 392-396, 12 S. E. 585. A more rigid rule would not be applied in a claim case, when the burden is on the plaintiff to show title in the defendant in *fi. fa.* Counsel for claimant contends that it was incumbent upon the plaintiff to show title in the defendant after the rendition of the judgment, and, to support the contention, cites *Butt v. Maddox*, 7 Ga. 495, and *Gunn v. Jones*, 67 Ga. 398, in which cases it was held that when mortgaged property is levied upon under a judgment of foreclosure, and a claim interposed, the plaintiff in execution must prove title to the property in the defendant at the date of the mortgage, or make out a *prima facie* case by proof of possession in the mortgagor at that time, before claimant is put upon exhibition of his title. Of course, the plaintiff in *fi. fa.*, where there is no presumption of title shown by possession, must show title in the defendant at the time he created the contract lien upon the property; but he can show title then by proving that title had accrued in the defendant before the mortgage was given, and thus raise the presumption that title continued until the contrary is shown. The case of *Knowles v. Jourdan*, 61 Ga. 300, is also cited. The decision in that case is that, to change the onus from the plaintiff in execution to the claimant in the claim case, the plaintiff must show either title in the defendant in *fi. fa.*, or possession in him since the date of the judgment. In the opinion delivered by Justice Jackson, on page 302, he uses this expression: "Therefore the nonsuit was right, neither possession nor title since the date of the judgment being shown in the defendant in *fi. fa.*" A more accurate expression would have been, "neither possession since the date of the judgment, nor title in the defendant in *fi. fa.*, being shown." But even this obiter of the justice is not at all in conflict with the view we take of the rule of evidence in such cases. Ordinarily, in order for the judgment to constitute a lien upon the defendant's property, he must have a title thereto at the time of the rendition of the judgment, but such title can be presumptively proven by showing that he owned the property before the judgment was rendered. The fact of such title in the defendant being admitted by claimant's counsel casts the onus upon the claimant to show a superior out-

standing title to the premises in dispute. The court therefore erred in dismissing the levy. Judgment reversed. All the justices concurring.

(105 Ga. 153)

WOLFF et al. v. HAWES.

(Supreme Court of Georgia. July 23, 1898.)

MARRIED WOMEN—LIABILITY—ESTOPPEL.

Where, from the nature of the transaction involving a sale of goods to a wife, the vendor is left honestly in doubt as to whether the wife was purchasing on her own account, or for her husband, and the wife afterwards, upon inquiry made of her by the vendor or his agent, stated that she purchased the goods on her own account, and in her own business, and thereupon the vendor acted upon such admissions to his own injury, in that he did not press the claim against the husband, who was in failing circumstances, such an admission by the wife amounts to an estoppel, and, in a subsequent suit against her for the purchase price of the goods, it will preclude her from setting up the defense that it was the husband's debt. The court erred in refusing to charge this principle of law in the case, and in refusing to admit testimony showing that the plaintiff had acted upon such admission to his injury.

(Syllabus by the Court.)

Error from superior court, Bibb county; W. H. Felton, Jr., Judge.

Action by Wolff & Happ against Mrs. H. B. Hawes. There was a judgment for defendant, and plaintiffs bring error. Reversed.

Daasher, Park & Gerdine, for plaintiffs in error. Hardeman & Moore, for defendant in error.

LEWIS, J. The circumstances surrounding the sale of the goods by plaintiffs' agent were of such a nature, to say the least, as to leave the creditor in honest doubt whether the wife had purchased on her own account or as agent for her husband. There was, in fact, nothing in the transaction to indicate any agency in the wife. She and her husband were occupying different stores in the same city, she apparently having an absolute dominion and control over one store, as the husband had over the other. When the husband was asked by plaintiffs' agent about selling to the wife, the agent was referred to her. He accordingly sold to her at her place of business, and nothing occurred to indicate that she was not buying on her own account. The agent thought he was extending credit to her, and such an inference was certainly legitimate, under the circumstances. It is true the bills were made out against the husband. This was merely a circumstance to show to whom the credit was extended, and was open to explanation. It appears that this was the result of the bills being entered against the husband by the bookkeeper, who was not made aware of the nature of the transaction. When the husband was in failing circumstances, evidently, to put the matter beyond all question, plaintiffs' agent called upon the wife to know definitely to whom

he should look for the payment of the claim. He was then assured by her that her husband had nothing to do with the debt, and that it was hers, and would be paid. At that time some of the goods bought were in the store occupied by the wife. Plaintiffs acted upon these representations; took no steps to seize the goods or to otherwise enforce their claim against the husband; relied upon her for payment; and, failing to pay, acting upon her representations, brought this suit. These facts were not even denied by the defendant. It seems to us that, if there ever was a case in which the doctrine of estoppel in pais should apply, it is made out by this record. Section 5150 of the Civil Code declares, as one of the grounds of an estoppel, "admissions upon which other parties have acted, either to their own injury or the benefit of the persons making the admissions." Here plaintiffs acted upon the admission made by the defendant to their own injury, in that they were induced to adopt a course which lost to them an opportunity that might otherwise have existed of collecting the claim from the husband, and also were injured by being induced by such admissions to incur the expense of a suit against the wife. It is also reasonable to infer that the admission operated to the benefit of the defendant, who made it; for, by virtue of it, she was permitted to continue in the business in which she was engaged, and to traffic in the very articles that were purchased of the plaintiffs. It has been held that where one has been induced, by the representations of a third party, to institute suit for the purpose of subjecting certain property as the property of the debtor, such representations estop the person making them from afterwards setting up a claim to the property. *Mitchell v. Reed*, 9 Cal. 204; *Drew v. Kimball*, 43 N. H. 282. This is not a case in which can be applied the rule that any assumption by the wife of the husband's debts is void. While her power of contracting is restricted by law, yet there is no principle of law or justice that will tolerate in her, any more than in a man, the perpetration of a fraud. Even minors may be estopped by their admissions from denying the truth of them, or by their silence, when the circumstances call for a disclosure of their claims or their rights provided the minor has arrived at those years of discretion when a fraudulent intent could be reasonably imputed to him. *Whittington v. Wright*, 9 Ga. 23. A married woman has no legal rights that can exempt her from this rule of law and justice. *Dunbar v. Mize*, 53 Ga. 439 (syl. point 2); *Dotterer v. Pike*, 60 Ga. 42; *Archer v. Guill*, 67 Ga. 195-200; *Ruffin v. Paris*, 75 Ga. 654; *Henry v. McAllister*, 99 Ga. 557, 26 S. E. 469. We think, therefore, that the court erred in not giving in charge to the jury the request made by plaintiffs' counsel, and in not admitting the testimony offered by plaintiffs as to why they

took no steps to recover the claim against the defendant's husband. Judgment reversed. All the justices concurring.

(105 Ga. 225)

BAKER v. RICHMOND CITY MILL WORKS.

(Supreme Court of Georgia. July 25, 1898.)

EXPERT EVIDENCE — CONCLUSIVENESS — SERVICES OF ATTORNEY.

1. Jurors, in passing upon the testimony of an expert witness as to the value of professional services, are not absolutely bound by his opinion, but may exercise their own judgment on the subject, taking into consideration the nature of the services, the time required to perform them, and all the attending circumstances.

2. Accordingly, where an attorney at law was the only witness as to the value of certain services rendered by himself, and testified that they were, in his opinion, worth a stated amount, the jury, had the matter been submitted to them, would not have been constrained to accept this opinion as absolutely correct, but might have found that the services in question were of a different value. This being so, it was error for the court to direct a finding to the effect that these services were worth the amount stated by the witness.

(Syllabus by the Court.)

Error from superior court, Bartow county; A. W. Fite, Judge.

Action by the Richmond City Mill Works against Thomas H. Baker. Judgment for plaintiff. Defendant brings error. Reversed.

R. W. Murphy and J. M. Neel, for plaintiff in error. John W. Akin, for defendant in error.

LUMPKIN, P. J. In the present case, which was an action upon a promissory note stipulating for the payment of "reasonable attorney's fees," the court directed a verdict in favor of the plaintiff for stated sums, as principal, interest, and attorney's fees. As the maker of the note contracted to pay reasonable attorney's fees, it was incumbent upon the plaintiff to show by evidence what was a proper amount to be allowed for the same. This it undertook to do by introducing as a witness its own attorney, who testified that his services in the case were worth \$250, the amount which the court directed the jury to find for the same. The defendant moved for a new trial. Some of the grounds of the motion relate to the refusal of the court to grant a continuance. These need not be considered, as a new trial is ordered because, in our opinion, the trial court erred in directing a verdict.

The theory of the defendant in error is that, inasmuch as the only evidence bearing upon the question of attorney's fees was the sworn opinion of an expert that they were worth so much, the jury would have been bound to find this amount, and could not lawfully have found that the services were of a different value. In this view we can-

not concur. After stating, in general terms, that a witness acquainted with the value of a thing, the value of which is in dispute, may give an opinion upon that subject, Judge Thompson says: "This rule is subject to the qualification that the opinions of witnesses as to value are not binding upon the jury, but persuasive merely. If they are of a different opinion, they may find according to their own opinion." 1 Thomp. Trials, p. 342, § 380. "Lawyers, physicians, nurses, artists, and authors, as well as persons in other walks of life, have been allowed to testify as experts as to the value of services rendered by those of their own profession or occupation. Such testimony is, however, not conclusive upon the jury, but merely advisory." 2 Jones, Ev. p. 862, § 389. The rule above announced is accentuated where the expert witness testifies as to the value of his own services. Thus, in Moore v. Ellis, 89 Wis. 109, 61 N. W. 291, it was held: "A jury is not bound to credit the testimony of a party on his own behalf as to the amount and value of services rendered by him, even when he is not contradicted by any other witness." In Anthony v. Stinson, 4 Kan. 211, which involved a controversy as to the compensation to be allowed for services rendered by attorneys, the trial judge instructed the jury that the testimony of certain lawyers as to the value of these services was the guide for the jury, and that they must take the testimony of the witnesses, and be governed thereby. This instruction was held to be erroneous. Said Bailey, J. (page 221): "The testimony of experts or professional witnesses is often very important, and justly entitled to great weight in a cause; but it must have its legitimate influence by enlightening, convincing, and governing the judgment of the jury, and must be of such a character as to outweigh, by its intrinsic force and probability, all conflicting testimony. The jury cannot be required by the court to accept, as matter of law, the conclusions of the witnesses, instead of their own." In Choice's Case, 31 Ga. 425, it was said: "The opinions of experts is competent testimony; and, when the experience, honesty, and impartiality of the witnesses are undoubted, their testimony is entitled to great weight and consideration. Not that it is so authoritative that the jury are bound to be governed by it. It is intended to aid them in coming to a correct conclusion in the case." It is true that the expert testimony there referred to related to a question of insanity, but the rule laid down is applicable to any kind of expert testimony which consists merely of opinions entertained by the witnesses. In 22 Am. Law Reg. p. 333, in an article prepared by John D. Lawson, Esq., he remarks: "The opinions of attorneys, testifying as to the value of lawyers' services, however, are not conclusive on the jury, who may act inde-

pendently or in opposition to them, applying to the case their own experience and knowledge of the character of the services. * * * It is therefore error to instruct the jury what is the proper compensation is to be determined from the professional evidence, and not from their own knowledge or ideas on the subject,"—citing *Head v. Hargrave*, 105 U. S. 45. In that case it was held: "In an action for legal services, the opinion of attorneys as to their value are not to preclude the jury from exercising their 'own knowledge and ideas' on the subject. It is their province to weigh the opinions by reference to the nature of the services rendered, the time occupied in their performance, and other attending circumstances, and by applying to them their own experience and knowledge of the character of such services. The judgment of a witness is not, as matter of law, to be accepted by the jury in place of their own." The reasoning of Mr. Justice Field in support of the doctrine above laid down is not only satisfactory, but convincing. Judgment reversed. All the justices concurring.

(105 Ga. 198)

CASEY et ux. v. HOWARD et al.

(Supreme Court of Georgia. July 25, 1898.)

CANCELLATION OF DEED—FRAUD—PLEADING.

The allegations in the petition and the amendments were sufficient to make out a case of fraud, authorizing the rescission of the contract and the cancellation of the deed and mortgage upon plaintiff's property; and the court therefore erred in sustaining the demurrer to the petition as amended.

(Syllabus by the Court.)

Error from superior court, Fulton county; J. S. Candler, Judge.

Action by John A. Casey and Mary E. Casey against Anderson Howard and J. L. Riley. Judgment for defendants, and plaintiffs bring error. Reversed.

Simmons & Corrigan and M. Foote, Jr., for plaintiffs in error. Alex. & Victor Smith and Thos. W. Latham, for defendants in error.

COBB, J. John A. Casey and Mary E. Casey brought suit against Anderson Howard and J. L. Riley. The petition alleged, in substance: Petitioners own certain land, which was set apart to them as a homestead. They obtained an order from the superior court authorizing the sale of the homestead property, the proceeds of which were to be reinvested in other property upon like uses. Howard approached them with a proposition to exchange a portion of the homestead land for a certain city lot in West End, which he held under a bond for titles from Riley, representing that he owed only \$1,280 on the property, and was paying the debt promptly as it fell due. The exchange was made, petitioners executing to Howard a bond for titles, and taking from him a transfer of his bond for titles. They allege that they were in-

duced to make the trade by the representations made by Howard, and the statements made in a letter from Riley to Howard as to the amount still due by Howard upon the lot traded to them. Subsequently, petitioners executed to Howard an absolute deed to the homestead property, taking from him at the same time a mortgage on the property. It appears from a copy attached to the petition that this mortgage contained a clause as follows: "This mortgage made and intended, and so accepted, as a second mortgage to one given to James L. Riley on the same property to secure a debt named therein." Howard, immediately after the deed to the homestead property was delivered to him, made to Riley a mortgage on it as security for the payment of his debt to him, both that which was due, and that which was to become due, being the amount of the purchase money of the property which Howard traded to petitioners. The statements made by Howard were false and misleading. He willfully misrepresented the status of his indebtedness, and fraudulently concealed the true status of affairs, thus inducing petitioners to make a trade which otherwise they would not have made. Instead of his indebtedness on the property traded to them being \$1,280, it was a much larger sum, accruing interest having increased it to an amount in excess of the sum which Howard had contracted to pay. Petitioner John A. Casey is old and infirm, and his wife, Mary E. Casey, is uneducated, being unable to read and write, and is dependent on the information of others as to the contents of writings, both as to what they contain and what the effect and operation of the same would be. Howard is insolvent, and is unable to respond in an amount sufficient to meet the payments due on the property traded to petitioners. The exchange proposed has not benefited petitioners, so as to meet the requirements of the order authorizing the sale of the homestead property, in that the property now stands merely as security for the purchase money of other property. Riley was not an innocent party in taking the mortgage on the homestead property, because he knew that Howard had defaulted in his payments, and was fully aware of the transactions between Howard and petitioners. At the time of the exchange, they rented to Howard the property traded for, and he is indebted to them \$200, which he refuses to pay. The property has been bid in by the county at a sale under an execution for taxes due by him thereon for the year 1898, and he has not redeemed it, and the taxes for 1894 are due. Petitioners have demanded of him a cancellation of their deed to him, and have tendered cancellation of the mortgage given them, as well as a reassignment of the bond for titles, to all of which he refuses to agree. They prayed for cancellation of the deed to Howard, as well as all other papers which might cause a cloud on the title or hinder a

sale being made as provided in the order of the superior court, and for general relief. By amendment, it was alleged that Riley was informed of the exchange and the consideration moving petitioners to make the trade, and that he has adopted the fraud practiced by Howard so as to benefit himself by obtaining the mortgage on the homestead property. Petitioners were induced to make the deed to Howard on the promises made that a first mortgage was to be executed to them as security, of which promises Riley knew when the deed was executed. Petitioners accepted the mortgage with the statement in it that it was a second mortgage to one given to Riley in ignorance of the fact that there was such a stipulation in it, and relied entirely upon the representations of the parties as to what the paper contained, believing that they were receiving at the time a first mortgage on the property. They prayed that the mortgage to Riley be canceled. By further amendment, it was alleged that the mortgages to petitioners and Riley and the deed from petitioners to Howard, although they bear different dates, were executed and delivered on the same day, and petitioners were ignorant that the papers were dated at different times. Howard and Riley both knew of the existence of the homestead estate, and that petitioners were selling the same under an order of the superior court. The dating of the papers at different times was a scheme, on the part of Howard and Riley to appropriate petitioners' property to the payment of Howard's debt. They prayed that the deed made by them to Howard and the mortgage made by Howard to Riley be canceled; and if, for any reason, the deed made by petitioners to Howard could not be set aside, that the mortgage from Howard to petitioners be held to be a superior lien to that of Riley's mortgage; and that, if it could be done, the mortgage of Howard to petitioners be foreclosed for the principal and interest due thereon, and the property sold, and the proceeds applied to petitioners' debt, to the exclusion of all other liens or creditors of Howard. Petitioners offer to deliver up to Howard his bond for titles, and cancel the transfer to them of the West End property; or if Howard will execute and deliver to them a good and indefeasible title to the West End property, free of liens, they are willing to execute and deliver to him a title to the property which is the subject-matter of this litigation. By further amendment, it was alleged that Riley and Howard made an arrangement between themselves to secure from petitioners a deed to the homestead property, so that Howard could mortgage the property to Riley. Petitioners were ignorant of this arrangement, and, at the request of Howard, they went to his attorney's office, and there the papers were prepared, the deed being prepared by Howard's attorney. They had the utmost confidence in the honesty and integrity of Howard, and relied on him and his attorney to

fix the papers correctly; and it was not until afterwards that they learned that Riley had a mortgage purporting to be a superior lien upon the property. Petitioner J. A. Casey, on account of old age and infirmity, and petitioner Mary E. Casey, on account of illiteracy, did not discover the clause in the mortgage making Riley's mortgage superior in dignity to theirs. The deed from petitioners was dated one day, the mortgage from Howard to Riley one day later, and the mortgage to petitioners still a day later; but all were executed at the same place and at the same time, and were a part of a fraudulent scheme on the part of Howard and Riley to deprive petitioners of their homestead property. The defendants filed a general demurrer to the petition, and the court sustained the demurrer, and dismissed the case. Plaintiffs excepted.

We have endeavored to give as plainly as possible the substance of the allegations in the petition. On account of the informal way in which the original petition was drawn, and the numerous amendments which were offered and allowed from time to time during the progress of the case, there is much confusion about the case. While we do not think that the case is presented in that clear and logical way which good pleading requires, still, upon a careful examination of the petition and the various amendments, we have come to the conclusion that the allegations of fraud were sufficient to require an answer. The substance of the allegations make a case against the defendants, and the truth of these allegations is admitted by the demurrer. The plaintiffs, two old people, infirm and illiterate, have as their only property a lot of land set apart to them under the homestead laws of the state. For some reason this property is not desirable for their use. An application is made to the superior court for an order to sell, in order that the proceeds may be invested in other property more appropriate to their necessities. An exchange of part of the homestead property is made for a city lot, the person with whom the exchange is made being indebted for a part of the purchase money, and not having any title to the property. Representations are made that this debt is being discharged, which are not true, the amount due upon the property which is exchanged increasing from day to day, by accumulation of interest. By a scheme concocted by the person with whom the exchange of the property was made and the holder of the purchase-money debt, the old people are carried into the office of an attorney, representing not them, but the other parties to the transaction, where a deed to the homestead property is executed to one of the parties, who immediately executes a mortgage to the other, giving to the old people a second mortgage upon the property which they had sold. The papers are executed on the same day and at the same time, but falsely dated, for the purpose of cover-

ing up, as far as possible, the transaction claimed to be fraudulent. The allegations are that this whole plan originated with the two persons with whom the old people were dealing, for the sole purpose of so arranging it that their homestead property would be absorbed, as well as the property which had been exchanged to them, in order that a debt owing by one of them to the other could be satisfied. The averments are clear and definite that both of the parties to this scheme had full notice of the fact that the homestead had been set apart, and that a sale was being made, under an order of the judge of the superior court, for reinvestment only. We have no hesitancy in holding that, under the facts alleged, a case has been made out which entitles the plaintiffs to be heard before a jury. If their allegations can be sustained, appropriate relief should be granted them by the superior court, in the exercise of its equity powers. The court erred in sustaining the demurrer. Judgment reversed. All the justices concurring.

(105 Ga. 428)

GRANT v. CAMP, Superintendent, et al.
(Supreme Court of Georgia. July 27, 1898.)
CONSTITUTIONAL LAW—CITY COURTS—CRIMINAL JURISDICTION—TITLE OF ACT.

Since the adoption of the present constitution of this state, the legislature cannot confer jurisdiction over crimes against the state upon a court created for the trial of municipal offenses. Especially is this true where the attempt to confer such jurisdiction is in an act amending the charter of the city so as to create the municipal court, and there is nothing in the title of the act to indicate the legislative purpose to create a court for the trial of offenses against the estate.

(Syllabus by the Court.)

Error from city court of Griffin; E. W. Beck, Judge.

Application by Thomas Grant for a writ of habeas corpus against J. J. Camp, superintendent, and others. From a judgment denying the writ, petitioner brings error. Reversed.

Thomas N. Thurman and Thomas E. Patterson, for plaintiff in error. O. H. P. Slaton and W. H. Beck, for defendants in error.

SIMMONS, C. J. In the year 1880 the legislature of this state passed an act "to amend the charter of the city of Griffin, so as to authorize the establishment of a city court in said city, to define the jurisdiction of the same, and for other purposes." Laws 1880-81, p. 375. In 1897 the name of this court was changed to that of the "Criminal Court of Griffin." Jurisdiction was given to said court over all violations of the ordinances of the city of Griffin, and all the powers conferred by the charter upon the mayor, as police judge, or upon the police court of the city, were vested in and delegated to this court. It was also provided that in case of the sickness, absence, or dis-

qualification of the judge, the mayor might preside in this court for the purpose of trying municipal offenses. The act also made it "the duty of said city judge, without additional compensation, to act as city attorney and counsel, for the mayor and council of said city, in all the courts of this state, except said city court, and, as said attorney, he shall perform such other duties as the mayor and council may direct." It also provided that the clerk of the mayor and council should be ex officio clerk of the city court, and required him to perform such duties and receive such compensation as the mayor and council might direct. The marshal and policemen of the city were made officers of the court, and were required to execute all process issuing therefrom. The court was given jurisdiction over "offenses against the criminal laws of this state, when the offenses are committed within the limits of said city; simple larceny and larceny from the house, where the property does not exceed fifty dollars in value; assault and battery, vagrancy, riots, and carrying concealed weapons." The act provided that the judge should be elected by the mayor and council, and commissioned by the governor. All fines collected were to be paid over to the treasurer of the city, to be used and appropriated as the mayor and council should direct. Heading this act in connection with its title, it is apparent that the legislature intended to establish only a municipal court for the city of Griffin. The requirements that the judge should be elected by the mayor and council, that he should act as city attorney, that the clerk of the city council should be clerk of the court, and that the marshal and policemen of the city should be officers of the court and execute its process, show clearly to our minds that the legislature intended this as a municipal, and not as a state, court. Intending simply to create a municipal court, could the legislature, under the constitution of this state, confer upon such court jurisdiction over misdemeanors committed in violation of state laws, and the trial of which belong exclusively to state courts? At the time of the passage of this act the present constitution (that of 1877) was in force. Among the provisions of that instrument is one that "laws of a general nature shall have uniform operation throughout the state, and no special law shall be enacted in any case for which provision has been made by an existing general law." Const. art. 1, § 5732; Civ. Code, § 5732. At the time of the passage of the act creating the city court, there was also in force a general law conferring upon state courts jurisdiction to try all offenses against the state. This being true, the legislature could not, by amending the charter of a city, take away the jurisdiction of the state courts over misdemeanors committed in the city of Griffin, and confer it upon a municipal or police court. It will be observed from reading the act that jurisdiction is not extended

to cases of misdemeanor committed beyond the limits of the city of Griffin, but is confined to offenses committed within the corporate limits. We think that the legislature had no power, under the constitution, to so amend the charter of a city as to create a special court, and confer upon it jurisdiction to try offenses against the laws of the state. This is especially true in the present case, because the title to the act gives no intimation of any intention on the part of the draftsman or of the legislature to confer such jurisdiction upon this court. It is true the title showed an intention to create the city court of Griffin, and that the legislature is given power, under the constitution, to establish city courts; but, when the legislature does establish city courts, they must be of the nature of those specified in the constitution, to wit, the city courts of Savannah and Atlanta. When courts such as those are established, they become state courts, and have jurisdiction all over the county, and of all cases, civil and criminal, which is not vested by the constitution exclusively in other courts. It is also true that under the constitution the legislature has power to establish other courts than those mentioned in the constitution, denominate them "city courts," "county courts," "district courts," or by any other name they may deem proper, and give them jurisdiction over state offenses. But, when so established, these are state courts; and we think that the legislature has no power to establish a hybrid court like the one now under consideration, the intention being to establish a municipal or police court, and make it subordinate to the will of the municipal authorities, and at the same time to confer upon it jurisdiction to try offenses against the state, when committed within the limits of the corporation. That portion of the act which gives jurisdiction over state offenses committed in the city is therefore unconstitutional, and the judgment rendered in that court, and here complained of, was void. It follows that the judge below erred in refusing to discharge the prisoner upon the writ of habeas corpus. Upon the question of the power of the legislature to confer jurisdiction of state offenses upon municipal courts, see the case of *Aycock v. Town of Rutledge* (present term) 80 S. E. 815, and authorities cited. Judgment reversed. All the justices concurring.

(105 Ga. 200)

KIDD et al. v. HUFF.

(Supreme Court of Georgia. July 25, 1898.)

JUDGMENT BY CONSENT—CONTRACTS—FRAUD—EVIDENCE—INSTRUCTIONS—EXECUTORS—CLAIMS—ATTORNEYS AT LAW.

1. While what purports to be a consent verdict and decree may fall to operate as a judgment binding upon the parties, on account of want of jurisdiction in the court or other valid reason, still, if the terms of the same were, upon sufficient consideration, agreed to by the parties, with a full knowledge of its contents,

or if it was carried into effect, and a fund thus arising was distributed among the parties, who received their shares being cognizant of all the facts, the same might be pleaded in bar of the rights of the parties assenting to or ratifying the agreement contained therein.

(a) Whether, on appeal in the superior court from the judgment of the court of ordinary on an issue of *devisavit vel non*, the pleadings can be amended, and a decree rendered declaring an intestacy and providing for a complete administration of the estate, is a question not made in the present record. What purported to be a verdict and decree, which was the subject-matter of defendant's plea in the present case, was not set up as a judgment conclusive upon the parties, but only as an agreement which had been assented to by them.

2. A written instrument, although not signed, will, if orally assented to by the parties, constitute the agreement. Such instrument, however, will not be admissible in evidence until it is shown *prima facie* that the terms were assented to. It therefore follows that a writing purporting to be a verdict and decree, pleaded only as an agreement between the parties, which was signed by no one other than a person signing as foreman of a jury and another signing as presiding judge, was not admissible in evidence until it was shown *prima facie* that the parties sought to be bound thereby assented to its terms.

3. In a suit by legatees against the executor of a will for an accounting and payment of their legacies, where what purports to be a verdict and decree, declaring an intestacy, and providing for an administration of the estate and the payment of a large amount to the executor as a claim superior to the claims of plaintiffs, is pleaded as an agreement by which the plaintiffs had surrendered their claims as legatees, and the claim of the executor on such paper is attacked as fraudulent, evidence showing that the executor was appointed trustee of the testator during his lifetime, and that his claim, which is recognized in the agreement as a claim superior to the claims of plaintiffs, grew out of services claimed to have been rendered as such trustee, and that extra compensation had been allowed by the ordinary for services of like character, and that no part of such claim had ever been paid, was admissible as circumstances tending to throw light upon the *bona fides* of the executor; and this, too, although the appointment as trustee and the order allowing extra compensation may have been void.

4. In such a suit, evidence that some of the heirs at law of the testator did not assent to the agreement pleaded by the defendant in bar of the suit was admissible, as bearing on the question of fraud.

5. In the trial of a case of the character above referred to, it was error to charge the law relating to the authority of attorneys at law to bind their clients in cases represented by them pending in a court of competent jurisdiction.

6. It was error, after charging as follows: "Neither an attorney nor other agent can represent two persons having conflicting interests, and an agreement made by a person having such double interest is not binding."—to add: "This is not true with this issue in question; that is, where one acts in a representative capacity and the other in an individual capacity. This is not applicable where one acts for both parties in a representative capacity."

7. The judge having charged the jury the general principles in reference to fraud, if additional instructions on the subject would have been pertinent or appropriate, they should have been specially requested.

(Syllabus by the Court.)

Error from superior court, Oglethorpe county; S. Reese, Judge.

Action by John Kidd, administrator, and others, against R. W. Huff, executor. There was a judgment for defendant, and plaintiffs bring error. Reversed.

H. T. Lewis and Saml. H. Sibley, for plaintiffs in error. John J. Strickland and Wm. M. Howard, for defendant in error.

SIMMONS, C. J. 1. It appears from the record that James M. Huff died in 1890, leaving a will. Specific legacies were bequeathed to four persons named. R. W. Huff was appointed executor, and qualified as such. The will was offered for probate, when it seems a caveat was filed by heirs of the testator. The will was, however, admitted to record, and an appeal was taken to the superior court. In that court the appeal was, by some means, converted into an equitable proceeding, and an alleged consent verdict and decree were had, by which it was provided that the will be set aside; that the land be sold; that out of the proceeds thereof the attorneys be paid \$400, the executor \$2,550 as for services rendered the testator in his lifetime, as will be hereafter more fully stated; and that the legatee given \$1,000 by the will be paid \$333.33, and the others reduced in like proportion. These legatees subsequently filed their equitable petition for an accounting and settlement with Huff, the executor, setting out the specific legacies they were to receive under the will, and averring that they had never received the same. The executor, in his answer, set up the verdict and decree above mentioned, and alleged that the plaintiffs were present, and agreed to the terms of the settlement therein made; that the land had been sold under the decree, but did not bring enough, after paying the attorneys and the executor, to pay the legatees the full amount named in the decree; that two of the legatees had accepted and receipted for the amounts which he had paid them; and that he had tendered to the other two the amounts coming to them, and that they had refused to receive them. To this plea the plaintiffs filed a demurrer, on the ground that the plea was insufficient in law. The court overruled the demurrer, and plaintiffs excepted.

It was contended here by counsel for the executor that this verdict and decree was valid against the plaintiffs, and that, by the decree, all of their rights had been settled, and they bound thereby. It seems, however, that in the trial below the judge ruled that the verdict and decree was not valid and binding on the plaintiffs as a judgment, but he allowed the plea to stand as setting up an agreement or compromise between the parties litigant. Taking this view of it, he overruled the demurrer to the plea. The ruling of the judge that the decree was not binding as a judgment upon the plaintiffs was not excepted to by defendant, and we are therefore not called upon to decide its correctness.

The only question necessary to decide on this particular part of the case is whether the executor could plead the verdict and decree as an agreement assented to by the plaintiffs. We think that as the plea set out that these plaintiffs were present, and, for a sufficient consideration, agreed to the terms of the verdict and decree with a full knowledge of those terms, and that the agreement was carried out by a sale of the land and a division of the proceeds among those entitled thereto, it was a good plea, as against the plaintiffs. It alleges that they were present, knew all the terms of the settlement, and agreed that the verdict and decree might be taken. While it is true the verdict was not signed by them, nor by their counsel, yet if they had full knowledge of all the facts, and agreed that it should be signed by the foreman of a jury and a decree entered by the judge, we do not see why they should not be bound thereby. As an agreement, it derived no force from the signature of the foreman of the jury or of the presiding judge, but, if assented to, it was good as an agreement without signature. "If the terms of an agreement be put into writing, and the writing be accepted by the parties as their agreement, though their assent be not evidenced by signature, nevertheless the agreement is a written agreement, and is subject to the rules of evidence affecting written agreements." Leake, Cont. 184; Blash. Cont. § 342, and cases cited. "A written instrument, although not signed by the parties, will, if orally assented to by them, constitute the agreement between them." Dutch v. Mead, 36 N. Y. Super. Ct. 427; Farmer v. Gregory, 78 Ky. 475; Bacon v. Daniels, 37 Ohio St. 279. The plea set up a valid agreement, and the judge did not err in overruling the demurrer thereto.

2. The trial proceeding, the plaintiffs, in an amendment to their petition, by way of reply to the answer and plea of defendant, denied all knowledge of the agreement above alluded to, denied being present at the time it was made, denied that they or any of them had authorized the executor or their counsel or any one else to enter into such an agreement on their behalf, and denied any ratification by them of the agreement. When, therefore, this verdict and decree was offered in evidence by the defendant, it was objected to because the defendant had not at that time proved, or attempted to prove, that the plaintiffs had assented to it. The court overruled the objection, and admitted the verdict and decree in evidence. This ruling is made one of the grounds of the motion for new trial filed by the plaintiffs, after verdict against them, and overruled by the trial judge. As before remarked, this agreement was not signed by these plaintiffs nor by their counsel. It was signed by no one except a person signing the verdict as foreman of a jury, and a judge signing the decree as trial judge. Treating it, not as a binding judgment, but simply as an agreement of the parties, the

signatures it bore were of no effect. When, therefore, the plaintiffs, by their amendment, denied making or agreeing to it, it became necessary for the defendant to establish plaintiffs' assent to it before it could be put in evidence as their agreement. It would not have been necessary for the defendant, before introducing it, to prove conclusively that plaintiffs gave their assent to the agreement, but it was necessary for the defendant, as a foundation for its introduction, to make at least a *prima facie* showing that they had assented. If the names of the plaintiffs had been signed to the paper, and they had pleaded *non est factum*, it would have been necessary, before the paper could have been introduced in evidence, to make to the judge *prima facie* proof of the signing by the plaintiffs. There is much more reason, when the paper is not signed, to require the same character of proof. When one party seeks to bind another by an unsigned written instrument, it is incumbent upon him to show *prima facie* the assent of the other to its terms before he can introduce it in evidence against him. The trial judge erred, in the present case, in overruling plaintiffs' objection to the introduction of the verdict and decree.

3. It seems that the executor, before the death of the testator, had been appointed by the judge of the superior court trustee of the testator. In his character as trustee, he went before the ordinary of the county, and had the ordinary pass an order allowing him \$300 per annum as extra compensation for his services in managing the estate of the testator. It appears that in his application to the ordinary he applied for additional compensation for future years as well as past, and that the order allowing extra compensation included both the future and the past. This extra compensation constituted a large portion of the amount allowed the executor in the alleged consent verdict and decree, and in the trial of the case it was set up as a claim preferred to that of the plaintiffs, the legatees. The latter contended that the claim was fraudulent. On this state of facts, the executor was allowed by the court, over objection of plaintiffs' counsel, to introduce in evidence his application to the ordinary, and the ordinary's order allowing extra compensation. He was also allowed, over objection, to introduce the order of the judge of the superior court appointing him trustee of the testator. The objections to the latter order were that it was "irrelevant and hurtful, and void for a want of jurisdiction." As the deed under which the testator derived the property did not require the appointment of a trustee, there was no necessity for one, and, under the law, the trust was executed, and the judge had no authority to appoint a trustee. The objection to the introduction of the order of the ordinary was that, the appointment of the trustee being void, the ordinary had no power to grant him extra compensation, and certainly had no

power to grant extra compensation for services yet to be rendered. It is unnecessary, in the view we take of the case, to decide the legality of either of these orders, except to say that the ordinary certainly had no power to grant extra compensation for services to be rendered in the future. Be this as it may, if Huff was appointed trustee, and *bona fide* performed the services of a trustee, and in good faith applied to the ordinary for extra compensation, this evidence was competent and admissible as a circumstance tending to show that his claim was not fraudulent, or trumped up, after the testator's death, for the purpose of obtaining a large proportion of the estate. If he acted in good faith, and performed valuable services, both of these orders, though void, tend to show that he is claiming compensation for those services in good faith. We think that these judgments were not conclusive upon the plaintiffs, either as showing that the services were performed by Huff, or as establishing the value of the services. They were admissible simply as circumstances tending to show Huff's good faith.

4. The plaintiffs alleged in their petition that the verdict and decree were obtained by Huff and others by fraud and collusion, and were therefore void. To their petition for an accounting and settlement, Huff replied that, by reason of the verdict and decree, he was discharged as executor, and that he had not claimed to be executor since the rendition of the decree. He also alleged, in an amendment to his answer, that the heirs at law had caveated the will, and that the verdict and decree were agreed to, so as to avoid future litigation and to settle the entire matter. The plaintiffs during the trial offered testimony to show that many of the heirs at law of the testator did not know of or authorize the settlement, or employ an attorney to represent them in the matter. This testimony was rejected by the court, and is here assigned as error. On the issue made in regard to the *bona fides* of the agreement made by Huff and the others who framed the decree, we are inclined to think the testimony was admissible. Fraud is subtle, and not easy to prove in many cases, and for this reason courts have been liberal in allowing any fact to be proved which could throw light upon this question. It is presumable that all the heirs joined in the caveat in this case, because it seems that the testator did not provide for any of them in the will, but gave the whole property to others. If they were all caveators, it was necessary to have the assent of all of them in order to make the settlement binding, and their assent was as much necessary as the assent of the plaintiffs, the legatees. To quiet the whole matter, it was necessary that all interested in the propounding of the will enter into the agreement of settlement. If any of the heirs at law did not consent, they would not be bound unless they stood by and by their

conduct ratified the agreement. While the main question in issue was whether the plaintiffs assented to the agreement, we think the fact that others, whose assent should have been obtained, did not do so, will throw some light upon the manner and the means used by the executor in obtaining the agreement. As he claims that all joined in the agreement, if it were shown that many of the heirs did not assent to it, this would throw light upon the question of the assent of the plaintiffs. The jury might, from his failure to obtain the assent of the heirs at law, infer that he also disregarded the assent of these poor and ignorant negroes, the plaintiffs.

5. The judge having treated the verdict and decree as not binding or valid as a judgment, and it being then relied upon simply as an agreement of the parties which required the individual assent of each before it would be binding, it was error to charge upon the power and authority of attorneys at law to bind their clients in cases represented by them, pending in a court of competent jurisdiction. If the theory was correct that the court had no jurisdiction of the case, then the agreement was not a court proceeding, and the attorneys would have no right, as attorneys at law, to bind their clients by signing such an agreement without the authority to do so. The whole theory of the defense was that these plaintiffs were present in court, and themselves assented to the agreement. Where the attorney has authority to represent his client and make settlements for him in a case pending in a court which has jurisdiction of the case, we think that the law will not authorize him to go outside of the court, and make an agreement for his client, without the knowledge or consent of the latter. Of course, if the client authorized him to make such a settlement, the case would be different.

6. One of the grounds of the motion for new trial complains that the judge erred in giving the following charge: "Neither an attorney nor other agent can represent two persons having conflicting interests, and an agreement made by a person having such double interest is not binding. This is not true with this issue in question; that is, where one acts in a representative capacity and the other in an individual capacity. This is not applicable where one acts for both parties in a representative capacity." There is no complaint made of the first sentence of this charge, but the error complained of is in the latter portion of it. This latter portion is to us unintelligible. We apprehend that there must have been a mistake in copying this part of the charge, for we cannot conceive that our learned brother below, who is generally so clear in his statements of his views of the law, could have made such a meaningless addendum to a correct principle of law. Inasmuch, however, as he has certified that the grounds of the motion are true, we must deal with this charge

as though he had so given it, and must hold that it was erroneous.

7. The judge charged the jury on the subject of fraud generally, and no exception is taken to the correctness of this portion of his charge. Complaint is made that he did not charge upon the subject of constructive fraud, but it appears that he was not requested to do so. In former decisions this court has held repeatedly that where a judge correctly charges the general principles of law which control the case, and no proper request is made for more specific instruction to the jury, the verdict will not be set aside because of a failure to give additional and specific instructions upon a subject already covered by the more general charge given. Here the judge charged the jury as to the general principles of the law relating to fraud, and, in the absence of any request to charge, it was not error to fail to instruct the jury in reference to constructive fraud. Judgment reversed. All the justices concurring, except LEWIS, J., disqualified.

(105 Ga. 515)

ARMSTRONG et al. v. ALABAMA FERTILIZER CO. et al.

(Supreme Court of Georgia. July 27, 1898.)

APPOINTMENT OF RECEIVER.

In view of the allegations in the pleadings, and the evidence as it appeared before the judge of the court below, no such abuse of discretion in appointing a receiver has been shown as would authorize this court to interfere.

(Syllabus by the Court.)

Error from superior court, Floyd county; C. G. Janes, Judge.

Action by the Alabama Fertilizer Company and others against J. W. Armstrong, executrix, and others. From an order appointing a receiver, defendants bring error. Affirmed.

Dean & Dean, for plaintiffs in error. Fouché & Fouché, for defendants in error.

PER CURIAM. Judgment affirmed.

(104 Ga. 857)

AUGUSTA NAT. BANK et al. v. MERCHANTS' & MINERS' BANK et al.

(Supreme Court of Georgia. July 27, 1898.)

WRIT OF ERROR—DISMISSAL—SERVICE ON INTERESTED PARTIES.

Where it appears from an inspection of the bill of exceptions and the record that all of the parties interested in sustaining the judgment of the court below have not been served with the writ of error, as required by law, and that parties not served will be necessarily affected by the judgment to be rendered by this court in the case, the writ of error will, on motion, be dismissed.

(Syllabus by the Court.)

Error from superior court, Haralson county; C. G. Janes, Judge.

Action by the Merchants' & Miners' Bank against the North Georgia Land & Manufac-

turing Company and others. Judgment for plaintiff, and the Augusta National Bank and one of the defendants bring error. Dismissed.

Lloyd Thomas, W. P. Robinson, and Head & Head, for plaintiffs in error. J. M. McBride, S. L. Craven, G. R. Hutcheson, J. A. Noyes, and Glenn & Rountree, for defendant in error.

COBB, J. When this case was called, a motion to dismiss the writ of error was made on the ground that C. W. Fox, W. H. Kimball, N. C. Matthews, and J. R. Knapp were parties defendant in the original petition, and that their rights were passed upon by the judge when he rendered the final decree in the case; that they were each interested in sustaining the judgment of the court below; that their rights would be affected by any judgment which might be rendered by this court, and they were not parties to the bill of exceptions filed, nor had they been served with the same. From the bill of exceptions and the record it appears that the Merchants' & Miners' Bank brought an action against the North Georgia Land & Manufacturing Company and the parties named above, besides others, in which it was alleged that the plaintiff was trustee under a mortgage executed by the defendant company to secure certain bonds which had been issued by it, and that the plaintiff was also the holder of certain of these bonds. It was also alleged that Matthews, Fox, and others were liable to account to the defendant company for the sum of \$15,000; that Matthews, Kimball, Fox, Knapp, and others were liable for different sums misappropriated by them; that Matthews, Kimball, Fox, and others had fraudulently conspired to depreciate the value of certain property of the defendant company; and that Kimball was the holder of some of the first mortgage bonds, and, having obtained the same fraudulently, was not entitled to collect them. The prayer of the petition was that the mortgage be foreclosed, that a decree be rendered against the parties alleged to be liable to the defendant company for sums misappropriated by them, and that the proceeds of the foreclosure sale, and whatever might be realized from judgments rendered against these parties, be distributed among the creditors of the defendant company. The case was referred to an auditor, who was directed to report the evidence and his findings of law and fact, the order of reference providing that "the auditor will hear evidence, decide and report the amount of bonds for which the mortgage or trust deed set out in the petition should be foreclosed, and he should determine and report, so far as he can, the names of the owners of such bonds, and the amount owned by each of such persons, and he shall also decide and report any and all other indebtedness and liabilities of any of the other defendants in said case." Among the findings made by the auditor af-

fecting the parties not served with the bill of exceptions were: First, that Kimball was the original holder of one of the bonds claimed by him; second, that two of the bonds claimed by him were placed by the defendant company to secure Kimball and one Tumlin against loss on a certain cost bond signed by them for the company; third, that one of the bonds was placed by the defendant company with the trustee to secure Kimball in the payment of a debt due him by the defendant company for a stated sum, the auditor finding that the debt claimed by Kimball was valid and unpaid; fourth, that the defendant company was due Knapp a stated sum for labor; fifth, that Matthews, Kimball, Fox, and Knapp were not liable for the sums with which they were charged in the original petition. The Augusta National Bank and others, who were interveners in the case, filed numerous exceptions to the auditor's report, some of law and some of fact. One of the exceptions of law was that the auditor overruled the motion of interveners to dismiss the plaintiff's petition on the ground that no cause of action was stated. There was no exception to the finding in favor of Kimball, Fox, Knapp, and Matthews on the claims made against them in the original bill. There was an exception to the finding in favor of Knapp on his claim for labor, and exceptions which raise questions in which Kimball, as a bondholder, is interested. After the exceptions were filed, the judge called a special term of the court. The Augusta National Bank and another bondholder of the defendant appeared at the special term, and objected to the trial of the case at that term on various grounds, one of them being that there was no jury present, and that the case required submission to a jury. The court overruled all of the objections, and proceeded to hear the case. All of the exceptions were dismissed except the one which complained of the finding in favor of Knapp's claim for labor, the priority of which was changed by consent so as to make it an ordinary unsecured claim. A decree was then rendered by the judge in accordance with the auditor's report. The bill of exceptions filed by the Augusta National Bank and another bondholder assigns as error the dismissal of the exceptions, and the refusal to approve the exceptions of fact and submit the matter to a jury, the order directing a sale of the property, and the entering of a decree at the special term. In reply to the motion to dismiss, it is claimed that Matthews and Fox are not necessary parties to the bill of exceptions, because the finding of the auditor was in their favor, and unexcepted to, and their status in the decree rendered was absolutely fixed, and could not be changed by any judgment of this court; that the auditor found in favor of Knapp on his claim for labor, and the priority thus given him was voluntarily abandoned at the hearing before the judge, and therefore that he is not a necessary party to

the bill of exceptions. No reason is suggested by counsel why Kimball was not a party to the bill of exceptions.

The above statement of facts, taken from an examination of the pleadings in the case, show that the interests of Kimball are directly involved in the application to foreclose the mortgage which was given to secure the bonds, of which he held some directly, and was interested in others deposited as collateral to secure debts of the defendant company on which he was surety. We do not see how a decision could be made in this case, either affirming or reversing the same, without the rights of Kimball being affected thereby. If a decision by this court would affect him, he is an indispensable party, and the failure to make him a party to the bill of exceptions and to serve him would be fatal to the writ of error. As to Knapp and all the other parties named in the motion to dismiss, without regard to the finding of the several claims held by them, or asserted against them, there is an exception to the auditor's report, and an assignment of error in the bill of exceptions, in which every person involved in the case is directly interested, and the decision of either would necessarily affect their rights.

The point was made before the auditor that there was no cause of action set forth in the petition, and that the same should be dismissed for this reason. The rights of every party to the case would be affected by a decision of this question. Especially is this true as to Kimball and Knapp, who have judgments rendered in their favor for sums of money which was due by the defendant company to them; and it is also true of Fox and Matthews, in that a judgment was rendered in their favor on the claim set up against them, which judgment, as long as unreversed, is a bar to any suit against them on account of these demands. The assignment of error in the bill of exceptions that the decree could not properly have been rendered at the special term of the court is one that affects every party in the case. If the decree is void, Kimball and Knapp have no judgments against the defendant company, and Fox and Matthews are liable to have the claims set up in the original petition asserted against them at some future time. On the two questions last dealt with, it is evident that the presence of all of the parties to the case before this court are necessary to a proper determination of the same, in order that those whose rights will be affected may be bound by the judgment. A failure to make these persons parties to the bill of exceptions, and to serve them, is fatal to the writ of error, and the same must be dismissed. Civ. Code, § 5562; Price v. Lathrop, 66 Ga. 247; Craig v. Webb, 70 Ga. 188; Knox v. McCalla, Id. 725; Baker v. Thompson, 78 Ga. 742, 4 S. E. 107; White v. Bleckley (this term) 81 S. E. 147. Writ of error dismissed. All the justices concurring.

(106 Ga. 421)

BARRETT et al. v. BASS et al.

(Supreme Court of Georgia. July 27, 1898.)

SURETIES ON NOTE—RELEASE—FAILURE TO APPROPRIATE SECURITIES—PLEADING.

1. Where a creditor, by promissory note signed by three persons, two of whom were sureties, having as further security for his debt a mortgage upon personal property, takes charge of such personalty, the same being sufficient in value to discharge the debt, and fails to appropriate it to the payment of the note, the sureties will be discharged from liability thereon. Especially is this true when the inducement held out to the sureties to undertake the obligation was a statement by the creditor that he had a mortgage upon personalty as additional security.

2. The plea in the present case, as against a general demurrer, sufficiently set up the defense referred to in the above note, and was improperly stricken.

(Syllabus by the Court.)

Error from city court of Floyd county; G. A. H. Harris, Judge.

Action by Bass Bros. & Co. against William, Anthony and Taylor Barrett. Judgment for plaintiffs, and defendants bring error. Reversed.

McHenry & Nunnally, for plaintiffs in error. Lumpkin & Printup and M. B. Eubanks, for defendants in error.

COBB, J. Bass Bros. & Co. sued William, Anthony and Taylor Barrett upon a promissory note which contained a stipulation as follows: "Should I at any time before the payment of this note become indebted to [the payees] on their books or otherwise, I bind myself to allow [them] to apply the first payments to the liquidation of the claims they may elect and determine." Anthony and Taylor Barrett filed a plea, which was substantially as follows: They did not sign the note as principals, but as securities only. At the time they signed, plaintiffs informed them that plaintiffs had already taken a mortgage on certain property belonging to William Barrett, the principal, being a mule, wagon, harness, and plow stock then in possession of and owned by the principal; and plaintiffs made this statement for the purpose of inducing defendants to sign the note as sureties. They, relying on the statement as true, and knowing that, if true, they would be fully protected in signing the note, and would not eventually have it to pay, did sign it with that understanding and belief, plaintiffs well knowing at the time that defendants so understood it. On February 20, 1895, plaintiffs took possession of the mule, wagon, harness, and plow stock, and appropriated the same to their own use and benefit, without warrant or authority, and without the consent of the principal or either of the sureties, thereby increasing the risk of the latter. The value of the property thus taken was sufficient to discharge the entire indebtedness represented by the note. On oral motion in the nature of a general demurrer the court struck the plea, and directed judgment to be taken in

favor of the plaintiffs against all of the defendants. The ruling of the court in striking the plea and entering judgment is assigned as error.

When the surety pays off the debt of his principal, he is subrogated to all the rights of the creditor, and in controversies with other creditors ranks in dignity the same as the creditor whose claim he has paid. Civ. Code, § 2995. He is also entitled to be substituted in place of the creditor as to all securities held by him for the payment of the debt. Id. § 2996. A mortgagee of personalty, who, without the consent of the surety upon the note secured by the mortgage, applies the mortgaged property, or its proceeds, to another debt owing to him by the mortgagor, will, by such conduct, discharge the surety from liability to him, to the extent of the value of the property, or its proceeds, thus misapplied. *Montgomery v. Martin*, 94 Ga. 219, 25 S. E. 531. It is, however, contended in the present case that this doctrine is not applicable, for two reasons: First, because the note contains the stipulation above referred to, which was authority to the creditor to appropriate the mortgaged property, or its proceeds, to the payment of other debts due by the principal; and, second, because it does not appear with sufficient clearness in the plea that the mortgage was taken by the creditor to secure the note upon which the defendants were sureties. In reference to the stipulation in the note, it is only necessary to say that it refers to "payments," and that in no sense would the taking and appropriating of the property in the manner described amount to such a payment by the principal as to give to the creditor the right to appropriate it under that stipulation to a matter entirely foreign to the debt which the mortgage was given to secure. It would be straining the meaning of the term to hold that the transaction complained of in the plea amounted in any way to a payment by the principal. Especially should the meaning of the term "payment" not be extended so as to embrace a transaction of the character described, when the sureties are asserting that the inducement held out to them to undertake the obligation was a statement by the creditor that a mortgage on personalty of sufficient value to discharge the debt had been taken from the principal, and that upon this statement the contract was entered into. In reference to the point made that the plea did not sufficiently connect the mortgage with the note on which these defendants were sureties, an examination of the same will disclose that there is no distinct averment that such was the case; but, construing the plea as a whole, and in absence of a special demurrer, we have no hesitancy in holding that it sufficiently appears that the mortgage referred to in the plea was taken to secure the note which was sued on, and that, therefore, it was error to strike the plea on this ground. If the facts set up in the plea can be sus-

tained by proof, the defendants are entitled to a verdict discharging them from liability on the note. Judgment reversed. All the justices concurring.

(105 Ga. 434)

LONG v. SOANLAN.

(Supreme Court of Georgia. July 27, 1898.)
APPEAL—RECORD—REVIEW—ACCORD AND SATISFACTION—TENDER.

1. Grounds of a motion for a new trial not approved by the trial judge will not be considered by this court. An amendment to a motion for a new trial, which has upon it an entry of "Allowed," and nothing else to indicate an approval of the grounds, is not sufficiently verified to authorize this court to deal with the errors assigned therein.

2. Where a party sues for damages growing out of a breach of contract, and the defendant pleads accord and satisfaction, and claims this contract of settlement cannot be rescinded without payment or tender by plaintiff, before bringing suit, of money received thereunder. It is a sufficient reply to such a plea that the defendant had failed to comply with other material obligations which were of the essence of this alleged contract of accord and satisfaction. This latter agreement not being fully executed, a tender of money received thereunder was not necessary before filing suit on the original contract.

(a) An amendment to the original petition, tendering to defendant the amount received by plaintiff under the agreement of accord and satisfaction, was unnecessary, but the allowance of the same was harmless to defendant.

(Syllabus by the Court.)

Error from superior court, Polk county; C. G. Janes, Judge.

Action by Belle Scanlan against James Long. There was a judgment for plaintiff, and defendant brings error. Affirmed.

Tielder & Mundy, for plaintiff in error. Irwin & Bunn, J. A. Wright, C. E. Carpenter, and A. Richardson, for defendant in error.

SIMMONS, C. J. The defendant in the court below lost his case there, and made a motion for a new trial. This motion contained several grounds which were approved by the trial judge. Subsequently, many additional grounds were added by way of amendment to the original motion. These grounds were not approved, either expressly or by implication. They had written upon them only the word "Allowed," and whether that was written by the judge or by counsel does not appear. This entry upon them meant, in our opinion, nothing more than that counsel's request to file additional grounds as an amendment was granted. A trial judge may pass upon grounds of a motion for new trial without approving them in the first instance. If, however, he overrules the motion, and the case is brought here, it is necessary, before this court can consider the grounds, that they have the express approval of the trial judge, and that the fact of his approval affirmatively appear. Had this motion been

granted by the trial judge, and the case been brought here by the plaintiff below, alleging error in granting the motion, the granting of the motion would have been such a verification of the grounds that they could be considered here. The granting of the motion on these grounds verifies their truth. *Stephens v. Woolbright*, 60 Ga. 322; *Flournoy v. Wardlaw*, 67 Ga. 378; *Skinner v. Roberts*, 92 Ga. 866, 17 S. E. 353. The grounds of the motion in the present case which were added as an amendment do not show that they were approved by the trial judge, nor is there any recital in the bill of exceptions that they were so approved. They therefore cannot be considered.

2. Mrs. Scanlan brought suit against Long, alleging in her petition that she had turned over to him a certain amount of personal property, for which he agreed to give her a home, and to support her during her life; that, in pursuance of this agreement, she went to Long's house, and remained there a certain length of time, when he violated his contract by refusing to support her or to allow her to live in his house. She therefore sought damages for the breach of the contract. There were also other allegations, which it is not necessary for the purposes of this decision to mention. Long, in his answer, denied most of the allegations of the petition, especially denying that any contract was made between him and plaintiff as alleged, and filed a special plea of accord and satisfaction. That plea alleged, in substance, that he had agreed, subsequently to the time of the alleged contract upon which she sued, to let plaintiff live in a certain house on his farm for and during her life, and to pay her \$25, in full settlement of her claims against him; that she agreed in writing to this, received the money, and went into possession of the house; and that the accord was therefore completely executed. He introduced in evidence a writing such as described, signed by Mrs. Scanlan. The evidence introduced by Mrs. Scanlan tended to show that she did not remember signing a paper containing such terms as those of the instrument relied upon by Long; that, if the paper she signed contained such terms, she had not understood it at the time of signing, because of her crazed and feeble condition; that the terms of the paper, which were in part executory, had never been fully performed by Long; that, while he had allowed her to move into a house on his farm, he shortly thereafter, by his conduct, compelled her to leave it, and she had not resided there since. If this contention of hers was true, we think it was a good reply to the plea of accord and satisfaction. The agreement on Long's part to allow her to live in the house during her life was not fully performed. When a plea of accord and satisfaction is filed by a defendant, he must show full performance of its terms by himself, and a full acceptance

by the plaintiff. Unless he show this, the accord is no bar to a suit upon the original contract or claim. "Interest reipublice ut sit finis litium." Accord executed is satisfaction; accord executory is only substituting one cause of action in the room of another, which might go on to any extent." Lord Chief Justice Eyre, in *Lynn v. Bruce*, 2 H. Bl. 317. "Every accord ought to be full, perfect, and complete; for, if divers things are to be performed by the accord, the performance of part is not sufficient, but all ought to be performed. * * * If the thing be to be performed at a day to come, tender and refusal is not sufficient, without actual satisfaction and acceptance." *Peytoe's Case*, 9 Coke, 79b, Ed. 1826, vol. 5, p. 145. To be good, the accord must be fully executed. *Russell v. Lytle*, 6 Wend. 390; *Bank v. De Grauw*, 23 Wend. 342; *Hearn v. Kiehl*, 38 Pa. St. 147; *Jones v. Fennimore*, 1 G. Greene, 134; *Frentress v. Markle*, 2 G. Greene, 553; *Clark v. Dinsmore*, 5 N. H. 136; *Ballard v. Noaks*, 2 Ark. 45. Execution of part, and tender of performance of residue, is not sufficient. *Kromer v. Helm*, 75 N. Y. 574, and cases cited; *Frost v. Johnson*, 8 Ohio, 393; 3 Bl. Comm. 15; 5 Lawson, Rights, Rem. & Prac. §§ 2567, 2568. See, also, Civ. Code, §§ 3732-3735; *Colt v. Houston*, 3 Johns. Cas. 243, 256. "As long as the accord is executory, although it is partially performed, the original cause of action is not extinguished." *Railway Co. v. Clem*, 80 Ga. 534, 7 S. E. 84.

The evidence in the present case was sufficient to authorize a finding that the original contract set up by the plaintiff was, in fact, agreed upon by the parties, and the jury so found. The plaintiff thus made out her case, and it was for the defendant to make out his defense,—accord and satisfaction. While the evidence shows that Mrs. Scanlan moved into the house on defendant's farm, it also shows that Long, by his conduct, compelled her to leave it. He thus violated the new agreement which he afterwards relied upon as a satisfaction of the former one. He cannot rely upon an unexecuted accord as a bar to the plaintiff's action, and this is certainly true where he has himself failed and refused to perform the accord.

The point is made that Mrs. Scanlan could not rescind the written agreement without restoring the status; that, whether or not she knew the terms of that agreement, she at least knew that she had signed it, and had received \$25 under it, and that she should have paid back that amount to Long, or offered to do so; that, until she had done so, she could not avoid the contract under which she had received the money. This, we think, is not true. The accord, not being fully executed, was no bar to her suit, and the portion which had been performed could be effectual, not as a bar, but only as a satisfaction pro tanto. It is held in the

case of *Railway Co. v. Clem*, supra, that "a mere accord, though partly performed or executed, does not extinguish the original right; the part execution may be pleaded as satisfaction pro tanto." That case is very similar to the present, and the decision there controlling here, as will appear from the following portion of the opinion of Bleckley, C. J., in that case: "The complaint is that, if there was a contract of accord and satisfaction partly performed, the plaintiff could not rescind as to the part performed without restoring the defendant to its original condition; and this is certainly the ordinary rule of rescission where it is not a matter of mutual consent. But the rule does not apply to accord and satisfaction, because, in order for there to be accord and satisfaction, the accord must be executed. That is what makes the satisfaction. As long as the accord is executory, although it is partially performed, the original cause of action is not extinguished; and an action may be brought upon it, and the remedy for the defendant is to plead his part performance as satisfaction pro tanto. He gets credit for all he has paid upon it, but the right of action is not extinguished by an accord merely, without complete satisfaction, where the parol contract is that performance, not mere promise, is to constitute the satisfaction."

(a) The motion for new trial alleges as error the allowance by the trial judge of an amendment to the plaintiff's petition, tendering to defendant the \$25 and any other property or rights which may have been received by plaintiff under the agreement of accord and satisfaction. For the reasons given in the preceding portions of this opinion, we think that this amendment was entirely unnecessary, and that this amount should have been pleaded by defendant as a partial settlement of the original contract, and credited to him as such. The amendment, being unnecessary, could not in any way help the plaintiff, and its allowance was therefore harmless to the defendant. Whether the allowance of this amendment was proper or not, it worked no injury to the defendant, and is not reversible error, if error at all. Judgment affirmed. All the justices concurring.

(106 Ga. 515)

RHODES v. ROYAL GOLD-MIN. CO.
(Supreme Court of Georgia. July 27, 1898.)

APPEAL—REVIEW—REFUSAL OF INJUNCTION.

This being an application for an injunction, and the evidence being conflicting, this court will not interfere with the discretion of the trial judge in refusing to grant the same.

(Syllabus by the Court.)

Error from superior court, Haralson county; C. G. Jones, Judge.

Action by J. T. Rhodes, administrator, against the Royal Gold-Mining Company.

From the denial of an injunction, plaintiff brings error. Affirmed.

E. S. & G. D. Griffith, J. M. McBride, and S. L. Craven, for plaintiff in error. Head & Head and Napier & Cox, for defendant in error.

PER CURIAM. Judgment affirmed.

(106 Ga. 432)

ROGERS et al. v. BURR.

(Supreme Court of Georgia. July 28, 1898.)

CORPORATIONS—SUBSCRIPTIONS—GUARANTY—CONSIDERATION—JOINT PROMISORS—NOTICE—STATUTE OF FRAUDS.

1. Where a number of persons, for the purpose of inducing others to subscribe for capital stock in a manufacturing company in which all such persons were interested, executed a joint instrument guarantying for three years the payment of an annual dividend of 8 per cent. on such stock to subscribers who would take an amount of stock necessary for successful organization, and stipulating that "if, at the expiration of said three years, the holder or holders of said stock desire and wish not to carry the same any longer, we hereby agree, with thirty days' notice from any or all of them, to pay each holder par value, of fifty dollars, for each share of stock held by them, their heirs and assigns; and, if said amount of par value is not paid promptly, we hereby consent that the agreement and guaranty to pay 8% dividend above set forth shall continue in force until the same is fully paid up." *Held*, that if the makers of such a contract were residents of the town in which the manufacturing establishment was to be located, interested in its growth and development, and jointly interested as subscribers in the furtherance of such a common undertaking, this was, in law, consideration sufficient to support the agreement.

2. A valid subscription to the capital stock of a manufacturing company, unless otherwise provided in its charter, is not required to be in writing. A contract to purchase such shares does not come within the statute of frauds; the subject of the purchase being neither the "goods," "wares," nor "merchandise" contemplated by the statute.

3. Under the terms of such a contract, the liability of the promisors to purchase, and pay a given amount for, the shares, was conditional, and did not exist, in favor of a particular promisee, unless, within a reasonable time after the expiration of the 3 years, 30 days' notice was given by him to the promisors of his election not to longer carry the stock.

4. Notice to one or more joint promisors of an election by a promisee to sell his stock was not, in such a case, notice to the joint promisors; and this is true though one of them, as agent for the others, had procured stock subscriptions under the contract.

(a) Accordingly, a verdict for the value of the shares of stock having been returned in the present case against all of the promisors, and the evidence failing to show that all of them had the notice required to fix liability, such a verdict was unsupported by the evidence, and must be set aside.

(b) The guaranty as to the dividends was by the contract unconditional and binding without notice, and this guaranty covered a period of three years, even though the agreement as to purchasing the stock became inoperative for want of notice.

(Syllabus by the Court.)

Error from superior court, Pike county; M. W. Beck, Judge.

Action by M. E. Burr, administratrix, against J. J. Rogers and others. There was a judgment for plaintiff, and defendants bring error. Reversed.

J. S. Boynton, R. L. Berner, and Estes & Jones, for plaintiffs in error. J. F. Redding and S. N. Woodward, for defendant in error.

LITTLE, J. There are two main facts on which the parties are at issue, and the right of the plaintiff to recover depends upon the determination of both in her favor, to wit: (1) Did the plaintiff's intestate contract for 60 shares of the capital stock of the Barnesville Manufacturing Company on the faith of a written agreement, signed by the defendants, conditioned that the defendants guarantied to her intestate the payment of an annual dividend amounting to 8 per cent. on the shares subscribed, and also by which they undertook, after the expiration of 3 years from the date of the agreement, and on 30 days' notice, to pay him the par value of the stock for which he had subscribed? And, (2) if the plaintiff's intestate did so subscribe, did he or his personal representative so comply with the terms of such agreement as to notice as would entitle the plaintiff to recover? This case has heretofore been before this court, and is reported in 97 Ga. 10, 25 S. E. 339. Construing the contract, this court there held that, if the intestate did so subscribe, he or his personal representative had the right, at the expiration of three years from the time stated, to elect whether he would keep the stock, or turn it over to the defendants, and require them to pay him par value for such stock. The court further held that such election could not be made until after November 30, 1892, and it was further held that the petition now under consideration set out a good cause of action against the defendants. To determine whether the verdict which is sought to be set aside is unsupported by evidence in the record, it is necessary to ascertain the obligations imposed by the contract on each of the parties thereto, as well as to review such portions of the evidence as bear on the questions presented. The contract upon which the suit was brought was an original undertaking by the makers, with such persons as would subscribe for any portion of the balance of the capital stock of the Barnesville Manufacturing Company which remained untaken at the time of the execution of the instrument, that such makers would guaranty to such subscribers the payment of an annual dividend on the amount of stock so taken equal to 8 per cent. per annum on the money paid into said company on said stock. So that the obligation of the makers of the contract was to pay to these subscribers annually such a sum as, when added to any dividends which might be declared by the manufacturing company, would equal the amount of 8 per cent. per annum

on the amount which such subscribers had actually paid into the company on the stock for which they subscribed; and this guaranty was to be in force for the term of three years from December 1, 1889. The makers further contracted with the subscribers that at the expiration of said three years, if the holder or holders of the stock so subscribed should so desire, and did not wish to carry the stock any longer, they would, with 30 days' notice given by any or all of such subscribers, pay to each holder of the stock \$50 (being the par value) for every share of stock so subscribed. So that the stipulations of the agreement bound the makers to pay the subscribers, as dividends on their stock for three years, 8 per cent. per annum on the money such subscribers had paid for the stock, less such a sum as might be paid by the company as dividends thereon; also, if, after three years from December 1, 1889, any or all of such subscribers did not desire to hold the stock subscribed for, the makers, after 30 days' notice from such of them as did not desire to carry the stock, would pay to such subscribers \$50 for each share of such stock, upon a transfer of the same. The theory of the plaintiff's case, as set out in her petition, is that her intestate, H. R. Chambers, in his lifetime, under the terms and conditions of the agreement aforesaid, subscribed to 60 shares of such capital stock, of the aggregate par value of \$3,000. The evidence does not show the date at which such alleged subscription was made, nor whether the same was in writing. But the petition alleges that before her intestate had paid for the stock he died, and that R. J. Powell, his administrator, knowing that the intestate had contracted and subscribed for the stock, carried out such contract, and paid the subscription therefor, and received a certificate. It was, of course, a question of fact, to be determined by the jury, whether such contract had been entered into by the plaintiff's intestate with the manufacturing company.

1. It was insisted by counsel for plaintiff in error that, even if Chambers had contracted for 60 shares of stock, the plaintiffs in error were not bound, because there was no consideration moving them in the execution of the instrument sued on, and also that the contract of subscription was not in writing, and did not, therefore, become a binding contract of subscription. A reference to the instrument shows that the makers of it were residents of the town in which it was proposed to erect and put in operation a manufacturing plant, in which the promisors and promisees were jointly interested, and the subscription to the stock invited to be made was in furtherance of the undertaking (see 6 Am. & Eng. Enc. Law, p. 704; Bryan v. Dyer, 28 Ill. 188); and, in the opinion of the makers, the establishment of such a plant would add to the prosperity of the town, and thus directly to themselves. Undoubtedly such a consideration is sufficient to support

the undertaking entered into, for a consideration is valid if any benefit accrues to him who makes the promise. Civ. Code, § 3657.

2. We also think it is not necessary to the validity of a contract of subscription to the shares of stock in a manufacturing company that such contract should be reduced to writing. Shares of joint-stock companies are neither goods, wares, nor merchandise, within the meaning of the statute of frauds. 1 Thomp. Corp. § 1068, and authorities cited in notes 11 and 12 on page 858, and note 1 on page 859. In the same volume (section 1147) this author says: "It is neither necessary that there should be a contract in writing to take and pay for shares, nor an actual receipt of them, or, what is tantamount, a receipt of their symbol, a stock certificate, in order to constitute one a shareholder. It has accordingly been held that one may become a shareholder without signing the stock book or any agreement to take shares, and that a parol agreement made with the directors of the corporation to take stock can be enforced when neither the governing statute nor the charter requires such contract to be in writing." And in notes 2 and 3 cases are cited to support the doctrine laid down. The contract of subscription for shares of stock in an incorporated company may be entered into in various ways. Whenever an intention to become a subscriber is manifest, the courts incline, without particular reference to formality, to hold that the contract of subscription subsists. It is, as in the case of other contracts, very much a question of intention. Formal rules are for the most part disregarded, and in general a contract of subscription may be made in any way in which other contracts may be made. Any agreement by which a person shows an intention to become a stockholder is sufficient to bind both him and the corporation. 1 Cook, Stock, Stockh. & Corp. Law, § 52, note 1.

3. In the present case the plaintiff testified that her intestate entered into a contract with the corporation for 60 shares of its capital stock in addition to the 40 shares theretofore subscribed, and a receipt was introduced in evidence showing the payment by the administratrix to the company of the amount due for such stock at its par value. The plaintiff further testified that such subscription was made to that part of the capital stock which the defendants referred to in their written agreement, and that such stock was taken under the terms and on the faith thereof; and we must rule, as a matter of law, that the consideration shown was sufficient to support the contract, and the evidence that the stock was subscribed under the terms of the instrument sued on was sufficient to authorize the finding by the jury that a valid contract for stock had been made by the intestate under the defendants' agreement. The jury having determined that a subscription to 60 shares of stock had been

made by the intestate under the terms of the agreement executed by the defendants, the question then arises, under the evidence, whether the plaintiff had so complied with the other terms of the agreement as to entitle her to recover. As we have seen, the obligation that the plaintiff should receive 8 per cent. per annum for three years on the money which her intestate, or any other representative of his estate, had paid into the company under the subscription, was absolute,—depending on no condition. But the agreement that the makers of the instrument would pay, at the expiration of three years, to the holders of stock subscribed under such agreement, the par value thereof, was conditional. The holders of such stock were under no obligation at the end of three years to sell their stock to the defendants for \$50 per share, but it was optional with them whether they would do so or not. If any holder so desired, and would indicate such desire by notice as stipulated, then the makers agreed to make the purchase. It was therefore necessary, in any event, at the expiration of such term, if any holder desired to sell his stock, that notice be given to the makers of the instrument that he elected to exercise his right of option and call on them to purchase the stock. The pregnant clause in the agreement was: "And if, at the expiration of said three years, the holder or holders of said stock desire and wish not to carry the same any longer, we hereby agree, with thirty days' notice from any or all of them, to pay each holder par value, of fifty dollars, for each share of stock held by them." This contract, therefore, so far as it imposed liability on the defendants to purchase the stock, was, as has been said, conditional; and if a holder desired, under its terms, to sell his stock, he was bound to give to the makers of the instrument, within a reasonable time after November 30, 1892 (see *Rogers v. Burr*, 97 Ga. 10, 25 S. E. 339), 30 days' notice of the exercise of his option, and of his wish to sell them his stock; and until such notice was given there was no obligation on the part of the makers to purchase the stock of any holder, and if no such obligation existed until notice was given, and no liability to purchase in the absence of such notice, then no right of action accrued to the plaintiff against the defendants to recover the purchase money of the stock until such a notice had been given. The notice required by the contract was a condition precedent to the liability of the defendants to purchase the stock. If, by the express terms of a contract, notice be a condition precedent to performance, or be implied from the nature of the contract, such notice must be averred and proven. 2 Story, Cont. (5th Ed.) § 1832, and authorities cited in note 1 on page 504. Clark, in his work on Contracts (page 667), says: "A promise may be conditional in the sense that its operation awaits the performance of some act to be done by the promisee. If no

time is specified in which the act is to be done, the nonfulfillment of the condition merely suspends, and does not discharge, the rights of the promisee. Common illustrations of such conditions are furnished by cases of promises conditional upon demand or notice. If a person promises another to do something upon demand, he cannot be sued until demand has been made, or if he promises to do something upon the happening of an event, and stipulates that notice shall be given him of the event having happened, he cannot be sued until such notice has been given." Apply this rule to the contract under consideration. It will be found that no time was specified in which the makers of the instrument obligated themselves to purchase the stock, except that it was not to be done until after three years from a given date. The instrument contained a promise that if it should so happen that the holder desired, after a given time, to sell his stock for a given price, then the defendants agreed to purchase it at that price, upon 30 days' notice of such desire being given to them. It must therefore be held that until such notice was given the defendants were under no obligation to purchase the stock held by the plaintiff, although it had been taken under the terms of the agreement. Whether or not the notice was given is a question of fact. The plaintiff avers that it was so given. The defendants, in their answer, deny it. The plaintiff, in her testimony on the subject of notice, says: "I never made any demand of the defendants for the eight per cent. interest, nor did I make demand of them to take the stock off of my hands. The only demands that ever were made were made by Mr. Burr, my husband, and they refused. Mr. Burr, for me, demanded that the parties should take the stock. This was done by a demand on Mr. Rogers. I never did make any demand personally. I never did give any personal notice that I wanted them to take the stock and to pay the interest." Burr, in his testimony, says: "I served each of the defendants on June 5, 1893, with a copy of the notice [written demand]. I mailed a copy to each one." So far as the record discloses, this written demand constituted the only notice which was ever given. Some of the defendants admitted having received this notice at a given date. Others of them denied that they had ever received any notice prior to the bringing of the suit. It is fair to treat Mr. Burr, in giving the notice, as the agent of his wife, and as acting for her. Of course, such of the defendants as received this written demand before the institution of the suit must be affected with the notice referred to in the agreement as of the date of the receipt thereof, if the same was given within a reasonable time after the expiration of the time when the plaintiff had a right to exercise the option; but can those defendants, who deny that they received the written demand, be

affected with the notice required by the terms of the agreement? It will be noted that while Mr. Burr says he served each of the defendants with a copy of the notice on June 5, 1893, he explains this by saying that he mailed a copy to each one. The notice required by the terms of the contract as fixing a right in the plaintiff to demand of the defendants the purchase of her stock could only be met by showing actual personal notice to the defendants. The notice required is equivalent to demand. If it was a condition precedent to the institution of her suit that 30 days' notice should be given that she desired to sell her stock, in order to render the defendants legally liable to purchase it, then such notice must be a demand that the defendants purchase the stock, because it is only on the failure or refusal to so purchase that the right of action accrues. The notice required being actual, it is apparent that the requirement is not met by simply mailing to the address of each of the defendants a statement that she exercised her right of option, and demanded that they purchase the stock, where the defendants, or any of them, deny that they received such notice, unless it be further shown that such written notice was in fact received by them. The evidence is uncontradicted, therefore, that some of the defendants received no notice prior to the bringing of the suit. In our opinion, before the plaintiff could maintain the action and recover against the defendants on this branch of the case, it was necessary that the requisite notice should have been given to each of the makers. The contract was a joint obligation, and, as to any particular undertaking therein set forth, all must be shown to be liable, or none are.

4. In the next place, we do not think that the contention of the defendant in error that notice to one or more of the defendants was, in law, notice to each and every one of them, because of the fact that they are joint contractors, is sound. We are aware that in the case of *Cox v. Bally*, 9 Ga. 467, it was held that a payment made by one of two or more joint contractors, within the statute, and before its bar had attached, constituted a new starting point for the statute, and bound all of such joint contractors; and the ruling there made was adhered to in the case of *Tillinghast v. Nourse*, 14 Ga. 641. The principle upon which those cases were decided was that the same rule applied to joint contractors or joint promisors as did to partners (for which, as it now exists, see section 3791 of the Civil Code). Such joint contractors or joint promisors were regarded as partners with reference to the particular joint obligation. In the latter of the cases cited above, however, Lumpkin, J., delivering the opinion of the court, after stating that, owing to disqualification, he did not preside on the former case, says: "We know that the correctness of the principle that the admission of one joint contractor or partner binds the other

has been frequently doubted, and sometimes denied. The doctrine was first laid down by Lord Mansfield in *Whitcomb v. Whiting*, 2 Doug. 652; and it is founded upon the idea that the bar created by the statute rests entirely upon the presumption that the debt has been paid, and that such an acknowledgment or payment removes the presumption and revives the original promise. And the conclusion is that in this, as in other cases, an acknowledgment by one of many who are jointly concerned is evidence against all, sufficient to remove the presumption of payment." He further says: "But I must say that this principle has not only been questioned in England (1 Barn. & Ald. 467), but from the examination by the supreme court of the United States in *Bell v. Morrison*, 1 Pet. 351, the foundation on which it rests, found to be altogether unsatisfactory. In Pennsylvania, and some of the other states, it has been utterly exploded,"—citing *Levy v. Cadet*, 17 Serg. & R. 126; *Inhabitants of Durham v. Inhabitants of Lewiston*, 4 Greenl. 140; also, cases collected in *Hunt v. Bridgham*, 2 Pick. (2d Ed.) 583, note 1. In the case of *Hunter v. Robertson*, 30 Ga. 479, the court, in declining to extend the principle announced in 9 Ga. and 14 Ga., supra, so as to prevent the statute of limitations from attaching as against the indorser or surety by reason of a payment on a note made by the principal or maker, said that the correctness of the principle, even as to joint contractors and partners, was gravely doubted by this court; but as the question was no longer open, but an adjudicated one, the principle was adhered to, although a contrary holding would have been the better policy. The court further said (Lyon, J., delivering the opinion), "If the principle is wrong when applied to joint makers,—and there is no doubt in my mind but that it is,—shall we extend it to an indorser, on the same fallacious reasons?" We think the true law is enunciated in the case of *Coleman v. Fobes*, 22 Pa. St. 156, where it was held that partial payment by one of several joint debtors, not partners at the time, was not such an act as justifies an inference of a new promise by the others, so as to remove the bar of the statute of limitations, and that joint debtors, as such, are not agents of each other. In that case Lowrie, J., delivering the opinion of the court, after commenting upon the case of *Whitcomb v. Whiting*, supra, and charging to it, for the most part, the confusion which exists in the decisions both in England and in this country on this subject, says: "It is not true that joint debtors, as such, merely, are the agents of each other. Partners are so while the relation continues, and this is part of the law and essence of that relation, but not of that of joint debtors. The distinction is palpable when it is noticed that a joint contract by persons not partners can have no inception, and cannot be changed in time, amount, subject, form, or substance, without the several act of each of the joint

contractors. Their interests are joined only in so far as the contract joins them. Their contract or understanding by which they agree together to enter into the joint liability to the creditor is one thing, and the joint contract with the creditor another thing. Their relations to each other are defined by the former, and their joint relations to their creditor by the latter, and their joint relations in one aspect in no sense define those in the other. Whether, as among themselves, one is to pay all, or half, or none, depends, not upon the contract with the creditor, but on their own arrangement. One alone may be the real debtor, and may be so abundantly able to pay that the others may be said to have no real interest in the matter. And even if they are, as among themselves, equal debtors, there is no real community of interest, for by enforcing contribution each is made to answer for his true share." It cannot be seriously contended that, under the evidence, service of a notice to purchase the stock on Rogers was notice to the other promisors. It appears from the evidence that Mr. Rogers procured the makers to execute the agreement, which after execution was left with him, to procure, under its terms, the desired amount of subscription. His agency could, under this, extend no further than to procure subscribers. When this was done, his agency ceased. What has been said in reference to notice or demand does not apply to the question of recovering the dividends contracted to be paid. That right, so far as it is stipulated in the contract, is absolute. *Rogers v. Burr*, 97 Ga. 14 (Opinion, point 2) 25 S. E. 339. And, if any legal reason exists why the plaintiff is not entitled to recover the amount of the dividends contracted to be paid during the period of three years, such reason must be founded on causes other than the want of notice. In the view we take of the law applicable to the case, we are constrained to rule that as some of the defendants in this case were without notice prior to the bringing of the suit, and therefore no right of action as to them accrued to the plaintiff upon the obligation to purchase the stock in her hands, it must follow that the verdict in her favor, requiring the defendants to pay over to her the par value of this stock, was contrary to law, and should be set aside. As above said the contract on which the suit was brought was joint, not several, and was an obligation of the promisors jointly to purchase the stock, and not an undertaking on the part of any one severally to do so. The action therefore was not, as to this particular stipulation, maintainable, unless each and all of the promisors who were in life, and within the jurisdiction of the court, were not only made parties, but shown to be liable. *Booher v. Worrill*, 43 Ga. 587; *Graham v. Marks*, 95 Ga. 38, 21 S. E. 986. We have shown there could be no recovery against all for a breach of this stipulation, and therefore, because of the joint character of the obligation, there could have

been no recovery against any. Judgment reversed. All the justices concurring, except SIMMONS, C. J., disqualified.

(103 Ga. 347)

**MAYOR, ETC., OF CITY OF MACON et al.
v. DYKES.**

(Supreme Court of Georgia. July 23, 1898.)

**NEGLIGENCE—PROXIMATE CAUSE—ACTION AGAINST
CITY.**

The negligence of the defendants not being the proximate cause of the plaintiff's injuries, he was not entitled to recover, and, consequently, the judgment in his favor was contrary to law.

Little, J., dissenting.

(Syllabus by the Court.)

Error from city court of Macon; John P. Ross, Judge.

Action by T. J. Dykes against the mayor and council of the city of Macon and the Macon Consolidated Street-Railway Company. Judgment for plaintiff, and defendants bring error. Reversed.

Minter, Wimberly, Bacon, Miller & Brunson, for plaintiffs in error. Dessan, Bartlett & Ellis and Chambers & Jordan, for defendant in error.

FISH, J. T. J. Dykes, plaintiff below, sued the mayor and council of the city of Macon and the Macon Consolidated Street-Railway Company for personal injuries. The undisputed facts proven at the trial were that plaintiff, while driving a horse attached to a two-wheeled road cart along a street in Macon upon which the railroad company had a track, attempted to drive, while the horse was in a walk, across such track at an angle of about 45 degrees. When the wheels of his cart came in contact with the iron rails of the track, the wheels slipped along the rails, and made a scraping noise. The horse immediately began to kick, jump, and run, and became wholly unmanageable. He ran at full speed along the street for some 150 feet, when the cart collided with a wagon, and plaintiff was violently thrown to the ground, and seriously injured. The height of the rails of the track above the surface of the street was variously estimated by the witnesses to be from two to four inches. An ordinance of the city made it unlawful for any street-railroad company to construct or place any track in the streets of the city, the rails of which should be above the level of the street. Plaintiff testified in reference to his horse: "After driving him nearly a year, I thought [he] was a reliable horse. I had driven him almost every day to the cart and buggy, and ploughed him some. * * * I have seen him under conditions in which horses disposed to kick would kick, and he never attempted to do so. He has made several attempts to run away, but was easily controlled, very biddable. He had never gotten from under my control at all. I was not afraid

of him. He was a high-strung blooded horse, but was not unreasonably frightened. I would rather say he was not easily frightened at all. He was an ordinarily gentle horse. I have had ladies to drive him. I suppose he is about as gentle as the average run of horses. * * * He was what I considered a reasonably safe horse. * * * I didn't regard him as a family horse. * * * He made some few breaks; nothing that I considered at all alarming." The accident occurred on the 26th of August, and the horse had been driven to the road cart with two persons in it for a distance of 26 miles in six or six and a half hours immediately preceding the accident. The case was tried by the judge of the city court without the intervention of a jury, and judgment rendered against the defendants. Upon the overruling of their motion for a new trial they excepted.

Assuming that the defendants were guilty of negligence, the controlling question in the case is, was their negligence the proximate cause of plaintiff's injuries? There seems to be no absolutely consistent rule to guide us in determining the matter, and each case has been made by the courts to largely depend upon its own facts. The most generally accepted theory of causation, however, is that of natural and probable consequences (1 Jag. Torts, p. 74, and cases cited; Gilson v. Canal Co. (Vt.) 36 Am. St. Rep. 802, and cases cited on page 809 (s. c. 26 Atl. 70); the rule being that, in order to recover for an injury alleged to have resulted from the negligence of another, the injury must be the natural and probable consequence of the negligence; or, as otherwise stated, the wrong and the resulting damage must be known by common experience to be naturally and usually in sequence. The damage, according to the usual course of events, must follow from the wrong. Gerhard v. Bates, 2 Bl. & Bl. 490; Add. Torts, 6; Cooley, Torts, 69. The principle in this state seems to be substantially the same. If damages are traceable to an act of negligence, but are not its legal or material consequence, or if other and contingent circumstances preponderate largely in causing the injurious effect, such damages are too remote and contingent to be the basis of a recovery. Civ. Code, §§ 3912, 3913. This rule of remoteness is applicable both to the damages which are the result of the act and to the cause of the act. Rucker v. Manufacturing Co., 54 Ga. 84. "It is not only true that damages which are the direct product of the act are the limit, but that only such acts as preponderate largely in producing even a direct result are the subject of suit." Id. "The law—we think, wisely—only gives an action for the prime, the leading, effective cause." Id. See, also, Belding v. Johnson, 86 Ga. 177, 12 S. E. 304. "The negligence complained of must be the main, controlling, and preponderating cause, ascertained and distinguished from other causes, in order to be the subject of a recovery."

Charge approved in *Brown v. City of Atlanta*, 66 Ga. 71. One guilty of negligence is only liable for proximate consequences of his wrongful act (*Perry v. Railroad*, Id. 746); liable only for its reasonable and probable consequences (*Montgomery v. Railway Co.*, 94 Ga. 332, 21 S. E. 571). Negligence must be the chief and preponderating cause of injury. *Gaskins v. City of Atlanta*, 73 Ga. 746. "Where a wrongful act puts other forces in operation which are natural, and which the act would reasonably and probably put in action, the party who puts in force the first efficient cause will be responsible in damages for the injury proved." *Cheeves v. Danielly*, 80 Ga. 114, 4 S. E. 902. In reference to the subject of proximate and remote damages, Prof. Jaggard (1 *Jag. Torts*, p. 372) says: "In determining what is a proximate and what is a remote consequence, the English courts incline to accept the measure of damages in cases of contracts, and to award such damages as (a) directly and necessarily result from the wrong complained of; and (b) such further damages as should have been foreseen by the wrongdoer, in view of his knowledge, actual or constructive, of the special circumstances of the case. The American courts do not seem to have determined very definitely whether the test is (a) what a reasonably prudent man should have foreseen under the circumstances, or (b) what follows as a natural result in the ordinary course and constitution of nature."

After a very careful consideration of the law and the controlling undisputed facts in the case at bar, a majority of us are of the opinion that the negligence of the defendants was not the proximate cause of the injuries of which the plaintiff complained. His injuries were not the natural and probable consequences of such negligence. The only immediate and direct effect of the contact of the wheels of the cart with the rails of the track was the noise. This noise may have been a natural and probable result of such contact, but it was not reasonable and probable that an ordinarily gentle and roadworthy horse would have been so frightened by it as to instantly cause him to kick, become entirely unmanageable, and run away. Such a noise and such an extreme fright, in an ordinarily gentle horse, as to cause him to kick and run away, we think, are not known by common experience to be naturally and usually in sequence; the one does not follow the other, according to the usual course of events. The great fright of the horse for such a cause was extraordinary and exceptional in a reasonably gentle roadster. Plaintiff's injuries cannot be traced back to the negligence of the defendants except through the intermediate action of his horse, which was evidently disposed to be unruly and inclined to run away, although plaintiff considered him reliable, ordinarily gentle, and reasonably safe. A horse that had made several attempts to run away, and, after being

driven to a road cart in which two men were seated, for 26 miles on an August day, instantly kicked, became wholly unmanageable, and ran away, when the wheels of the cart came in contact with the rails of the track, making a scraping noise, evidently had a trick or habit not common to ordinarily gentle horses. To our minds, this vice of the horse, rather than the negligence of the defendants, was the conspicuously preponderating, effective, and proximate cause of plaintiff's injuries. The direct and immediate cause of plaintiff's injuries was the collision of his cart with the wagon, in consequence of the running away of the horse; it not being alleged that the wagon was a defect in the street. In *Brooks v. Acton*, 117 Mass. 204, which was an action against a town to recover for personal injuries caused by a defect in a highway which caused the horse driven by plaintiff to run, it was held that, if the vice of the horse caused the running, or contributed to the running, the plaintiff could not recover,—"the vice of the horse" meaning some trick or habit of plaintiff's horse other than the natural excitability common to horses; the reason for the rule being that the vice of the horse, and not the defect, was the proximate cause of the plaintiff's injury. See, also, *Cook v. City of Charlestown*, 98 Mass. 80; *Spaulding v. Winslow*, 74 Me. 533. In these cases, it is true, there was no collision of plaintiff's vehicle with the defect in the highway; but, if there had been such collision, and the vice of the horse had caused him to run, and plaintiff had been injured by such running, similar rulings would, doubtless, have been made. Judgment reversed. All the justices concurring, except LITTLE, J., dissenting.

(104 Ga. 361)

ERWIN v. ENNIS et al.

(Supreme Court of Georgia. July 28, 1898.)

APPEAL—BILL OF EXCEPTIONS—CONSOLIDATION OF CAUSES.

An agreement between counsel that "three causes be submitted to the finding and decision, as to all facts and law, of [the presiding judge], without the intervention of a jury," does not amount to a consolidation of the cases, and did not authorize the losing party, who was a party to all three of the cases, to make only one motion for a new trial, and, upon the same being overruled, to file one bill of exceptions to this court, attempting to bring all three of the cases for decision here. This court has no jurisdiction to entertain such a bill of exceptions, and therefore in such a case the writ of error will be dismissed, notwithstanding the fact that it appears that the three cases relate to the same fund or property, each case being between different parties.

(Syllabus by the Court.)

Error from superior court, Floyd county; W. M. Henry, Judge.

Action by O. C. Erwin against Woodacry & McPherson and another, and by the Rome Iron Company against O. C. Erwin, and by O. C. Erwin against Woodacry & McPherson

and others. From the judgments, C. C. Erwin brings error. Dismissed.

Dean & Dean and A. G. Ewing, for plaintiff in error. McHenry & Nunnally and J. W. Ewing, for defendants in error.

COBB, J. Three cases were pending in the superior court of Floyd county. The following agreement was entered into in reference to the same:

"C. C. Erwin vs. Woodacry & McPherson and Rome Iron Company, Garnishee.

"No. 74, Sept. Term, 1893, of Floyd Superior Court. Garnishment before a Justice of the Peace. Answer of Garnishee. Traverse Judgment and Appeal by Garnishee.

"Rome Iron Company vs. C. C. Erwin and L. W. Raynes.

"No. 47, Floyd Superior Court, March Term, 1894. Petition for Injunction, Interpleader, etc. Filed Jan. 30, 1894.

"C. C. Erwin, Plff. in Fl. Fa., vs. Woodacry & McPherson, Deft. in Fl. Fa.; Rome Iron Company, Garnishee; and L. W. Raynes, Claimant.

"No. 89, Floyd Superior Court, March Term, 1894. Claim Affidavit and Bond.

"The undersigned, of counsel for the respective parties above, do hereby consent and agree that the above-stated three causes be submitted to the finding and decision, as to all facts and law, of the Hon'l W. M. Henry, judge of Floyd superior court, without the intervention of a jury. This 23rd July, 1897.

"[Signed] J. W. Ewing,

"Atty. for Iron Co.

"A. G. Ewing and Dean & Dean,

"Attys. for Erwin.

"McHenry & Nunnally,

"Attys. for W. H. Ennis, Administrator of Raynes."

Under authority of this agreement, the presiding judge made a decision which finally disposed of each case. While the decision is embodied in one order, there is in it a separate and distinct judgment in each case. It appears that the subject-matter in each case is the same, and three distinct cases arose from the fact that different parties were interested in the fund which was involved in all of them. The judgment rendered in each of the cases resulted adversely to one who was a party to all of them. One motion for a new trial was made by him in all of the cases, which being overruled, a single bill of exceptions was sued out to bring the case to this court. Whether it was in the power of the judge of the superior court to consolidate the three cases into one, so far as to authorize one motion for a new trial and one bill of exceptions, is a question not necessary to be decided in the present case. The agreement above quoted can in no event be construed to be a consent that the cases be consolidated.

By its very terms, it recognizes that there are three separate and distinct cases, and they are submitted to the decision of the presiding judge, not as one consolidated case, but as three separate and distinct cases. Properly construed, the agreement accomplishes only two purposes: First, that all of the cases should be heard by the presiding judge without the intervention of a jury; and, second, that they should be heard at the same time. There being three separate cases, and no order of consolidation, a motion for a new trial by the losing party was necessary in each case to authorize the judge to review his rulings; and, this being true, a single bill of exceptions, which attempted to bring to this court the three distinct cases, was nugatory. *Assurance Co. v. Way*, 98 Ga. 746, 27 S. E. 167; *Hicks v. Walker* (Ga.) 30 S. E. 383. Writ of error dismissed. All the justices concurring.

(103 Ga. 385)

COSGROVE v. CITY COUNCIL OF AUGUSTA.

(Supreme Court of Georgia. July 23, 1898.)

CITY ORDINANCE—DEPOTS—DRUMMERS.

1. The city council of Augusta has not, under the "general welfare clause" in the charter of that city, the power to pass an ordinance absolutely prohibiting drummers, runners, hackmen, cabmen, and all other persons from entering, with the owner's consent, a union passenger depot in such city, "to solicit custom or patrons."

2. The question whether the owner in fee of such a depot, or its lessee, may or may not lawfully grant, to one or more persons, the privilege of entering the same for the purpose of soliciting "custom or patrons," to the exclusion of all others carrying on a like business, is not made in the present case.

Simmons, C. J., and Little, J., dissenting.

(Syllabus by the Court.)

Error from superior court, Richmond county; E. H. Callaway, Judge.

C. H. Cosgrove was convicted of violating an ordinance of the city council of Augusta, and brings error. Reversed.

Jos. B. Cumming and Bryan Cumming, for plaintiff in error. Wm. H. Davis, Sol. Gen., M. P. Carroll, and Wm. K. Miller, for defendant in error.

FISH, J. 1. There is nothing in the charter of the city of Augusta delegating to its city council express power to regulate hacks or the hack business. The powers of the council in this respect are derived from the general welfare clause in the act of incorporation. It is elementary that a municipal corporation, in the exercise of police power conferred by the general welfare clause of its charter, for the purpose of promoting the comfort, health, convenience, good order, and safety of its citizens, may pass reasonable ordinances for the regulation of lawful trades and occupations within its limits. But it is not authorized, under such power, to make

it unlawful to carry on a lawful trade or business in a lawful manner. There is quite a difference between prohibition of a trade and the regulation of it. Indeed, "a power to regulate seems to imply the continued existence of that which is to be regulated." An ordinance which prescribes that certain persons shall not carry on their business, which would otherwise be legitimate, in a particular place, or on certain premises, is, as to such place or premises, clearly prohibitive; and to authorize the passage of such an ordinance, where the power is undoubted, the injury to the public, which furnishes the justification for the ordinance, should proceed from the inherent character of the business when conducted at such place or upon such premises. Where, however, the business can be conducted there by proper persons without harm or inconvenience to the public, the prosecution of it should not be entirely prohibited, but such necessary police rules and regulations should be prescribed for carrying on such business in that particular locality as may be necessary for the public good. See *Corporation of Toronto v. Virgo*, 73 Law T. (N. S.) 449. On appeal from the supreme court of Canada, the privy council held (affirming the judgment of the court below) that, where a municipal council had power to make by-laws for "regulating and governing" hawkers, etc., they did not have power to prohibit hawkers from plying their trade at all in a substantial and important part of the city, and that a by-law to that effect was ultra vires; that, when the legislature intended to give power to prevent or prohibit, it did so in express words; and that the provisions of the act did not intend to include a power to prevent or prohibit in a power to regulate or govern. It is stated in the opinion that it was argued that the by-law did not amount to prohibition, because hawkers might still carry on their business in certain streets of the city; but Lord Davey, speaking for the council, said: "The question is one of substance, and should be regarded from the point of view as well of the public as of the hawkers. The effect of the by-law is practically to deprive the residents of the most important part of the city of the power of buying their goods from, or trading with, the class of traders in question. * * * At the same time the hawkers, etc., are excluded from exercising their trade in that part of the city." As somewhat in point, see Dill. Mun. Corp. (4th Ed.) § 325; 17 Am. & Eng. Enc. Law, p. 254, and notes; Tied. Lim. 289, 290; Horr & B. Mun. Ord. § 30. The case of *Napman v. People*, 19 Mich. 352, is very similar to the case at bar. *Napman* was convicted before the recorder's court of the city of Detroit of violating an ordinance of that city providing that "no porter, runner, hackman, * * * omnibus agent * * * shall, on the arrival of any * * * railroad cars in the city of Detroit, for a period of

fifteen minutes thereafter, go upon, or approach within twenty feet of, the * * * depot where such * * * railroad cars have * * * stopped running, or are about to stop running, unless such porter, runner, hackman, * * * omnibus agent, * * * be requested by a passenger to remove some trunk or other baggage from said depot," etc. The facts, as found by the recorder, were that, by an agreement between the Detroit & Milwaukee Railroad Company and the omnibus company, the drivers and agents of the latter, and they alone, were authorized and permitted to go within the depot of the former, immediately on the arrival of any train, to invite passengers to ride in their omnibuses. *Napman* was a driver of the omnibus company, and as such, under the above agreement, within 15 minutes after the arrival of a train at the Milwaukee depot, entered therein, and solicited passengers to take one of the vehicles of his company. It was for this act he was convicted. The supreme court, to which the case was carried by certiorari, directed that the conviction be quashed, and in the opinion says: "The main question, however, calls for a decision upon the validity of a prohibition which would prevent railroad companies from making such arrangements as one found by the recorder to have been entered into here. We have no difficulty in deciding that the city cannot lawfully interpose to prohibit such arrangements. The acts done are done upon the private premises of the railroad companies, over which the city can have no general control; and we think there is no reason why these companies, in their character of carriers of passengers, may not properly make such arrangements as will facilitate their reaching their destination anywhere in the city as well as at the end of the track in the depot. Passengers who are strangers in the city have no means of knowing the character of the runners they may encounter outside of the depot, and, if they can deal without confusion and at their leisure with responsible agents, it will be much more convenient and safe than to compel them to select from among strangers and in the noise and bustle attendant upon the arrival of the cars. Such contracts of employment made in the cars and on the premises by the companies cannot lawfully be restrained by the city authorities. No driver can, without permission, go, of right, on the private property of the railroad company, unless employed by a passenger, and the city could give him no authority to do so, and any arrangements for the delivery of passengers and their baggage, not unlawful in themselves, which are made by the railroads in their own cars, and on their own lands, are exempt from municipal interference, and the ordinances, so far as they may attempt such interference, are invalid." This court held in *Fluker v. Railroad Co.*, 81 Ga. 461, 8 S. E. 529 (Syl., point 1), that "the

dominion of a railroad corporation over its trains, tracks, and 'right of way' is no less complete or exclusive than that which every owner has over his own property. Hence the corporation may exclude whom it pleases, when they come to transact their own private business with passengers or third persons, and admit whom it pleases, when they come to transact such business. This applies to selling lunches to or soliciting orders from passengers for the sale of lunches." See cases cited at the end of first paragraph of the opinion, page 464, 81 Ga., and page 530, 8 S. E.; also, *Railroad Co. v. Tripp*, 147 Mass. 35, 17 N. E. 89; *Griswold v. Webb* (R. I.) 19 Atl. 143; *Perth General Station Committee v. Ross*, 8 Am. & Eng. R. Cas. (N. S.) 639, and cases cited in note. While it may be true that to permit all the hackmen in a city to go into the railroad depots upon the arrival of trains, and, without rules regulating their conduct, allow them to offer their services and solicit patronage, would naturally create great confusion and bewilderment, and be very annoying, embarrassing, and harassing to passengers, yet the railroad company has the right to prevent this by excluding them all (see *Fluker's Case*, supra), or by making such rules and regulations as would obviate the evils. See *Cole v. Rowen* (Mich.) 50 N. W. 138; *Bus Co. v. Sootsma*, 84 Mich. 194, 47 N. W. 667. If necessary, the municipality, by prescribing reasonable rules for the conduct of hackmen while plying their trade upon the premises of the railroad companies, could avoid the annoyance, etc., to which the public might otherwise be subjected. As we have already seen, the dominion of a railroad company over its depot grounds is no less complete and exclusive than that which any other owner has over his own property, and the corporation can admit or exclude whom it pleases, except when they may come to transact business with it as a common carrier. *Fluker's Case*, supra. Therefore the railroad company, if it should see fit, could keep all the hackmen out of its depot grounds, if they did not come to transact business with it as a common carrier, or, if it pleased, it could admit them all upon its premises, unless legally deprived of such right by the city ordinance in question.

The right to permit hackmen to ply their trade upon its premises, by there soliciting patronage, is a valuable property right belonging to the railroad company, similar to its right to sell or lease to another the privilege of conducting a restaurant, news stand, lunch counter, storage rooms for parcels, etc., in its depot, which, although its exercise may be regulated, cannot be completely taken away by the municipality under the power granted it in the general welfare clause of its charter. To do so would be to deprive the railroad company of its property without due process of law. Moreover, the carrying on of a public hack business,

not having any inherent evils, is lawful in itself; and where the privilege of soliciting custom for one's hack upon the premises of another, much frequented by the public needing hacks, has been secured from the owner of the premises, such privilege also becomes a valuable property right, of which the owner cannot be entirely deprived by the city under the power granted in its general welfare clause. Of course, the city, under such power, may regulate the exercise of the right by such reasonable rules as may be necessary for the comfort, convenience, and safety of the public.

2. The question whether a railroad company can lawfully grant to one or more hackmen the exclusive privilege of entering its depot for the purpose of soliciting and obtaining patronage is not made in this case. The only point presented by the writ of error is, did the city of Augusta, under the power conferred by the general welfare clause of its charter, have the authority to pass the ordinance prohibiting all hackmen from entering the depot to solicit patronage therein, although the railroad company might consent for them to enter for such purpose? Whatever may be the rights, if any, of hackmen who may have been excluded from the depot, they are not here complaining. The fact that the employer of the plaintiff may have secured from the railroad company the exclusive privilege of plying his trade in its depot can certainly shed no light upon the question as to whether or not the city, under its charter, could lawfully exclude all persons engaged in the same business from the depot. The question made is whether *Cosgrove* was rightfully there, and not whether others were wrongfully excluded. Judgment reversed. All the justices concurring, except *SIMMONS, C. J., and LITTLE, J., dissenting.*

(103 Ga. 843)

HATCHER v. SMITH.

(Supreme Court of Georgia. July 23, 1898.)

EXECUTION—PROPERTY SUBJECT—UNCERTAIN INTERESTS—WILLS.

1. Where a testator devised to a named son described land, "for the use of my said son, his wife and children, during his natural life, and after his death to be equally divided between any children he may leave," further providing, "It is my intention that said land shall at no time be subject to the debts of my said son, * * * but shall be for the support of himself and family during his natural life, and after his death to be divided as before stated," and where such testator bequeathed to the same son an interest in certain railroad stock, providing, as to it, "The portion or share of my son * * * shall be for the support of my said son and his family during the term of the natural life of my said son, and after his death to be equally divided between any children he may leave,"—held, that even if, under a proper construction of this devise and bequest, any legal life estate in the corpus of the property passed to the son, it was, at a time when he had a living child or children with a pos-

sibility of becoming the father of other children, too indefinite and uncertain to become the subject of levy and sale, and this would be so as long as such possibility continued.

2. This case is distinguishable from that of *Bozeman v. Bishop*, 20 S. E. 11, 94 Ga. 459.

(Syllabus by the Court.)

Error from superior court, Columbia county; E. H. Callaway, Judge.

An execution in favor of J. F. Hatcher was levied on property to which John L. Smith, trustee, interposed a claim. There was a judgment for claimant, and plaintiff brings error. Affirmed.

H. O. Roney and Emory Cason, for plaintiff in error. Thos. E. Watson, and John T. West, for defendant in error.

FISH, J. 1. The first headnote sets forth the material parts of the will under which John L. Smith, as trustee, claimed the property levied upon. We deem it unnecessary to express our opinion as to whether or not, under the terms of the will, there was a subsisting executory trust when the claim was interposed, and whether John L. Smith had a life interest only in the usufruct or in the corpus of the estate; for, granting that the trust, if any, was executed, and that, under a proper construction of the will, he had a legal life estate in the corpus of the land and railroad stock in question, it was certainly too vague and uncertain to become the subject of levy and sale, because at the date of the levy, and when the claim was interposed and tried, he had two children then in life, with a possibility of becoming the father of more, and, so long as such a possibility continued, his interest would be too shifting and indefinite to be subject to levy and sale. Until his death it could not be known how many children he would have, and how many, if any, would be in life at that time. Should the one-fourth interest of the life estate be sold under this execution against him, and should other children be born to him, they would be deprived of any interest in the one-fourth sold, or be driven to the expense of having to bring suit for same, with risk of loss of income, etc.

2. The case at bar is distinguishable from that of *Bozeman v. Bishop*, 94 Ga. 459, 20 S. E. 11. In that case the property was conveyed to a father by name, and to his lawful children, without naming them, their heirs, etc., for the use, support, and maintenance of the father, and for the support and education of his children during the life of the father, and at his death to be equally divided among his lawful children. The father, at the time the conveyance was executed, had two children then in life. It was held that the father and each of the children took, under such conveyance, an estate for the life of the father, with remainder to the children, and that the father's life estate in the property was subject to levy and sale for his

debts. There was an estate to the father and his two children then living for and during his life, with remainder to those two children. In the case at bar the property is given for the use of the father, his wife and his children, for and during his natural life, and after his death to be equally divided between any children he may have, it being for the support of himself and family. The father's interest was contingent upon, and subject to be diminished by, after-born children, whose rights would be the same as those in life when the levy was made. There was no such contingency in the case in 94 Ga., 20 S. E., supra. There the father's interest was more definite, and could be sold without interfering with the rights of his children then living or to be born, as the latter would have no interest in the property. Judgment affirmed. All the justices concurring.

(106 Ga. 516)

ENGLISH v. STATE.

(Supreme Court of Georgia. July 29, 1898.)

MURDER—VERDICT—REVIEW.

1. Under the decision of this court in *Thomas v. State*, 38 Ga. 117, a verdict, upon an indictment for murder, finding the accused guilty of "involuntary manslaughter," is too vague and uncertain to support a judgment of any kind.

2. Though complaint of such a verdict was made in a motion for a new trial, and not by a motion in arrest of judgment, it was not legitimate to refer either to the evidence or the charge of the court for the purpose of ascertaining what the verdict really meant.

Fish and Lewis, JJ., dissenting.

(Syllabus by the Court.)

Error from superior court, Fulton county; J. S. Candler, Judge.

Lon English was convicted of involuntary manslaughter, and brings error. Reversed.

Arnold & Arnold, for plaintiff in error. O. D. Hill, Sol. Gen., and Arnold & Broyles, for the State.

PER CURIAM. Judgment reversed.

FISH and LEWIS, JJ. (dissenting). Where a verdict of "involuntary manslaughter" was rendered, and not otherwise complained of than as above indicated, and where the record discloses that the judge properly charged the jury that there could be no conviction of involuntary manslaughter in the commission of a lawful act, and further instructed them that, in the event they found the accused guilty of involuntary manslaughter in the commission of an unlawful act, the form of their verdict would be, "We, the jury, find the defendant guilty of involuntary manslaughter," a verdict in these terms was sufficiently certain, and was rightly construed and treated as a verdict convicting the accused of involuntary manslaughter in the commission of an unlawful act. *Wright v. State*, 78 Ga. 192, 2 S. E. 693.

(105 Ga. 535)

COLLINS et al. v. SMITH.

(Supreme Court of Georgia. Oct 3, 1898.)

WILLS—PROPERTY SUBJECT TO DISPOSITION—CONTINGENT INTERESTS.

A deed executed in 1844 conveying land to a trustee for the use and benefit of a married woman for her life, and declaring that at her death the same should vest in the children born of her body, but that in the event of her death "without any children so born of her body, as aforesaid, or that her child or children may all die intestate and without issue" after her death, "then the said premises to be sold, and one-half of the net amount of sale to vest in and be the property of [R. C.], his heirs and assigns, and the other half to revert to and become the property of the [grantor] and his heirs and assigns, thenceforth and forever," conveyed to R. C. a contingent interest, subject to testamentary disposition by him.

(Syllabus by the Court.)

Error from superior court, Bibb county; John P. Ross, Judge.

Petition by B. C. Smith against Oscar Collins and others for instructions. A decree was passed, and Collins and others bring error. Affirmed.

Hill, Harris & Birch, M. R. Freeman, and Dessan & Bartlett, for plaintiffs in error. Anderson & Anderson and Guerry & Hall, for defendant in error.

FISH, J. By deed dated in 1844, James Smith conveyed a certain house and lot in the city of Macon to Robert A. Smith, as trustee for Eliza C. Collins, the daughter of grantor, upon the following terms: "To the separate use and benefit of her, the said Eliza C. Collins, for and during her natural life, and at her death to vest in the children born of her natural body, and to them and their heirs forever; but in the event of the death of the said Eliza C. Collins without any children so born of her body as aforesaid, or that her child or children may all die intestate and without issue after the death of said Eliza, then [the described realty] to be sold, and one-half of the net amount of sale to vest in and be the property of the said Robert Collins [husband of Eliza], his heirs and assigns, and the other half to revert to and become the property of said James Smith, his heirs and assigns, thenceforth and forever." At the date of the conveyance there was one child of Eliza Collins living,—Juliet by name. Another, a daughter, Mary, was afterwards born. Robert Collins died testate in 1861. By his will he directed that his estate and property of every kind and description should be equally divided between his wife, Eliza, and his daughters, Juliet and Mary. Both daughters died intestate and without issue,—Mary in 1870, and Juliet in 1873. Eliza Collins died testate in 1889, without children surviving her. By her will she gave all of her estate to her nephew B. C. Smith, defendant in error, whom she made her executor. In 1876 the heirs of James Smith, the grantor in the trust deed, relinquished or quitclaimed

their interest in the reversion under the deed to Eliza Collins. B. C. Smith claims this half interest under the will of Eliza Collins, and as to such reversion there is no controversy. B. C. Smith upon the death of Eliza went into possession of the house and lot described in the trust deed, and has since kept possession. The heirs at law of Robert Collins at the time of the death of Eliza Collins were his sister Harriet A. Gunn, his nephew Oscar Collins, and various nephews and nieces, who are the plaintiffs in error. They claimed that under the terms of the deed executed by James Smith they were entitled to one-half of the net amount of the sale of the property in dispute, and demanded its sale and a division as the deed provided. B. C. Smith, being in possession, filed his equitable petition, both as executor and individually, asking for direction as executor, for a determination of the controversy between himself, individually, and the plaintiffs in error, as to such property, and the removal of the cloud upon his title growing out of the claim of plaintiffs in error. The case was, by consent, tried by Judge Ross without the intervention of a jury, and the facts above stated appeared in evidence. The court decreed that the plaintiffs in error had no title or interest in the property in dispute, and that their claims be disallowed and removed as a cloud upon the title of defendant in error, and that the title of the property, as to each and all the plaintiffs in error and heirs at law of Robert Collins, was in the defendant in error, in fee simple. Plaintiffs in error excepted.

The precise question for determination is, did Robert Collins at the time of his death have, under the terms of the deed, such right or interest in the proceeds of the property directed in the deed to be converted as he could dispose of by will? If he did, then it passed by his will to his wife, Eliza, and his two daughters, Juliet and Mary; and the interest of the daughters having gone by inheritance to their mother, Eliza, the whole went to B. C. Smith, under the will of Eliza, and the decree of the court below was correct. If, on the other hand, Robert Collins did not have at the time of his death a right of interest in such proceeds which he could dispose of by will, then the plaintiffs in error, who were his heirs at law at the time the contingency occurred when the conversion and division were to be made, took by inheritance from him whatever interest or estate he may have acquired under the deed, and in such event the court erred in its decree. Both theories were forcibly presented to us by the able counsel of the respective parties, and we have very carefully considered all the authorities cited, as well as such others as were at our command; and finally we have no difficulty in deciding that, under the terms of the deed, Robert Collins took, not merely a naked possibility, but an interest in the nature of a contingent remainder,—the contingency de-

pending upon the event, and not upon the person,—and that his interest was subject to testamentary disposition. It was held in *Morse v. Proper*, 82 Ga. 13, 8 S. E. 625, that a contingent remainder in fee in realty, where the contingency is not as to the person, but as to the event, is devisable. The material facts in that case are quite similar to those in the case at bar, except that the testamentary disposition of the contingent interest was made after the Code, and the deed under which the testator claimed such interest made no provision for sale of the realty and distribution of the proceeds. Under the provisions of the deed in the case at bar, there was no contingency as to the person who should take half the net proceeds of the sale of the property in the event of the death of Eliza Collins without children surviving, or that her children should all die intestate and without issue. The deed stated with certainty that upon the happening of such contingencies half of the proceeds should vest in, and become the property of, Robert Collins, his heirs and assigns. The direction that upon the occurrence of such contingencies the realty be sold, and division of the proceeds be made as before stated, converted the realty into personalty when the contingencies happened, but did not change the estate, or the quantity of interest, which Robert Collins took under the deed. *De Vaughn v. McLeroy*, 82 Ga. 687, 10 S. E. 211; *Legwin v. McRee*, 79 Ga. 430, 4 S. E. 863; *McGinnis v. Foster*, 4 Ga. 377. In 1 Jarm. Wills, *49, it is said: "An executory interest in real or personal estate is disposable by will, if the nature of the contingency on which it is dependent be such that the interest does not cease with the life of the testator; in other words, if it be descendible or transmissible." Chancellor Kent (4 Kent, Comm. *261) says: "It is settled that all contingent estates of inheritance, as well as springing and executory uses and possibilities, coupled with an interest, where the person to take is certain, are transmissible by descent, and are devisable and assignable." See citations in note c, Gould's Ed. Dr. Minor (2 Minor, Inst. p. 416) says: "A contingent remainder of inheritance is transmissible by descent to the heirs of the person to whom it is limited, if such person chance to die before the contingency happens, supposing the existence of the remainder-man not to enter into and make part of the contingency itself, upon which the remainder is intended to take effect. And, whereas a contingent remainder is descendible, it is at common law devisable by will." To the same effect, see 20 Am. & Eng. Enc. Law, 968, 969, and citations in notes 1, 4.

Counsel for plaintiffs in error earnestly contend that by the early common law contingent remainders in realty were not devisable, and that a different rule was not established by the decisions of the courts in England until after May 14, 1776, the date

from which the common law was adopted in Georgia by the act of 1784; that contingent interests in personalty were not devisable in England until the act of parliament of 1837 (1 Vict. c. 26, § 3); and that prior to the adoption of the Code, in 1863, contingent remainders in neither realty nor personalty were devisable, under the law then in force in this state. If this be so, then, as the deed made by James Smith was executed in 1844, and Robert Collins died in 1861, the latter did not have, under the terms of the deed, such an interest in the property therein described as could pass by his will. We do not think the authorities sustain counsel in their contention, and we are of opinion that contingent remainders both in realty and personalty, where the contingency was as to the event, and not as to the person, passed by will under the law of Georgia as it existed prior to the adoption of the Code. In *Gardner v. Sheldon* (1670) Vaughan, 259, it was held that executory devises were devisable. To the same effect is *Wind v. Jekyl* (1719) 1 P. Wms. 572. In *King v. Withers* (1735) 3 P. Wms. 414 (a case directly in point), it was held by the lord chancellor, and affirmed by the lords, that a contingent devise of personal estate was not a possibility only, but was an interest vested, and transmissible. This ruling was approvingly cited in *Gurnel v. Wood* (1741; Term R. 14 Geo. II. C. B.) 8 Vin. Abr. 112, pl. 38; where Willes, C. J., said: "The question is whether an executory devise is transmissible. Most of the old cases which hold that they are not devisable were before executory devises were well established, but that doctrine is now exploded. Executory devises are not naked possibilities, but are in the nature of contingent remainders, and there is no doubt but that such estates are transmissible, and consequently devisable." *Selwin v. Selwin* (1760) 1 W. Bl. 222, 251, is generally cited for the doctrine that contingent estates or interests in land passed by will previous to their vesting. This case was stated out of chancery for the opinion of the court of king's bench, and it was contended that the testator had only a future executory use at the time of making his will, not a present use, for the statute could not draw the estate to the use till the possibility (that is, the completion of the recovery) had actually happened, and that this future executory use was not devisable. 6 Cruise, Real Prop. *27. The court of king's bench certified its opinion that the lands passed by the will. In the subsequent case of *Roe v. Griffiths* (1766) 1 W. Bl. 606, Lord Mansfield, C. J., observed that, if the practice when the court of king's bench certified into chancery had permitted him to give his reasons, he was prepared, in the case of *Selwin v. Selwin*, supra, to have shown, with the concurrence of all his brethren, that all contingent, springing, and executory uses, where the person who was to take was certain, so that the same might be de-

ascendible, were devisable; "descendible" and "devisable" being convertible terms. In *Moor v. Hawkins* (1765) 2 Eden, 342 (another case well in point), James Grubb devised all his real and personal estate in trust for his son James; and if he should die without issue, under age, then all his lands, tenements, hereditaments, and premises should go to Cochram, his heirs and assigns. Cochram devised all his lands and tenements whatsoever that he should die seised and possessed of, in possession, reversion, or remainder, and bequeathed all his personal estate, to the plaintiff, Moor. Cochram died in the lifetime of James Grubb, the son, who afterwards died, under age, and without issue. Moor, the devisee of Cochram, brought his bill, in which he claimed the freehold, leasehold, chattel, and personal estate unadministered of the testator James Grubb. The question was whether the possibility in the realty and personalty given by James Grubb, the father, in his will to Cochram, was devisable and bequeathable by Cochram to Moor. Lord Chancellor Northington said: "I never had a doubt, since I was twenty-five years old, that these contingent remainders are devisable, notwithstanding some old authorities to the contrary. In the case of *Selwin v. Selwin*, however, I sent the question into the court of king's bench for the satisfaction of the parties; and the certificate of the judges in that case implied, I think, that they agreed with me in my opinion." Upon which the solicitor general and Mr. Skynner, for the defendant, declined any further argument. The chancellor added: "This argument is very properly withdrawn, as the point is settled, and ought not to be shaken. It is a liberal and right determination. Declare the real and personal estate of the said testator, James Grubb, passed by his said will to the said Nicholas Cochram, etc., and that the real and personal estate of the said Nicholas Cochram, therein being comprehended the real and personal estate of the said James Grubb, passed by his said will to the plaintiff, Thomas Moor." In *Perry v. Jones*, O. P. (1788) 1 H. Bl. 80, one of the points for discussion was whether, if the interest of Joseph, one of the devisees under the will being considered, was contingent, it was devisable. Lord Loughborough said the discussion of the question was unnecessary, "for, taking it to be a springing, contingent, executory use in Joseph, we are all of opinion that it was devisable, and passed by his will. The case of *Selwin v. Selwin* has determined this point, and we think ourselves bound by that determination, confirmed as it is by the case of *Moor v. Hawkins*," etc. Upon writ of error this decision of the court of common pleas was affirmed by the court of king's bench (1789; 3 Term R. 88); the judges basing their opinions upon the construction of the statute of wills (1540, amended 1542-48), and the decisions in *King v. Withers*, *Gurnel v. Wood*, *Moor v. Hawkins*, and *Selwin v. Sel-*

win, referred to above. See 6 Cruise, Real Prop. *27. Blackstone (1765) says: "Contingencies and mere possibilities, though they may be released or devised by will, or may pass to the heirs or executor, yet cannot (it hath been said) be assigned to a stranger, unless coupled with some present interest." 2 Bl. Comm. *290 (Chitty's Ed.) citing *Shep. Touch.* 238, 239, 322, and *Marks v. Marks* (1719) 1 Strange, 132. Mr. Fearne says that, before the statute of wills, contingent interests of chattel or personal interests were allowed to pass by testamentary disposition, though inheritable interests were not. 1 Fearne, Rem. 368. As to the English act of 1837, one of its prominent purposes seems to have been to enlarge the rule laid down in the decisions, and to extend the power to devise contingent interests, both in realty and personalty, "whether the testator may or may not be ascertained as the person or one of the persons in whom the same * * * may become vested," etc. The right of testamentary disposition of executory interests has never been so far extended in this state, but is still restricted to instances where the limitation is as to the event, and not as to the person.

Section 3080 of the Civil Code, to the effect that any estate may be created in personalty that can be created in realty, and that the rules of construction as to both shall be the same, and section 3101, which provides that, "if the remainder-man dies before the time arrives for possessing his estate in remainder, his heirs are entitled to a vested remainder interest, and to a contingent remainder interest when the contingency is not as to the person, but as to the event," are but mere codifications of the old law. It was so stated as to the latter section in *Payne v. Rosser*, 53 Ga. 662. There an executory devisee died prior to the Code, and before the happening of the contingency upon which his interest was limited to take effect; and it was held that his contingent interest was descendible, —not, of course, to those who were his heirs at the time of his death, but to such persons as sustained that relation to him at the time the executory devise fell into possession; this being in accordance with the old rule that a person who claims a fee simple by descent from one who was first purchaser of the reversion or remainder expectant on a freehold estate must make himself heir to such person at the time when that reversion or remainder falls into possession. The record shows that the executory devise in this case was in both realty and personalty, that the will directed all the property to be equally divided among the executory devisees, that all the personalty was destroyed, and that the fund which it was decreed descended to the heirs of the devisees was the proceeds of the realty sold by an administrator *de bonis non*, etc., under an order of the ordinary for distribution. Under the rule laid down, plaintiffs in error in the case at bar would

have taken by descent the interest of Robert Collins in the property in controversy, if he had not disposed of it by will or otherwise. They were his heirs at law when the executory interest which he took under the deed fell into possession, but such interest had passed under his will to his wife and daughters, under whom defendant in error claims it. If the executory devise in *Payne v. Rosser* was descendible, why was it not devisable? When the contingencies occurred upon which the executory interests of James Smith and Robert Collins were to vest, such interests had united in the defendant in error; and he had the right, at his election, to take the realty itself, rather than the proceeds of its sale. *De Vaughn v. McLeroy*, 82 Ga. 687, 10 S. E. 211. The cases of *Young v. Harkleroad*, 166 Ill. 318, 46 N. E. 1113, and *Elwin v. Elwin*, 8 Ves. 547, strongly relied upon by counsel for plaintiffs in error, are not in conflict with our ruling; for they are simply to the effect, that where there is a limitation over to the heirs of an executory devisee upon his death prior to the happening of the contingency upon which the devise is to vest, pending such contingency the devisee has no interest in the devise which he can dispose of by will, and, if he dies before the contingency occurs, then the persons who may be his heirs at the time of the vesting of the executory devise take as purchasers. Nor do we think, upon careful examination, that any of the other authorities cited by counsel for plaintiff in error are adverse to the conclusion which we have reached; but, as this discussion has been sufficiently extended, we will not comment upon them. Judgment affirmed. All the justices concurring.

(106 Ga. 534)

ATLANTA, K. & N. RY. CO. v. BARKER.

(Supreme Court of Georgia. Oct. 3, 1898.)

EJECTMENT—RIGHT OF WAY—PAYMENT OF PRICE.

1. When the owner contracts with a railroad company to sell to it a right of way over his land, receives a part of the purchase money in cash, and takes promissory notes for the balance, reserving title to himself until the same are paid, and consents to the placing on the land of railroad track, etc., as a part of a continuous line, an action of ejectment cannot thereafter be maintained by such owner to dispossess the company of the right of way so procured.

2. Even if, in such a case, the purchase-money notes remain unpaid, and they become barred by the statute of limitations, this fact is not material in determining the question as to whether the action of ejectment would lie. (Syllabus by the Court.)

Error from superior court, Fannin county; George F. Gober, Judge.

Action by Thomas H. Barker against the Atlanta, Knoxville & Northern Railway Company. Judgment for plaintiff. Defendant brings error. Reversed.

A. S. J. Hall and Alex. & Victor Smith, for plaintiff in error. C. D. Phillips, O. R. Dupree, and Enoch Faw, for defendant in error.

LITTLE, J. As will be seen, the question which arises in this case is whether a landowner who has expressly contracted with a railroad company to sell a right of way for the maintenance and operation of a railroad over his land, and who has consented to the placing on such land of a line of railway track, etc., at great expense upon the part of the vendee, and who, reserving title in himself, made to the railroad company his bond conditioned to convey such right of way upon the payment thereafter of a stipulated sum, is entitled to maintain an action of ejectment against a railroad company which, being the successor of the original vendee, is in the possession of such right of way, on which it is maintaining a line of railroad, and operating its cars in the transportation of passengers and freight. As will be seen by the petition, the plaintiff alleges that in February, 1889, he contracted with the Marietta & North Georgia Railroad Company, which was the predecessor of the defendant in error, to sell it a right of way across certain lots of land owned by him in Fannin county; that the purchase for said right of way contemplated the payment of a certain sum of money, of which he received \$200 in cash, and promissory notes of a third person, due thereafter, for the balance, and delivered to the railroad company his bond obligating himself to make title to it whenever the balance of the purchase money should be paid, with other stipulations unnecessary to be mentioned. The plaintiff further alleges in his petition that he has been paid \$50 on the notes, but that the balance is unpaid, and that, in pursuance of said contract, the company entered upon the lots of land, and appropriated the right of way by its roadbeds and tracks, and remained in possession of the same until the railroad was sold to the present defendant in error.

It cannot be understood from this state of facts that any question arises as to the right of the railroad company to take the land of another for its use without the payment of just compensation. The land, under the circumstances set out in the petition, was not taken in the exercise of the right of eminent domain, but under contract of purchase, and possession surrendered for the particular purpose of constructing a railroad upon it. Had it been the pleasure of the landowner so to do, he could have forbidden the entry of the company on his land, and the appropriation of any part of it to its use, except on payment of its value, and ample power was afforded him by law to enforce this right. While he had undoubtedly the right to have done so, he was not compelled to exercise it, and he had the equal right by contract with the company to permit it to occupy his land. The question as to what would be the remedy of a landowner against a railroad company which entered on his land, and appropriated a portion of it to its use, without his consent, is not involved in the present case.

But the sole question is when, having agreed to the sale of the land to a railroad company for the express purpose of allowing the company to place its tracks thereon, and to use a right of way over it, for the transportation of its cars, and having, under the contract, agreed that the company could do so, can he thereafter maintain an action of ejectment to oust the company from the possession of the right of way so occupied, because a portion of the purchase money has not been paid, and because title to such land still remains in him?

The plaintiff in error contends that an action of ejectment does lie, and cites us to the case of *Remshart v. Railroad Co.*, 54 Ga. 579. It was ruled in that case (third headnote) that the complainant, who asked for an injunction against the continued operation of the road, was not entitled to it, but, if the title to the land was still in him, that he could recover the land by ejectment. It is important to note that in this case there was originally no contract made between the railroad company and the landowner for the sale and purchase of the right of way; nor does it appear in the brief statement of the facts in that case that the landowner consented to the occupancy of the land by the railroad company. We are also cited to the case of *Gammage v. Railroad Co.*, 65 Ga. 614. It will be seen from the facts in that case that proceedings to condemn the land of the plaintiff were had by the railroad company, and damages assessed in the legal manner provided. Pending this litigation, the land on which the right of way was located was sold as the property of Gammage, and bought by Shelby. A bill was filed by the purchaser, alleging an agreement between himself and the former owner as to the recovery for the right of way, and praying for an injunction to restrain the defendant railroad company from passing over the land. In this case, the court *arguendo*, in passing on the question whether the plaintiff was entitled to a writ of injunction, also said, in effect, that, if the title was in the plaintiff, he had a remedy by ejectment; but it must also be noted that in this case the original occupation of the land was against the consent of the owner, who, by the legal means he possessed, resisted the right of the company to take it. We are referred to the case of *Alston v. Wingfield*, 53 Ga. 18, which, after examination, we think is not applicable to the question involved in the present case, the suit there being between private individuals. The same is true in the case of *McDaniel v. Gray*, 69 Ga. 433, to which we were also referred. A similar state of facts also exists in the case of *Fields v. Carlton*, 75 Ga. 554, which we were asked also to examine.

It must be understood that we are not denying the right of the vendor to maintain an action of ejectment to recover land sold by him when, by the contract, he reserved title in himself until the payment of the purchase

money, and where the purchase money is due, and has not been paid. As a general proposition, that is too well settled to require at our hands any consideration. But the question is whether, under the circumstances of this case, the plaintiff in this action had this remedy. In the argument here, counsel for defendant in error insisted that, if this remedy did not exist in this case, it was because the defendant was a railroad company, and he questioned whether a railroad company had any rights superior to those of an individual. Counsel was right. If this action cannot be maintained in the present case, it is because the defendant is a railroad company. Not that a railroad company has or ought to have any more rights than an individual; not because the claims of a railroad company should be entitled to any more consideration than those which any natural person possesses; but it is because a company which has constructed and is operating a railroad between two distant termini, running through several counties, and possibly states, must, for the sake of the public interest involved, be treated as an entirety, and that "one cannot stand by and suffer another to expend money to large amounts on his land as part of a great system of improvement, and then stop (by injunction) the entire system until he is paid. He must move in limine. He must defend at the threshold. Laches is a lock to the door of equity, which few keys, if any, are strong enough to open. *Griffin v. Railroad Co.*, 70 Ga. 167. "A railroad, with its bridges, depots, and other appurtenances, is no less an entirety than a dwelling house, with its kitchen, its chimneys, and its doorsteps; and yet no one has ever supposed that a mechanic's lien could be enforced against the doorsteps or chimneys of a dwelling house, or that they could be sold and removed, to the utter destruction of the whole property." *Loan Co. v. Candler*, 87 Ga. 242, 13 S. E. 560, cited from *Knapp v. Railroad Co.*, 7 Am. & Eng. R. Cas. 395.

In a very strong and able opinion delivered by Mr. Justice Cobb in the case of *Railway Co. v. Hughes* (Ga.) 30 S. E. 972, and from which we freely quote, it is aptly said: "Controversies in reference to the possession of land, where the rights of individuals only are involved, are purely matters of private concern. Controversies in which a corporation charged with the duties incumbent upon carriers of passengers, freight, and mails, in which an effort is made by private individuals or others to take away from such corporation a part of the property in its possession which is absolutely essential to its complete performance of the public duties required of it, become matters of more than private concern, and in which the public is deeply and seriously interested. For this reason it has become settled law that the harsh remedies which would be allowed to one individual against another in reference to the possession of land will not be allowed to one who is seeking to

recover such property from a railroad company, when exact justice can be done to such owner by giving to him remedies which are less severe in their nature, and by which he would secure substantially the same rights; thereby saving to the public the right to require a performance of the public duties incumbent upon the corporation whose property is the subject-matter of the controversy. That a railroad corporation has a right to deprive a person of his property for its uses by doing acts which in an individual would be dealt with as a trespass is not contended for; but when a railroad company enters upon land, and constructs its road without lawful authority, and the landowner acquiesces in the unlawful act and the consequent appropriation of the property to a great public use, until the same has become a necessary component part of the property required by the railroad to perform its public duties, such landowner will be held to have waived his right to retake the property, and will be remitted to such other remedies for the wrong done him as will not interfere with the rights of the public to have the railroad maintained and operated. If this is the case in reference to unlawful entry, for a stronger reason the same result would follow if the entry by the railroad company in the first instance was by the authority or consent of the landowner, even though it be under a parol license, and the legal title to the land still remain in the landowner. The current of modern authority sustains the proposition that when a railroad company is in possession of land, using it as a right of way, although not having acquired the legal title thereto, the landowner would be estopped from ejecting the company from the premises, if it was shown either that the original entry was with his consent, or that the entry without his consent was so long acquiesced in that to allow the company to be ejected would either dismember the property of the company, or essentially interfere with its ability to discharge the public duties incumbent upon it."

For all practical purposes, the ruling in the case to which we have just referred controls the question made in the present case. It must be borne in mind that we are considering only the question of the right of the landowner to have the remedy of ejectment. Of course, the owner of land who has not been paid for the same is entitled, as a matter of right, unless his claim has been defeated by some act or omission on his part, to be paid for the use of such land, whether such use was authorized or unauthorized by him, and "the landowner is entitled to compensation for his property, and this must be ascertained and paid to him before the corporation is vested with the complete right to hold and enjoy his property as its own." Mr. Justice Cobb, in the opinion referred to, cites a number of authorities directly in point, to sustain the proposition laid down in that part of his opinion from which we have quoted; and it would really seem to be a work of supererogation

to add further citations. We will, however, briefly refer to some other adjudicated cases clearly establishing the proposition that, under circumstances such as are involved in the present case, the landowner, while being entitled to the same rights to collect the purchase price of his land as exist in all other cases, is not entitled to the remedy of ejectment to regain possession of the land on which the said railroad track is located. Indeed, some of the authorities, while denying this remedy, go to the extent of declaring that the court will frame a decree so as to protect him in preference to other creditors.

In the argument here, counsel for the plaintiff in error asked leave to review such of the decisions of this court as seemed to conflict with the doctrine that the landowner did not have a remedy by ejectment in cases where the circumstances were similar to those present here. Among them are the cases heretofore referred to as having been cited by counsel for the defendant in error. It is not necessary, in our opinion, so far as the decision of the question involved in the present case is concerned, to review the cases cited by the defendant in error. In all of those to which reference has been made, the facts were that the railroad company entered into possession of the land without the consent of the owner. What the law may be as applicable to cases of that character is a question with which we are not now concerned, as it is not present for consideration. In the most excellent and exhaustive brief of counsel for the plaintiff in error, many very strong authorities supporting his contention have been collected. Some of these and other cases we will briefly note.

The supreme court of Alabama, in *Thornton v. Railroad Co.*, 84 Ala. 109, 4 South. 197, speaking through Stone, C. J., on the question of the right of a party to recover damages for the injury done to her freehold by taking a right of way for a railroad, says: "It is contended for the appellee that, by permitting the railroad company to construct its road and operate it without interference, complainant has estopped herself from now asserting her right to compensation for the right of way. There is no principle of estoppel against this claim, considered as a mere demand for damages for the right of way. If she was seeking to evict the corporation, there might be something in the objection. That is not the purpose of this suit." The supreme court of Arkansas, in *Railroad Co. v. Turner*, 31 Ark. 494, ruling on the question of the remedy of a landowner to have compensation from a railroad company which had located its right of way on his land, says "that the statutory remedy in favor of the landowner was exclusive, and he could not maintain ejectment for land appropriated for a right of way." Further, "if the appellee was not confined to the statutory remedy, as it seems from the authorities he was, he should, in justice, be required to re-

sort to some remedy that would give him the value of his land, and leave the company in the use of the easement." The supreme court of Colorado, on the same question, rules as follows: "If the railway company, without right, enters upon the land of a citizen who is vested with the exclusive right of possession, and attempts to construct its road-bed over the same, the citizen may procure its expulsion by an action of ejectment, provided he does not acquiesce in the possession so taken, or, by affirmative acts, laches, or other conduct, place himself and the railroad company in such a position as to make it inequitable for him to insist upon a restoration of the possession. Conduct of the character mentioned would limit his recovery to the value of the land taken." *Railroad Co. v. School Dist. No. 22*, 14 Colo. 327, 23 Pac. 978. Similar rulings are made in *Morris v. Railway Co.*, 76 Ill. 522. In *Porter v. Railway Co.*, 125 Ind. 476, 25 N. E. 556, it is ruled that, where the owner stands by without objection until the rights of the public and third parties have intervened, he may maintain neither ejectment nor injunction, but may resort to an action for damages. And in *Fazende v. Morgan*, 31 La. Ann. 549, it was ruled that, as a railroad was a quasi public work, one who permitted without complaint a railroad company to use his land and construct its road cannot thereafter reclaim it, free from the servitude he has permitted to be imposed on it; and, while this presumed waiver is a bar to an action to dispossess the company, the owner is not deprived of his action for damages for the value of the land. The courts of many other states have ruled the same principle. See *Perkins v. Railroad Co.*, 72 Me. 95; *Railroad Co. v. Strauss*, 87 Md. 238; *Haskell v. New Bedford*, 108 Mass. 214; *Harlow v. Iron Co.*, 41 Mich. 336, 2 N. W. 913; *Walker v. Railroad Co.*, 57 Mo. 265; *Hull v. Railroad Co.*, 21 Neb. 372, 32 N. E. 162; *Hentz v. Railroad Co.*, 13 Barb. 646; *Railroad Co. v. Battle*, 68 N. C. 540; *Goodin v. Canal Co.*, 18 Ohio St. 169; *Sturgis v. Knapp*, 33 Vt. 511. In 158 U. S., on page 11, 15 Sup. Ct. 758, Mr. Justice Shiras, delivering the opinion of the court in the case of *Roberts v. Railroad Co.*, uses this language: "So, too, it has been frequently held that if the owner, knowing that a railroad company has entered upon his land, and is engaged in constructing its road without having complied with the statute requiring either payment by agreement or proceedings to condemn, remains inactive, and permits them to go on and expend large sums in the work, he will be estopped from maintaining either trespass or ejectment for the entry, and will be regarded as having acquiesced therein, and be restricted to a suit for damages." For authority, he cites *Railroad Co. v. Ormsby*, 7 Dana, 276, and other reported cases. The English courts have recognized the same doctrine as correct. In 17 Beav. 60, where a canal was located through

certain land, it was "held in equity that A., having thus sanctioned the formation of the canal, was not entitled to retake possession, but only to fair compensation." And in the case of *Doe v. Railway Co.*, 71 E. C. L. 525, it was held: "Even if the effect of the expiration of the three years were to make it impossible, under the clause of the act, to take proceedings for ascertaining the amount of compensation, such effect has arisen from the neglect of the owner of the land; and he cannot, by his own neglect, make wrongful that possession of the land by the company which was rightful when they made their entry. We are therefore clearly of opinion that, if the original entry was lawful, the present possession was lawful, and that this ejectment cannot be sustained."

In our opinion, plaintiff was not entitled to maintain an action of ejectment against the railroad company in the court below, nor recover possession of the land sued for; he having consented to the entry of the company with the knowledge that it was to be used as part of the right of way of the railroad company. This is the only question which we have to decide in relation to his right. It will be time enough to consider his right to compensation in a different form of action when that question is made.

2. The second ground of demurrer is that any cause of action which plaintiff may have had is barred by the statute of limitations, as appears on the face of his petition. We are of opinion that the court did not err in overruling the demurrer on this ground. Even if the original notes taken by the plaintiff in his contract to sell the land were barred by the statute of limitations, that fact in no way could affect the merits of the case presented by the petition. Under the action of ejectment, the question is one of title, and not one of limitations of the right of action on an alleged debt. The petition in this case sought to recover possession of the land on which the company entered, and constructed its road, by agreement and with the consent of the defendant in error; and, whatever may be the rights of the owner to recover the compensation agreed on, it must be held that, for the reasons stated, he cannot now revoke the consent he gave to such appropriation of the land, nor disturb the possession to which he consented with a knowledge of the use to which it was to be appropriated, and the court erred in overruling the demurrer. All the justices concurring. Judgment reversed.

(106 Ga. 517)

HARRISON v. HARRISON et al.

(Supreme Court of Georgia. Oct. 3, 1898.)

WILLS—ESTATE DEVISED—TENANCY IN COMMON—CONDITIONS—PERFORMANCE.

1. A will, by which land is devised to named legatees, "to have and to hold in common for a home and support so long as they remain together. Should one or more leave, they can

take such as is given them individually in this will, but have no share or control of this that is given in common, without the consent and signature of those that remain on the place," with restrictions on the power of either to alienate or leave any part of the land without the consent of all,—constitutes the legatees named tenants in common in the land devised, with a condition subsequent that the whole land be used for the support of such of the named legatees as choose to reside on the place.

2. If, for any reason, the condition becomes incapable of performance, it will be rejected, and the devise will be held to be absolute. Accordingly, if one or more of the legatees be forced to remove from the land by the cruel treatment of another, the condition imposed by the will becomes impossible of execution, and the use of the land follows the title divested of the condition.

3. The petition in this case contains averments sufficient, if proved, to authorize a recovery of some amount from one of the defendants, and it was error to dismiss it on demurrer.

(Syllabus by the Court.)

Error from superior court, Washington county; E. H. Callaway, Judge.

Petition by Mary J. Harrison against William F. Harrison and another for an accounting and partition. There was a judgment for defendants, and plaintiff brings error. Reversed.

Evans & Evans and Jas. A. Harley, for plaintiff in error. R. H. Lewis and Jas. K. Hines, for defendants in error.

LITTLE, J. Mary J. Harrison filed her petition in the superior court of Washington county, making, in brief, the following case: In July, 1877, the will of her father, William D. Harrison, was admitted to probate, and letters testamentary were issued to William T. Harrison and Seleta L. Harrison. After providing for a number of specific legacies to several of his children, the thirteenth item of the will is in the following language: "That all my lands and other property, after the above-named bequests have been settled, I give and bequeath to my five children that remain with me, to wit, Seleta L., Emma S., Martha W., Mary J., and William T.; to have and to hold in common for a home and support so long as they remain together. Should one or more leave, they can take such as is given them individually in this will, but have no share or control of this that is given in common, without the consent and signature of those that remain on the place. No one or more shall sell, lease, rent, or in any way convey to any other than those that remain on the places without the signature of the five named in this item." The petition alleges that the realty on which item 13 operated consisted of a tract of land lying in Washington county, containing 400 acres (fully described), and also another tract of land in Johnson county, containing 200 acres (also fully described), and that the personal property was of the value of \$1,500. The petition also sets out as a fact that W. T. Harrison has had the exclusive management and

control of the property referred to in item 13 since his qualification as executor, in July, 1877; that he has made no annual returns. It also alleges that W. T. Harrison has received from the property referred to in item 13 the sum of \$1,200, which he has invested for his own use and benefit, and denies to petitioner the right of participating therein. It also alleges that William T. Harrison, from the rents and profits of the property referred to in item 13, has purchased two tracts of land in Hancock county, and that at the request of W. T. she and her sisters who are named in the thirteenth item in 1894 empowered said W. T. to sell the Johnson county land, which he did for \$500, but has not accounted to her for any of the purchase money. It is also alleged that the affairs of the testator have long since been settled, and there is no legal obstacle in the way of a final distribution. The petitioner also alleges that she lived on the land named in the item, which was the W. D. Harrison home place, with the said W. T. Harrison and her sisters, Seleta L. and Emma, from the death of her father until July, 1895; that her treatment by her brother, W. T., was so cruel and unpleasant that she was forced to leave said land, and reside with her sister; that since her removal the defendants have set up an adverse claim to the home place, and pretend that petitioner forfeited her interest in that portion of the land known as the "home place" by her removal therefrom. The petitioner makes W. T. Harrison and Seleta L. Harrison defendants, and prays that they come to a full and complete accounting of the rents, issues, and profits of the property embraced in the thirteenth item of the will, and that the court decree that the defendants pay over to petitioner her share of such rents and profits; and she prays that she have a special lien for said sum on the land lying in Hancock county, purchased by the defendant W. T. with the funds arising from the estate of W. D. Harrison. Petitioner also prays to recover her share of the home place, with reasonable rents since July, 1895. To this petition the defendants demur on the following grounds: The petition sets out no cause of action; the petition shows that the petitioner has no interest in the land and other property devised and bequeathed in the thirteenth item of the will; because Martha W. Dugan and Emma S. Harrison, sisters of petitioner named in the thirteenth item, are not made parties defendant; because petitioner does not set out any definite sum due her by defendants; because, petitioner having assented to the terms of the thirteenth item from the probate of the will until July, 1895, she is now estopped from claiming contrary thereto. The demurrer was sustained, and the petition was dismissed. At the September term, 1897, by leave of the court, petition was amended, and at the same term the defendants also, by leave of the court, amended their demurrer. Petitioner except-

ed, and assigned as error the ruling of the court in allowing the demurrer to be amended and in sustaining the demurrer to the petition.

1. Questions affecting the construction of this will were before this court in the case of *Duggan v. Harrison*, 97 Ga. 738, 25 S. E. 387. That decision grew out of an application on the part of Martha W. Dugan, one of the legatees named in the will, to bring W. T. and Seleta Harrison, as executors, to a settlement before the ordinary. The decision in that case ruled the following propositions: (1) That the executor and executrix, by living upon the land and permitting the other devisees to do so, assented to the legacy in so far as the income was concerned, and all of these parties accepted the legacy to this extent. (2) If Mrs. Dugan was entitled to any of the rents and profits which accrued during the period of her voluntary absence from the land, her claim is not against the estate, but against the other four as individuals. (3) The case did not involve a ruling on the question as to whether the other legatees were liable to her. On the latter point Mr. Justice Lumpkin, who delivered the opinion of the court, says: "The terms of the will, so far as it relates to this land, are peculiar, and it is quite a difficult matter to determine what is the precise interest of Mrs. Dugan either in the land itself or in its income during the period while she was absent from the premises and the other devisees remained upon, used, and enjoyed the property in common. We are quite certain, however, she has no right to demand of W. T. Harrison and Seleta, in their representative capacity, an accounting as to the income of the land during the time she was absent." Under the case made here we are called on to determine the rights of the plaintiff in this land under the terms of the will as affected by the allegations made in the petition. It will be seen, by reference to the petition, that the action is brought against the persons named as executor and executrix of the will, but not in their representative capacity. Indeed, while Seleta L. Harrison is made formally a party defendant, no specific prayer for relief is made as against her.

As said by Mr. Justice Lumpkin, the language of the thirteenth item of this will is peculiar, and it is difficult to carry into effect the evident intention and wish of the testator, and at the same time preserve to the legatees their absolute legal rights under the instrument. It would seem that some of the language used in making the devise evidences an intention to create an estate in joint tenancy. This estate only exists when the tenants have one and the same interest arising by the same conveyance, commencing at the same time, and held by one and the same undivided possession. 2 Bl. Comm. 180. So far these incidents are present. But the principle incident to an estate in joint tenancy is the right of survivorship, which, un-

der no fair construction of this item, can be found to be present. However, we will not enter into a discussion to determine whether the will created an estate in joint tenancy, for, while we do not think it does, yet, if it could be construed to do so, such estates are abolished by our statute, and must be held to be tenancies in common. Civ. Code, § 3142. By reference to the will as a whole, it will be found that the expressed intention of the testator as set out in the preamble was to divide the property "among my children as equitably as the nature of the case will admit, some having received more than others, and some having been with me longer, and some having done more for me than others." Again, in item 2 of the will, the testator directs "that my property and effects be divided among my children in the following order." Coming now to the point of difficulty, the thirteenth item, the words preceding those which fix the character of the estate devised are "that all of my lands and other property, after the above-named bequests have been settled, I give and bequeath to my five children that remain with me, to wit," so that it cannot be doubted that it was the intention of the testator to give to each of the children named in the thirteenth item of his will equal shares in the property therein described. It is true that the words used in fixing the estate of each limits the use of the property so devised. Each of said children is "to have and to hold in common for a home and support so long as they remain together. Should one or more leave, they can take such as is given them individually, but have no share or control of this that is given in common, without the consent and signature of those that remain on the place." If it be contended from this language that when one or more of the legatees remove from the place the removal works a forfeiture of their estate in the land theretofore devised, the reply is that forfeitures are not favored; and, while it is the duty of the courts to give effect to the intention of the testator, a forfeiture will not be decreed unless expressed in plain and unambiguous language. We do not construe this language to work a forfeiture by removal from the place. The property is given to the children "to have and to hold for a home and support so long as they remain together." Suppose all of the children should remove from the land, it would hardly be claimed that the last one to remove took an estate in fee in the whole of the land; and yet such would be the only logical conclusion of the contention that the removal by one from the land forfeited all his interest therein, because, when all had removed save one, then that one, under the contention, would have the whole land, and title would vest in him; and, as there is no limitation over, the right of disposition would rest in him. As we construe this item, it vests in the five children named equal interests in the land and

other property covered by this item as tenants in common. So long as any of the named children remain on the home place, the rents, issues, and profits of the place are to be used exclusively for the support and maintenance of those who remain. When the place is abandoned by all, the property is relieved from this charge, and the devisees are entitled as tenants in common to its control and disposition. It is not an uncommon thing for devisees to be made on a condition requiring residence in some particular place or some particular house. The rule is that all such conditions are to be reasonably interpreted, if possible, or else pronounced void as unreasonable of themselves, and obnoxious to public policy. This latter view is tenable where the restraint must so operate as to involve the donee in some breach of permanent duty; as, for example, in compelling married persons to live apart. On this subject it is said in Schouler on Wills (2d Ed.; par. 604): "Ordinarily, one who is to be supported under a provision in a will is not limited to live in a particular place, especially if there be good reason for leaving it. But a condition that an infant shall live during minority with a suitable person named as sole guide and guardian, may be upheld under most circumstances," and that "a condition not uncertain or ambiguous happens to be injudicious is an insufficient reason for setting it aside, but all conditions should be justly and reasonably construed." If the terms of this will are to be so construed as that the condition of residence was required in order for the estate to vest, even then such condition would be liberally construed. In the case of *Fillingham v. Bromley*, T. R. 530, Lord Eldon said: "Suppose the devisee had been a member of parliament, and had had a house in London, would you say that he did not live and reside at J.? Should the devisee be required to reside in the house during a defined period, or to make it his principal or usual place of abode, the condition may still be frustrated, for personal presence in a specified place for any part of a day is sufficient residence for that day, and it is not necessary to pass the night of that day there." *Jarm. Wills*, p. 901, citing *Kay*, 534; 24 *Beav.* 430; 25 *Ch. Div.* 605. But, as we have before said, we do not construe the terms of this will as vesting an estate in these children on condition that they live on the place, which is to be forfeited by removal. As we construe its terms, it vests an absolute estate in each of these children; but while any one or more of the five remain on the land the profits arising thereupon shall be devoted to the support of those who so remain; for the testator's intention to qualify reasonably what he chooses to dispose of is not incapable of taking effect when not contrary to law, and a devise absolute in terms may be modified in effect by other clauses of the will, and restrict the gift in accordance with his intention. *Schouler, Wills*, §§ 599-602.

It will be noted that the plaintiff alleges she lived on the home place with her brother and sisters from the death of her father until July, 1895; that her treatment by her brother, W. T., was so cruel and unpleasant that she was forced to leave the land, and reside elsewhere. If these allegations be true, then such forced removal is not to be counted against her. She had the same right, under the will, to reside on the land as her brother had, and he as much right as she had, and if the conduct of either towards the other was such as, with due regard to personal comfort, required one to remove, then it may well be held that the use contemplated by the testator was impossible of performance; and in that event the devisees would be entitled to immediate possession of the estate, divested of the right of use as prescribed in the will. Conditions subsequent are construed beneficially, in order to save, if possible, the vested estate or interest; and if such condition prove illegal, or incapable of performance, whether as against good morals or as impossible under any circumstances, or is rendered impossible in a particular case and under existing circumstances, the gift, whether of real or personal property, relieved of the condition, becomes absolute in effect. 2 *Jarm. Wills*, 10-13; 35 *Beav.* 312; 4 *Ch. Div.* 272; *Conrad v. Long*, 33 *Mich.* 78; 4 *Kent, Comm.* p. 130. And Prof. Schouler, in his work on Wills (section 600), says that "public policy may constitute an element in such cases besides, and, as conditions are here construed into conditions subsequent rather than precedent,—for conditions precedent are never favored in the construction of wills,—the impossible, illegal, or impolitic condition being rejected, the gift stands absolute"; and he further says that "a will, of all writings, deserves the most flexible interpretation which can lay open the mind of its maker." The testator devised this property in equal interests to his named children, but intended that those of them who chose to do so should reside on the land, and receive an equal part of the rents and profits of the property devised. This right vested equally in each of these named children, under the will. If, by disagreement among themselves, it became impossible for the use to continue,—if by the conduct of one any other of them was forced to leave, possessing an equal right with the others,—that one could not be legally deprived of the benefit which the testator intended him to enjoy. It will not do to say that the one so compelled to leave would have a right of action to recover his damages against that other for his eviction because he was entitled to live on that place, and have a home there, and the deprivation of this right is contrary to the will of the testator, and, that intention being thus impossible of performance, such devisee is entitled then to have the full and absolute use of the estate devised to him. For such right the only method of enforcement is to have his estate free from the condition imposed;

and if it is found to be true that petitioner was subjected to annoyance and bad treatment on the part of one of the other devisees having equal, but no more, rights than hers, she is entitled to her estate free of the condition. Indeed, we might go further, and say that the home and support intended by the testator was that it should be a reasonable one, and, if such could not be afforded from any cause,—the unproductiveness of the land, the incapacity of the dwelling house to afford suitable shelter, or other similar causes,—the condition would be held to be impossible of performance, and be therefore defeated.

Sufficient averments are made in this case, if proven, to defeat the condition attached to the devise,—that is, that the property devised should be used for a home and support for the five children named. In that event the petitioner would have the right to immediate possession of that portion of the estate devised to her, and could exercise the right of partition, or seek any other remedy afforded to a tenant in common. She could not, however, have any partition under the proceeding instituted in this case, if for no other cause than for the want of parties. She, however, alleges in the petition that one of the defendants—W. T. Harrison—has received the sum of \$500 from the sale of the Johnson county land, sold by the consent of all of the devisees, and in which she alleges she has a one-fifth interest. She also alleges that he has received the rents and profits of the home place, in which she has an interest. The allegations in the petition are sufficient to allow it to be held in court at least to recover such of these items as she is entitled to receive from the defendant, and, limited as it may be in this respect, the petition sets forth a legal cause of action to recover such interests, and the court erred in sustaining the demurrer thereto, and the judgment of the court is reversed. Judgment reversed. All the justices concurring.

(104 Ga. 446)

**EXCHANGE BANK OF MACON v.
LOH et al.**

(Supreme Court of Georgia. July 18, 1898.)

INSURANCE—INTEREST—CREDITORS—EVIDENCE.

1. A creditor has, for the purpose of indemnifying himself against loss, but for no other, an insurable interest in the life of his debtor.

2. This interest cannot exceed in amount that of the indebtedness to be secured.

(a) Such indebtedness may, however, include the cost of taking out and keeping up the insurance, if made a charge against the debtor or his estate, or upon the proceeds of the policy when collected.

3. Courts should not concern themselves with the disposition of the proceeds of "wagering" policies.

4. The evidence in the present case warranted a finding that the policy in question was not of this character, but that it was in good faith taken out by the insured himself, and by him assigned to his creditor as collateral security merely; and the judgment rendered was not contrary to law.

(Syllabus by the Court.)

Error from superior court, Bibb county; W. H. Felton, Jr., Judge.

Petition by Edward Loh, administrator of the estate of John D. Hudgins, deceased, against the Exchange Bank of Macon and others. A judgment was entered, and the bank brings error. Affirmed.

Bacon, Miller & Brunson, for plaintiff in error. Hardeman, Davis & Turner, Ryals & Stone, Steed & Wimberly, A. W. Lane, Guerrey & Hall, Dessau, Bartlett & Ellis, Dasher, Park & Gerdine, Morcock & Warren, and L. D. Moore, for defendants in error.

LUMPKIN, P. J. It is provided in section 2114 of our Civil Code that a policy of life insurance may lawfully be taken out only upon the life "of the assured, or of another in whose continuance the assured has an interest." It is well settled that a creditor has an insurable interest in the life of his debtor, but the nature and extent of this interest has become a seriously complicated question. Much of the confusion now surrounding this subject is, we think, attributable to two erroneous views which have been entertained and announced by quite a number of the most respectable courts and judges in this country. The first is that a contract effecting insurance upon the life of a debtor for the benefit of a creditor is not a contract of indemnity; and the second is that the creditor's insurable interest in the debtor's life is not confined strictly to the amount of the indebtedness to be secured. Before proceeding further, it may be remarked that the form in which the transaction is clothed is utterly immaterial. It makes not a particle of difference whether the policy be payable to the insured, or his estate, with an assignment to the creditor, or payable directly to the creditor as the nominated beneficiary. The real thing to be ascertained in any given instance is, what was the actual object of the parties, for by this test alone is the legality of what they did to be determined.

1. Our first proposition is that effecting insurance for the purpose of securing an indebtedness is a contract of indemnity, and nothing else. We have the utmost confidence in the correctness of this assertion. Indemnity is the only logical end to be attained by a transaction of this kind. What possible right has a creditor to be the beneficiary of such insurance except to protect himself against loss? And what is such protection, if not indemnity? Notwithstanding the fact that eminent jurists have held otherwise than as above laid down, we cannot help thinking that this is a very plain proposition, and one as to which there ought to be no serious difference of opinion. We will cite a few of the great array of authorities which we could produce in support of our position, making, as we proceed, such comments as may seem appropriate.

In *Godsall v. Boldero*, 9 East, 72, we find the following: "A creditor may insure the

life of his debtor to the extent of his debt, but such a contract is substantially a contract of indemnity against the loss of the debt." Lord Ellenborough said: "This assurance * * * is, in its nature, a contract of indemnity, as distinguished from a contract by way of gaming or wagering;" and, in this connection, he quoted a pertinent extract from Lord Mansfield's opinion in *Hamilton v. Mendes*, 2 Burrows, 1210. It is true that in the latter case Lord Mansfield was dealing with a case of marine insurance, and it is also true that the *Godsall Case* was subsequently overruled; but it is apparent that Lord Ellenborough thought the doctrine of the marine insurance case was applicable to the life insurance case which he had under consideration; and in this view we concur. Whenever it is admitted that a contract of life insurance made for the benefit of a creditor is not one having indemnity for its object, we necessarily stamp it as a purely wagering contract. There is much reason for the position that even ordinary contracts of life insurance, whereby a man insures his own life for the benefit of those dependent upon him, are contracts for indemnity merely; but we do not care to enter upon a discussion of this question, or assail the great current of authority tending to establish the contrary, this being a matter not involved in the case now before us. Accordingly, we will adhere strictly to our text, which is that life insurance effected to secure a debt is, and can be, for nothing else but indemnity against loss. A creditor secured by a policy of marine or fire insurance can collect thereon, for his own benefit, so much only as will save him from actual loss; the precise amount of which is easy of ascertainment. The interest of a creditor holding as security a life policy can be as readily computed in dollars and cents, being properly measured by the amount of the debt, which, as we shall, before concluding, endeavor to show, constitutes the sole basis of his insurable interest. How, then, can it be said that it would be against public policy to allow a creditor to speculate upon the mere chance of property being destroyed by the dangers of the sea or by fire, and not equally repugnant to public policy for him to speculate upon the life of a fellow creature? And if the creditor protected by the life policy can lawfully stipulate for anything more than indemnity, what prevents the transaction from being a speculation, pure and simple? We are at a loss to perceive any rational distinction between life and marine or fire insurance in so far as the supposed right of a creditor to effect insurance beyond the extent of his insurable interest is concerned. Surely, in view of section 2117 of our Civil Code, which declares that the principles governing "fire insurance, wherever applicable, are equally the law of life insurance," this court would not be justified in giving recognition to any such intangible and specious distinction.

In *Port. Ins.* (2d Ed.) p. 13, it is said that a creditor who insures his debtor's life "obtains a contract of indemnity against the loss of his debt by the death of the debtor before it has been paid," and that "in such a case the debt is not the mere excuse for the policy, but the securing of the debt, or indemnification against its possible loss, is the reason for the insurance being effected." This author says that Lords Mansfield and Ellenborough "both undoubtedly considered that insurance *sur autre vie* was a contract of indemnity," and that the case in 9 East was decided upon this view. He then refers to the fact that this case was overruled in *Dalby v. Insurance Co.*, 24 Law J. C. P. 2, 15 C. B. 365, and *Law v. Policy Co.*, 24 Law J. Ch. 196, 1 Kay & J. 223, and asserts that the decision in the first of these two latter cases was based upon a misinterpretation of the English "gambling act," and divers misconceptions of the real nature of a contract of life insurance effected for securing a creditor. See *Port. Ins.* (2d Ed.) pp. 14, 15. On page 17 he states that a policy of insurance taken out by a man on his own life has been settled not to be a contract of indemnity, "but to be a contract by the insurer to pay a certain sum on the happening of a given event,—usually the death of the assured, or his attaining to a certain age; and the sum will not vary with reference to the greatness or smallness of the loss to the family of the assured." This alleged distinction between ordinary life insurance which a man takes out for the benefit of his family and that taken out for, or assigned to, a creditor for his protection, was recognized as correct by the supreme court of the United States in *Bank v. Hume*, 128 U. S. 195, 9 Sup. Ct. 45; but it was therein distinctly laid down that the latter was a contract of indemnity. Mr. Chief Justice Fuller said (page 205, 128 U. S., and page 44, 9 Sup. Ct.): "Marine and fire insurance is considered as strictly an indemnity; but while this is not so as to life insurance, which is simply a contract, so far as the company is concerned, to pay a certain sum of money upon the occurrence of an event which is sure at some time to happen, in consideration of the payment of the premiums as stipulated, nevertheless the contract is also a contract of indemnity. If the creditor insures the life of his debtor, he is thereby indemnified against the loss of his debt by the death of the debtor before payment." This high court had previously, in at least one case, recognized the correctness of the doctrine that life insurance for a creditor's benefit was a contract for his indemnity. "In cases where the insurance is effected merely by way of indemnity,—as where a creditor insures the life of his debtor for the purpose of securing his debt,—the amount of insurable interest is the amount of the debt." Mr. Justice Bradley, in *Insurance Co. v. Schaefer*, 94 U. S. 461, 462. An assignment of a life insurance policy for the purpose of securing a creditor is "for

his indemnity." 13 Am. & Eng. Enc. Law, 648. "A creditor's claim upon the proceeds of insurance intended to secure the debt should go no further than indemnity, and all beyond the debt, premiums, and expenses should go to the debtor and his representative, or remain with the company, according as the insurance is upon life or on property." 2 May, Ins. (3d Ed.) § 459a.

In view of the foregoing authorities and of the sound sense and reason of the rule they lay down on this subject, it is difficult to understand how there can be any doubt that an insurance policy upon a debtor's life, held by a creditor as security for a debt, is simply and merely, so far as the latter is concerned, a contract for indemnifying him against loss. To our minds, no other view of this matter can be accepted as sound. We could, as already intimated, produce many citations to the same effect as those appearing above, but we do not think this is necessary, for we are satisfied that, if our first proposition really required demonstration, it stands proved.

2. A single step carries us easily and naturally to the next proposition we are to consider; which is that the insurable interest which a creditor has in the life of his debtor cannot exceed in amount that of the indebtedness to be secured. Before proceeding with this discussion, we will briefly explain the meaning of the word "indebtedness," as here used. We wish to be understood as employing it in a liberal sense, and, accordingly, as holding that it may embrace not only a debt or debts actually existing when the insurance is taken out by the debtor, or is thereafter assigned to the creditor, but also additional indebtedness to arise upon the making of further loans or advances by the creditor to the debtor; such, for instance, as cash for premiums to be paid in obtaining the policy, or in keeping it alive. Manifestly, if expenses thus incurred by the creditor are made a charge against the debtor or his estate, the creditor may, by agreement, hold the policy as security therefor, and look to its proceeds for his reimbursement. The same is also true if such expenses, though not made a debt generally against the debtor or his estate, are made a charge upon the money to be realized from the policy; for this, in effect, is making the cost of the insurance ultimately payable out of a fund which in law primarily belongs to the debtor's estate subject to the creditor's right to so much thereof as he is entitled to receive upon his secured claim or claims against the deceased. A creditor cannot, however, rightfully appropriate the proceeds of a policy held by him as a collateral security to the repayment to himself of sums voluntarily paid by him for premiums for which the debtor was in no way liable, and which could not lawfully be made a demand against his estate or its assets. If a creditor desired protection by way of insurance upon his debtor's life, and chose to pay for it himself, this would be

proper enough; but the insurance would be available to the creditor to no greater extent than the amount of his insurable interest at the time the insurance was effected, viz. the amount of the then existing indebtedness.

We will now undertake to show that, whenever it is attempted to give to a creditor any greater insurable interest in a debtor's life, the transaction becomes a wagering contract. If one cannot, for his own benefit, insure a life in which he has no interest at all, why does not insurance for a creditor's benefit, when effected for anything beyond indemnity,—the right to which gives the creditor his insurable interest,—stand upon the same footing? Whenever a creditor undertakes to stipulate for more than the amount of his just demands, what distinguishes the transaction from a wagering contract, pure and simple, having for its object speculative gain? If he can lawfully take one dollar more than the amount of his debt, why can he not take any number of dollars within the limits of the policy? Where, and upon what principle, is the line to be drawn? An examination of scores of cases bearing upon every conceivable phase of these questions has satisfied us that it has become a difficult, if not an impossible, task to make the daylight of truth shine so clearly upon the complicated and conflicting mass of decisions as to bring into clear view the correct rule relating to this class of insurance. A hurried examination of the cases cited in this opinion would disclose that the courts of this country have indulged in quite a variety of holdings thereon. An exhaustive list of all the cases touching upon the subject, with even a brief comment upon each, would unduly expand this opinion, if, indeed, it did not make it fill a volume of our reports. The language quoted supra from the opinion of Mr. Justice Bradley in the case cited from 94 U. S. shows that he thought the amount of the creditor's insurable interest was to be measured by the amount of the debt. In *Roller v. Moore's Adm'r*, 86 Va. 517, 518, 10 S. E. 241, 243, Lacy, J., said: "To the extent in which the assignee stipulates for the proceeds of the policy beyond the sums advanced by him, he stands in the position of one holding a wager policy." The supreme court of Tennessee, in *Rison v. Wilkerson*, 3 Sneed, 565, held that a creditor to whom had been assigned a policy issued to his debtor could retain of its proceeds no more than the amount of the original debt and certain premiums paid by the creditor to keep the policy alive. *Coon v. Swan*, 30 Vt. 6, is a case supporting the doctrine that a creditor cannot lawfully keep any more of the proceeds of a policy insuring a debtor's life, and collected by the former, than the amount actually due by the debtor, although the policy was payable to the creditor, and the contract between the parties undoubtedly contemplated that the creditor might make a profit by the transaction. In *Cheeves v. Anders*, 87 Tex. 287, 28 S. W. 274, it was held

that: "The limit of interest of a creditor in a policy upon the life of his debtor is the amount of such debt and interest, plus amount expended to preserve the policy, with interest thereon." The following are extracts from 13 Am. & Eng. Enc. Law: "Where the assignment is for the purpose of securing a creditor, although he is entitled to recover the face of the policy, he cannot hold what is not necessary for his indemnity. The legal representatives of the debtor will be entitled to the balance." Page 648. "Where insurance is effected on the life of a debtor in favor of a creditor, whether by the debtor himself or the creditor, and whether the premiums are paid by the debtor or the creditor, the latter, on the death of the former, is entitled to the amount of his debt and premiums, and the representatives of the debtor to the balance of the proceeds of the policy." Page 653. Bacon, in his work on Benefit Societies and Life Insurance (volume 1, § 250a, 2d Ed.) says: "A creditor has an insurable interest in the life of his debtor, and can insure the life of the debtor without his consent, but such interest is limited to the amount of the debt." And see, in this connection, 2 May, Ins. (3d Ed.) § 459a, cited *supra*.

Giving to the word "indebtedness" the comprehensiveness above indicated, the following cases all to some extent sustain the rule for which we are contending—that the creditor's insurable interest in the debtor's life cannot exceed the amount of the secured indebtedness: *Insurance Co. v. Robertshaw*, 28 Pa. St. 189; *Downey v. Hoffer*, 110 Pa. St. 109, 20 Atl. 655; *Ruth v. Katterman*, 112 Pa. St. 251, 3 Atl. 833; *Seigrist v. Schmoltz*, 113 Pa. St. 326, 6 Atl. 47; *Schonfield v. Turner*, 75 Tex. 324, 12 S. W. 626; *Insurance Co. v. Hazlewood*, 75 Tex. 838, 12 S. W. 621; *Cawthor v. Perry*, 76 Tex. 383, 13 S. W. 268; *Lewy v. Gilliard*, 76 Tex. 400, 13 S. W. 304; *Goldbaum v. Blum*, 79 Tex. 638, 15 S. W. 564; *Helmetag's Adm'r v. Miller*, 76 Ala. 183; *Insurance Co. v. O'Brien*, 92 Mich. 584, 52 N. W. 1012; *Cammack v. Lewis*, 15 Wall. 643; *Page v. Burnstine*, 102 U. S. 664; *Warnock v. Davis*, 104 U. S. 775. We do not, however, wish to be understood as asserting that these cases are closely in point, or as concurring in all of the rulings therein made; certainly not in those whereby the courts undertook the distribution of funds arising from the collection of wagering policies. It is not essential to our present purpose to analyze these cases, discuss the various questions dealt with therein, or point out specifically the conclusions to which we do not assent. Without undertaking to do this, we simply cite them as containing decisions and dicta which, to a greater or less extent, recognize the correctness of our present contention. In the highest courts of at least two states—Maryland and Pennsylvania—efforts have been made to establish the proposition that a creditor may lawfully have insurance upon the life of his debtor in an amount greater than that of the

debt secured, provided there is not a "gross disproportion" between these two amounts. The case of *Rittler v. Smith*, 70 Md. 261, 16 Atl. 890, was a suit by the administratrix of the insured to recover of a creditor the excess remaining in his hands after satisfying all his demands against the insured. It appears that the creditor, of his own motion, insured the life of his debtor, and paid all premiums. The debt was \$1,000. The policies, on their face, amounted to \$6,500, but, owing to certain stipulations therein, only \$2,124.82 was collected. The surplus amounted to \$474.53. The policies were issued in the name of the creditor, and, so far as appears, there was no understanding, express or implied, between him and his debtor, that the latter was, in any event, to have any interest in the policies or their proceeds. The court held that the creditor was entitled to the surplus. The decision was based on the ground that the creditor had a right to procure a policy on the life of his debtor, provided there was not "such a gross disproportion between the debt and the amount of the policy as to stamp the transaction with want of good faith, and as a mere speculation or wager," and that, accordingly, the entire proceeds of the policy belonged to the creditor. Such a "rule" would seem entirely too loose, and itself too "speculative," to admit of anything like a reasonable and practical application, even if it is to be considered as resting upon sound doctrine, rather than as repugnant to the spirit, if not directly opposed to the letter, of the law in regard to wagering contracts. The supreme court of Pennsylvania, in the case of *Cooper v. Shaeffer*, 11 Atl. 548, held that, "where the disproportion between the amount of a policy taken out by a creditor on the life of his debtor and the debt thereby secured is very great,—as where the insurance is \$3,000 and the debt \$100,—it is the duty of the court to declare the transaction a wager, as matter of law." This case does not appear in the Pennsylvania state reports. In the opinion, Sterrett, J., characterizes as "a just and practical rule" a suggestion which Paxson, J., speaking for himself, had made in *Grant's Adm'r v. Kline*, 115 Pa. St. 618, 9 Atl. 150, to the effect that a policy taken out by a creditor on the life of his debtor ought to be limited to the amount of the debt, with interest, and the amount of premiums, with interest thereon, during the expectancy of the life of the insured, according to the *Carlisle Tables*. In the subsequent case of *Ulrich v. Reinhoehl*, 143 Pa. St. 238, 22 Atl. 862, a policy for \$3,000 was assigned to a creditor, absolutely, to secure a debt of \$110.02. The creditor at the trial offered evidence to show the expectancy of the deceased according to the *Carlisle Tables*, and expert testimony going to prove that, had deceased lived up to such expectancy, the total amount invested in the policy would have been \$4,836.31. In the opinion, which was delivered by the learned jurist last mentioned, he having in the

meantime become chief justice, he undertakes to prove the correctness of the above-mentioned "rule"; it being thus stated: "A creditor may lawfully take out a policy of insurance on the life of his debtor in an amount sufficient to cover the debt, with interest, and the cost of such insurance, with interest thereon, during the period of the debtor's expectancy of life according to the Carlisle Tables; but, if such amount be exceeded, the policy may be a wagering transaction." The substance of the argument embodied in the opinion is that, if the principal and interest of the debt secured, the aggregate sum of the premiums which would have to be paid during the entire period of the expectancy of the insured, in case he lived out the same, and the interest on such premiums, would, all together, amount to a sum greater than the face of the policy, it would not be a wagering contract, but would be one if the chances were that the insured would not live out his expectancy, and there would be a consequent probability that the proceeds of the policy would exceed a sum representing the total cost of the policy and the amount of the debt. Among other things urged in support of the views above outlined, Chief Justice Paxson says: "It seems clear upon reason that the creditor may take out a policy in excess of his debt. But to what excess? The answer to this question obviously depends upon circumstances. An important element in the consideration of this question is the age of the assured. The difference between a policy on the life of a man 25 years of age and one of 75 is clear to the dullest understanding. The assured was only 42 years of age, and his expectancy of life was 26 years. The chances were greatly in favor of his living out his expectancy. The Carlisle Tables were prepared with care by competent experts, and are the result of actual experience. I am therefore justified in saying that the chances were in favor of the assured living out his expectancy, in which case there would be the loss of interest on the debt for 26 years, added to the dues and assessments, with interest thereon, for the same period. The evidence shows that in such event the defendants would have been losers by a considerable sum. In fact, I infer from the tables furnished that after about 17 years the defendants would have carried this policy at a loss. The defendants assumed this risk when they took out the policy. They also had the chance of the assured not living out his expectancy. This is a risk which an insurance company assumes upon every policy which it issues. In a particular instance the assured may live many years beyond his expectancy, which is a large gain to the company. But this gain is equalized by the loss in instances where the assured dies before the expiration of his expectancy, so that, in the vast volume of business of such corporations, the average result is reasonably uniform. But the holder of a single

policy can have no average result. He takes the risks with the chances fairly balanced." With the utmost respect, we think this is fallacious reasoning. As stated by the distinguished chief justice, "All life insurance is, in one sense, speculative," and this remark applies to every policy. It is radically erroneous to say that one average man has a greater or a less chance to live out his expectancy than another. The man of 42 is no more apt to live out his expectancy of 26 years than the man of 75 is to live out his expectancy of 7 years. Life insurance premiums are fixed relatively to the different ages and expectancies of the persons insured, and every company whose business is conducted on sound principles proceeds upon the theory that it must be the gainer in every risk where the insured lives out his expectancy, and all the premiums are paid. Some live longer and others shorter periods, but the company looks to the average, and on the average basis it must take in more than it pays out, or else ultimately fail. Clearly, therefore, in every instance of life insurance there is a chance for the insured, or the person paying the premiums, to pay in more than the policy will bring back; and, as a consequence, there can, under the doctrine announced in Pennsylvania, be no such thing as a wagering policy. The test that the amount of a policy taken out to secure a debt must not be out of proportion to the amount of the debt with added premiums and interest thereon will not stand scrutiny, for every one carrying the burden of keeping up a life policy may, whether a debt be thereby secured or not, suffer loss by paying out more than is finally received on the policy. In the case of a man who insured his life for the benefit of his wife, and paid out in premiums more than the insurance company paid to her after his death, the loss would be the difference between the sum of the premiums, with interest, and the proceeds of the policy. If a creditor who held as collateral security a policy of life insurance, and paid the premiums under a contract with the debtor to be reimbursed therefor out of the fund to be realized by the payment of the policy, paid to the company more than it returned when the debtor died (which would inevitably be the case in the event the latter lived out his expectancy, and all premiums up to that time were duly met), this creditor, if the collateral was the only source to which he could look for satisfaction, would lose the difference between the amount received on the policy and the amount resulting from adding the sums representing the premiums, the interest thereon, and the debt; and this would be true whether the debt was great or small. If, for instance, one man loaned to another \$10, and insured the latter's life in the sum of \$50,000 to secure the debt, the creditor undertaking to pay the premiums, and the debtor (whether young or

old) lived out his expectancy, and died, leaving no assets but the insurance money, the creditor would certainly lose the difference between the face of the policy and the sum of the premiums and the interest thereon, and would lose also the \$10 and the interest on that sum. If the debt thus created was \$25,000, the creditor's loss would, in that case, be greater by \$24,990 and interest than in the other. There would be no difference in principle between the two cases. It is therefore to be regretted that the Pennsylvania court, while declaring that there should be "a fixed rule" for determining when a creditor was and when he was not obtaining an "excess of insurance," did not succeed in evolving a more satisfactory one. The truth is, there can be no sound rule on the subject which does not recognize the truth of the proposition that whenever a creditor stipulates for receiving more than indemnity upon a policy insuring his debtor's life he is engaged in a speculative venture, the gain from which, if successful, would be represented by the excess of the sum derived from the policy over the amount of the "indebtedness" thereby secured.

Enough has been said to make it clear that, with our views of the question under discussion, we cannot follow as sound the decision rendered by the supreme court of Indiana in *Amick v. Butler*, 111 Ind. 578, 12 N. E. 518, which was strongly relied on by the able counsel for the plaintiff in error. In that case the facts were as follows: "Frazee was indebted to Amick in the sum of about six hundred dollars." It was agreed between them that the creditor should take out a policy for \$2,000 in an assessment benefit association upon the life of the debtor, paying all expenses and premiums. This was done, the policy as issued naming the creditor, his heirs and assigns, as beneficiaries. "At the time the policy was issued, it was orally agreed that if Frazee should at any time thereafter pay his indebtedness, and reimburse Amick for the cost of obtaining the policy and carrying the insurance, the latter would turn over the policy to the former." It did not appear, however, that there was any express understanding between them as to the disposition of the surplus (if any) after the death of the insured, in the event he had not paid off such demands. The creditor having collected the entire sum due upon the policy upon the death of his debtor, the latter's administrator brought an action to recover the surplus, which amounted to "twelve hundred and fifty-nine dollars and fifty-eight cents." The court took the position that no intention to enter into a wagering contract was shown; that the policy belonged absolutely to the creditor, the stipulation as to paying off the debt not having been complied with by the debtor prior to his death; and therefore no part of the proceeds thereof could be claimed by the administrator upon the theory that the

creditor held the same as trustee. It would seem that without any great strain the court might have construed the contract to be for indemnity merely, for it was not necessary that there should be any express stipulation as to the distribution of the proceeds. On the contrary, nothing as to this having been specifically agreed to, the law would raise a constructive trust, rather than treat the contract as a wager. That, as construed by the court, it was a wager, pure and simple, seems evident. By the early death of the debtor the creditor won a clean stake of over \$1,250; whereas, had the debtor continued to live insolvent to a ripe old age, the creditor would doubtless have lost a part or the whole of his entire debt, because forced to abandon his policy, or pay in assessments and premiums an amount equal to the whole face of the policy, which was only \$2,000, and consequently could not, according to the rule as to "gross disproportion," be considered as evidencing an attempt and intent to gamble. For a just criticism on the decision, see, again, 2 May, Ins. p. 1055, § 459a.

3. As already intimated, there are numerous cases in which the courts have dealt with life insurance policies as valid which ought, in our judgment, to have been treated as mere nullities. Some of these cases were actions against insurance companies upon what we regard as wagering policies, and others of them involved controversies over the proceeds of such policies which the insurance companies had voluntarily paid. No argument is required to show that, in cases of either character, the courts ought not to afford any relief whatever, but should, in every instance, leave the parties exactly as they were before the litigation began. No court can properly concern itself with the enforcement of a contract which is contrary to public policy, and for that reason void, nor with the adjustment of alleged rights or equities growing out of such a contract. This doctrine is so thoroughly established and so universally recognized that it will not, we apprehend, be questioned; but it has evidently been too often overlooked by the courts in their efforts to do what they conceived to be "justice." Our Civil Code (section 3868) declares that "a contract which is against the policy of the law cannot be enforced," and that "wagering contracts" are of this character. Whenever, therefore, it appears that a particular contract of life insurance falls within the prohibited class, no court of this state should have anything to do either with its enforcement or the distribution of its proceeds.

4. We will now apply the foregoing to the facts of the present case, a fair and accurate statement of which we find in the brief of counsel for the plaintiff in error, as follows: "John D. Hudgins was a merchant, residing in Macon, who had been carrying on there for many years a wholesale and retail liquor business. The Exchange Bank, plaintiff in

error, had advanced to him, at various times, large sums of money. In December, 1892, this indebtedness amounted to something over \$10,000, for which the bank held Hudgins' notes. To secure the payment of this indebtedness, Hudgins had given to the bank certain mortgages on both his real and personal property, including his stock of liquors. To further secure the bank, he had also taken out a policy of insurance on his life for \$1,000 in the Manhattan Life Insurance Company, and a policy for \$5,000 in the New York Life Insurance Company, both of which policies were duly assigned by him to the bank; and upon both of these policies Hudgins himself paid the premiums. These policies were recognized by both parties as being the property of Hudgins, transferred by him to the bank as collateral security for his indebtedness. In the latter part of 1892 Hudgins applied to one Winship, who was the general agent in Georgia for the Equitable Life Insurance Company of New York, for a policy of \$5,000. His application was duly forwarded to the home office, and upon the request or instruction of Winship, and without the request, or even the knowledge, of Hudgins, the company sent out to Winship two policies of \$5,000 each on Hudgins' life. Upon the reception of the policies Winship endeavored to persuade Hudgins to take them both. Hudgins, however, would only accept the one for \$5,000 for which he had applied, and declined to take or accept the second or additional policy of \$5,000, and refused to pay the premiums due thereon, saying that the rate was so high he was not able to carry it. Upon this, Winship, knowing that Hudgins was indebted to the Exchange Bank, carried the second policy to J. W. Cabaniss, the cashier of the bank, stated to him the facts, and requested him to take the policy for the bank as a creditor of Hudgins, and pay the premiums thereon. This Cabaniss finally consented to do, provided Hudgins would execute the necessary assignment. This was done by Hudgins, Winship delivering the policy to the bank, and receiving from the bank the premium due thereon. Cabaniss had no conference or consultation with Hudgins about the transaction, either personally, by letter, or by messenger; and it was distinctly understood between Cabaniss, representing the bank, and Winship, representing the Equitable Life Insurance Company, that the policy was taken out by the bank for its own protection as a creditor of Hudgins, and that in no event was Hudgins to be liable for that premium, or any future premiums, either to the bank or to the insurance company. The demands for the subsequent premiums were made by the insurance company directly on the bank, and not against Hudgins, and they were paid by the bank, and were not charged against Hudgins upon the books of the bank, nor has any claim or demand ever been made by the bank for the payment of such premiums, either against Hudgins in his lifetime or

against his estate. On the 12th day of March, 1894, Hudgins died intestate, and Edward Loh was appointed his administrator. Upon examination by the administrator, Hudgins' estate was found to be hopelessly insolvent, and on August 3, 1895, the administrator filed his equitable petition in Bibb superior court against the Exchange Bank and the various other creditors of Hudgins to marshal the assets of the estate, and to obtain the direction of the court as to the administration of the same. To this petition the Exchange Bank duly filed its answer, setting up the facts recited above. The case came on for trial on March 22, 1897, and by consent of all parties was heard by the presiding judge without the intervention of a jury. Upon the trial it appeared from the evidence that the debt of the Exchange Bank at that time amounted, principal and interest, to \$12,228.94. It was also shown that the proceeds of the policies collected by the bank from the New York Life and the Manhattan Companies, with interest thereon to the date of the trial from the date of collection, amounted to \$7,082.02, which left a balance due to the bank upon its claim of \$5,196.92. Upon this balance of \$5,196.92 the bank proposed to credit the net proceeds of the fund arising from the sale of the real and personal property, upon which it was admitted by all parties that the bank held the highest and best lien, and which fund amounted to \$4,537.78. This would have left a balance still due to the bank from the Hudgins estate of \$658.74, upon which final balance the bank proposed to credit a sufficiency of the net proceeds derived from the Equitable insurance policy to pay the same, and that it should retain as its own property the entire balance of the fund derived from such policy in the Equitable Company. The court refused, however, to allow the Exchange Bank to apply upon its claim any portion of the fund derived from the sale of the mortgaged properties until the bank had first applied as a credit upon its claim the entire proceeds of the fund derived from the Equitable policy; the court finding in its decree that, after making such credit of the Equitable fund, the estate would still be indebted to the Exchange Bank \$230.46, which the court decreed to be the highest and best lien to that extent, and no more, upon the fund of \$4,537.78, derived from the sale of the mortgaged properties. To be entirely clear, the exact ruling of the court on this point is given in the following language, quoted verbatim from the decree: "The court holding, finding, and decreeing that the proceeds of such Equitable insurance policy, after first reimbursing the bank for the premiums paid by it, with interest thereon, is the property of said intestate, Hudgins, and not the property of said Exchange Bank, and must, therefore, be credited upon the bank claim as above directed." It is only necessary to add that the insurance policy in question was payable to the estate of Hudgins

and that Cabaniss, the cashier, testified as follows: "What induced me to take out this third policy was the fact that the bank was practically carrying Mr. Hudgins' business, and had been for two or three years, probably longer, and his business had been getting worse, and I wanted all the protection that I could get in the carrying of his business, and I took this as additional protection." In answer to the question, "To what extent were you influenced in the taking out of that policy as an investment?" he said: "I regarded it as a good investment. He was quite an old man, and, in the ordinary course of life, would probably not live very long; and I thought, even as an investment, it would do to take."

From the foregoing it appears that there can be no dispute as to the following facts: (1) Hudgins was largely indebted to the bank, and, prior to the issuing of this policy, had assigned to it, as collateral security for his indebtedness, two other policies. (2) After this policy had been issued, he refused to accept it, when first tendered to him by the agent of the company. (3) Subsequently, he did accept it, for he could not have assigned it to the bank without so doing. (4) He made an absolute assignment of the policy to the bank. (5) The bank paid the first premium, and took the policy for its protection as a creditor of Hudgins, the cashier also having in mind at the time that the policy was a good investment. (6) The bank paid all the premiums which accrued upon the policy before the death of Hudgins. They were not charged to him upon its books, nor was any demand ever made upon him or his estate for the payment of these premiums. If the assignment of the policy was made and accepted simply to place the bank in the same attitude as it would have occupied had it upon its own responsibility, at its own expense, and for its own benefit, applied for and obtained a policy upon the life of Hudgins, payable to itself, and in which neither he nor his estate was to have any interest or concern, it was a wagering contract. But if Hudgins assigned the policy to the bank, and it accepted the same as a collateral security for his existing indebtedness, and for the further purpose of securing the repayment to the bank out of the proceeds of the policy of all sums advanced for premiums, the transaction was a lawful and proper one. The form in which the transaction was clothed is, as above stated, immaterial, the question at last being, what was the real intent and purpose of the parties? This case belongs to one or the other of the two classes just indicated. If to the former, the judgment under review was wrong for two reasons: (1) The estate of Hudgins had no interest in the proceeds of the disputed policy, because there was no privity of contract between him and the insurance company, or between him and the bank; and (2) the court should not have undertaken to dispose of or distribute the

proceeds of a wagering or gaming contract. If, on the other hand, this case falls within the latter class, the judgment excepted to should be sustained.

In view of the facts as stated, did the evidence warrant the judge in finding that the transaction was lawful and valid? Or, to put the question in different form, did the evidence demand a finding that it was a wagering contract? The policy, being payable to the estate of Hudgins, purported to evidence a contract of insurance between himself and the insurance company; and the assignment of the policy to his creditor, the bank, could certainly have been made for a legitimate purpose. The writings, therefore, on their face, are perfectly consistent with the idea that the transaction which the parties had in mind was a lawful one, and the presumption of law would be that such was the fact. Does the parol evidence sustain or overcome this presumption? So far as relates to Hudgins, it is easy to conclude that he simply intended to supplement the security of like kind which he had already given to the bank, and that, being unable himself to pay the premiums, he was willing for the bank to do so, and get its reimbursement out of the proceeds of the policy. There is nothing in the testimony which expressly negatives such a purpose on the part of Hudgins, and there are many circumstances from which its existence may be inferred.

The next inquiry is, what was the bank's purpose in taking the assigned policy? Mr. Cabaniss explicitly testified that he was seeking to obtain "additional protection,"—that is, security; and, though he did regard the policy somewhat in the light of an investment, his testimony did not require a finding that he deliberately sought to have the contract so disguised that it would not, upon its face, show what was the real truth of the matter, or that his purpose was to evade the law against gaming by any concealment or artifice. On the contrary, it would seem that he accepted the assignment of the policy for no improper purpose, but may have been mistaken as to what legal rights would thereby be secured to the bank. Neither any private understanding between the insurance agent and the cashier nor the latter's opinion (if he entertained it) that the proceeds of the policy would belong exclusively to the bank, could affect Hudgins or his estate. A secret purpose entertained by one party to a contract, but not disclosed to the other, does not bind the latter, for, obviously, as to this particular matter there was no "meeting of minds." *Harris v. Lumber Co.*, 97 Ga. 465 (opinion, point 2), 469, 470, 25 S. E. 519, and authorities cited. It was certainly not shown that Hudgins made any agreement with the bank that he would claim no interest in the policy. Nor can it be said that by mere silence he assented that the assignment should vest an absolute and unconditional ownership of the policy in the bank, for it nowhere appears

that any such idea on the part of the bank's representative was communicated to Hudgins, or that he had any direct dealings with the bank in regard to this particular insurance. If his purpose was that which we have attempted to show, could, under the evidence, be attributed to him, viz. to give additional collateral security to the bank, it is very reasonable to conclude that he might have understood that the cashier's purpose in procuring him to accept the last policy and assign the same to the bank was simply to increase its security by taking and holding this policy in the same way it did the others, the bank being willing to advance the premiums, and look for reimbursement solely to the proceeds of the policy, since he was unable himself to carry it. At any rate, the trial judge was warranted in reaching the conclusion that these parties did not enter into a scheme to furnish a cloak to a purely colorable transaction; and it follows that the rights of the parties are to be measured according to the terms of the contract as written, which evidences what purports to be a bona fide and entirely lawful transaction. Thus treated, the policy is without taint of illegality, and it was proper to limit the assignment to the object really intended to be thereby accomplished.

In this immediate connection the case of *Morland v. Isaac*, 20 Beav. 389, is quite pertinent. In that case it appeared that Isaac, a tradesman, insured the life of his debtor, Walker; the policy being payable to the former. He charged the premiums to Walker, but the latter never paid them, nor does it appear that he ever expressly agreed to do so. Upon his death the court held "that his representatives were entitled to the produce of the policy after payment of the debt and premiums." Isaac himself "denied that any express agreement had ever been made between him and Walker, either as to the amount to be insured (which was to be entirely at [Isaac's] discretion), or the ownership of the policy, or payment of the premiums; but it was clearly understood by [Isaac], and, he believed, also by Walker, that the policy was [Isaac's], and, with respect to the payment of the premiums, that it should, in the first instance, be made by [Isaac]; and it was fully understood that the moneys assured by the policy should remain [Isaac's] own absolute property." His "understanding and intention was, as he alleged, that if Walker should, in his lifetime, pay off the debt and premiums and expenses of insurance, he should be at liberty to do so, and in that case [Isaac] would either have dropped the insurance or transferred the policy to Walker." Isaac also stated that an entry of a charge in his account against Walker "for insurance was a mistake." The master of the rolls, taking into consideration the foregoing, and also the facts that Walker knew the insurance was to be effected, that he had attended the insurance office for

this purpose, and that when Isaac's account with the item for insurance charged therein was delivered to him he did not complain, was of the opinion that, though Walker had never, in express terms, agreed to pay or become liable for the premiums, nor admitted liability therefor, the circumstances warranted the inference that he was so liable. Observed the master: "This matter depends on the contract between the parties. This, however, may either be expressed in writing or by parol, or it may be inferred from the acts and dealings between the parties from which a contract between them may appear." It was accordingly held that the policy was simply a security for the debt and the premiums, and that the creditor was entitled to payment of these, and no more. It will be seen that this case in many respects resembles the one at bar, and is direct authority for the correctness of Judge Felton's judgment, if, as we think is true, he was warranted in finding as matter of fact that Hudgins, in assigning to the bank the policy in controversy, really intended merely to secure his existing indebtedness, and the premiums to be paid on the policy, expecting his estate to get the benefit of the surplus, if any. If this was what he intended, and the bank took the policy for the purpose of securing these claims, the mere opinion of its cashier (like that of Isaac in the case *supra*) that it would absolutely own the policy and its proceeds would not alter the legal status of the matter.

As somewhat applicable to this branch of the discussion, we again refer to *Helmetag's Adm'r v. Miller*, 76 Ala. 183, and *Roller v. Moore's Adm'r*, 86 Va. 512, 10 S. E. 241, cited *supra*. The following is extracted from the synopsis of the points decided in the latter case: "Assured made assignee an assignment absolute on its face of a policy of insurance on his life. The evidence, however, showed that in former transactions about the same matter the policy was held by assignee as security for advancements made by him for premiums and assessments on the policy. Held, the assignment was not a new contract between the parties, and an absolute assignment, but it bore the impress of the original transactions, and stood merely as a security for the advances made by assignee." In our case, the previous dealings between Hudgins and the bank, in the course of which he had assigned to it policies of insurance as collateral security for his indebtedness to it, greatly strengthens the conclusion that he intended no more at the time of the last transaction, but that, being unable to pay the premium upon the policy then assigned, he expected the bank to advance the necessary amount, and look for reimbursement to the proceeds of this policy when collected. As all inferences in favor of the legality of a transaction are to be indulged, and as the conclusions of the judge below are sufficiently supported by evidence, the judgment ren-

dered by him should be allowed to stand, especially as it is in direct accord with the justice and the equity of the case. Judgment affirmed. All the justices concurring, LITTLE, J., concurring specially.

NOTE. In addition to the authorities cited in the foregoing opinion, see the following, which are more or less in point on several questions discussed: *Gilman v. Curtis*, 66 Cal. 116, 4 Pac. 1094; *Curtiss v. Insurance Co.*, 90 Cal. 245, 27 Pac. 211; *Insurance Co. v. Hazard*, 41 Ind. 116; *Hight v. Taylor*, 97 Ind. 892; *Walker v. Larkin*, 127 Ind. 100, 28 N. E. 684; *Insurance Co. v. Sturges*, 18 Kan. 93; *Tateum v. Ross*, 150 Mass. 440, 23 N. E. 230; *Ferguson v. Insurance Co.*, 32 Hun. 306; *Rawls v. Insurance Co.*, 27 N. Y. 282; *Matthews v. Sheehan*, 69 N. Y. 585; *Olmsted v. Keyes*, 85 N. Y. 593; *Wright v. Association*, 118 N. Y. 237, 23 N. E. 186; *Gilbert v. Moose's Adm'rs*, 104 Pa. St. 74; *Scott v. Dickson*, 108 Pa. St. 6; *Clark v. Allen*, 11 R. I. 439; *Rivers v. Gregg*, 5 Rich. Eq. 274; *Price v. Supreme Lodge*, 68 Tex. 361, 4 S. W. 633; *Insurance Co. v. Williams*, 79 Tex. 633, 15 S. W. 478; *Crotty v. Insurance Co.*, 144 U. S. 621, 12 Sup. Ct. 749; 35 Am. Law Reg. 65-87, 161-183, and cases cited.

LITTLE, J. (concurring specially). I agree to the judgment of the court as being sound, and properly interpreting the rights of the parties, but I arrive at this conclusion for reasons different from those stated in the very able opinion rendered by Presiding Justice LUMPKIN. It is not my purpose to enter into a discussion of the case. It has, from time to time, been considered by each of us with a great deal of care, and the authorities, which are numerous and conflicting, have been carefully examined. It will be seen by reference to the opinion of the majority of the court, that there are two propositions of law which form the basis for the conclusions reached. The first is that a contract effecting assurance upon the life of a debtor for the benefit of a creditor is a contract of indemnity. The second is that the creditor's insurable interest in the debtor's life is confined to the amount of the indebtedness to be secured. I think that neither of these is a correct conclusion of law. Neither of these questions, in my judgment, properly arises under the circumstances of the case; but, meeting the proposition so broadly laid down that insurance (life) for the purpose of securing an indebtedness is a contract of indemnity, and nothing else, I have this to say: By our Code (section 2089) a contract of fire insurance is clearly made a contract of indemnity. And by section 2120 of our Civil Code a contract of marine insurance is, in terms, classed as a contract of indemnity. The definition of the contract of life insurance which is made by the Code (section 2114) is that it is a contract by which the insurer, for a stipulated sum, engages to pay a certain amount of money if another dies within the time limited by the policy. If such contracts derive any of the incidents which attach to contracts of indemnity, they must arise under principles of law which are not enunciated in our Code.

It is true that section 2117 of the Code declares that the principles stated in the Code in relation to fire insurance apply equally to the law of life insurance. Manifestly, however, reference is had to those legal principles which pertain generally to fire insurance, which can be made applicable to a contract of life insurance, and this provision in no way affects the definition or meaning of these two contracts. It is provided in the Code (section 2114), in reference to contracts of life insurance, that the assured must have an interest in the continuation of the life insured, and both by text writers and adjudicated cases creditors have an insurable interest in the life of a debtor. Mr. Joyce, in his work on Insurance (volume 1, § 26), says that: "Although the question of indemnity as related to life insurance has been prolific of much discussion by both text writers and the courts, yet the weight of authority is that life insurance is not a contract of indemnity." And this author then proceeds to discuss the question, referring to a large number of adjudicated cases to support the text. As a matter of law, numerous courts have held them to be contracts of this character, while a great many other courts of final resort have held the contrary of the proposition; and it seems to me that the latter are more in accordance with principle. A life is not, and cannot of itself be, a subject of valuation. Mr. Bunyon, in his work on Life Insurance (page 7), says that such insurances are independent of the value of the subject-matter; and in the case of *Insurance Co. v. Schaefer*, 94 U. S. 457, it is declared that "in life insurance the loss can seldom be measured by pecuniary valuations." The doctrine of indemnity contemplates that the insured shall be indemnified, but shall never be more than fully indemnified, for a loss. For instance, the contract of fire insurance only indemnifies the assured against any loss which he may sustain within an amount named by the policy. This affects property. The value of the property destroyed can be ascertained, and the contract is a pure and simple indemnification for the value of the property destroyed. The same applies to a contract of marine insurance; property is there also the subject-matter of the contract; and hence our Code treats these two contracts as contracts of indemnity. But a life is not property. It cannot be valued so as to afford indemnity. The following authorities collected by Mr. Joyce rule that a contract of life insurance is not a contract of indemnity. 15 C. B. 365; *Nye v. Grand Lodge*, 9 Ind. App. 139, 36 N. E. 429; 1 Kay & J. 228; *Whiting v. Insurance Co.*, 15 Md. 297; *Insurance Co. v. Johnson*, 24 N. J. Law, 585; *Rawls v. Insurance Co.*, 27 N. Y. 282; *Ferguson v. Insurance Co.*, 32 Hun. 311; *Id.*, 102 N. Y. 647; *Mowry v. Insurance Co.*, 9 R. I. 346; *Scott v. Dickson*, 108 Pa. St. 6; *Insurance Co. v. Allen*, 138 Mass. 27; *Emerick v. Coakley*, 35 Md. 188. For the doc-

trine that such contracts are not strictly contracts of indemnity, yet are in the nature of indemnity, where a creditor insures his debtor's life, the author refers to *Bac. Ben. Soc.* § 163; *Miller v. Insurance Co.*, 2 E. D. Smith, 294. That they are not contracts of indemnity, such as fire and marine insurance contracts, he refers to *Insurance Co. v. Bailey*, 13 Wall. 616.

As to the second proposition, the majority of the court rules that, while a creditor, for the purpose of indemnifying himself against loss, has an insurable interest in the life of his debtor, this interest cannot exceed in amount that of the indebtedness to be insured against, although it may include the cost of taking out and keeping up the insurance. While I do not dissent to this ruling, the conclusion of the court, in my opinion, is put upon a wrong doctrine, which very many of the cases cited by Presiding Justice LUMPKIN will prove. A creditor has an insurable interest in the life of his debtor, and the amount of the debt and the expense of taking out and keeping up the insurance must be the basis of the insurance; yet it is neither practicable nor essential to the validity of such a contract that the amount insured must exactly equal these sums. Indeed, it is impossible that it can be so. If one owes another \$1,000, and the latter takes out a policy of insurance on the life of his debtor, while he is entitled to fix the amount at \$1,000, and the interest thereon, and the cost of paying the premium and keeping up such insurance, yet, from the nature of things, it is impossible for the parties to agree on an exact amount which will represent these items. The insurer may have to pay premiums for a quarter of a century; he may not pay but one premium. The interest may run on the principal indebtedness for a year; it may run for 20 years. So that it is practically impossible to settle in advance on an amount which represents the principal and interest of the indebtedness and the cost of the insurance which will be due at the time of the death of the assured. It must be remembered that a contract of insurance must specify a given amount, must be made anterior to death, and, being so, the amount necessarily has to be fixed at a time when the pecuniary interest of the creditor in the life of his debtor cannot be ascertained. At the same time, in order to render the contract valid, it must not be a wagering policy. Therefore a contract is valid, and not subject to be attacked as a wagering policy, if the creditor insures for such a sum as, under all the circumstances, considering the amount of the debt, the expectancy of the debtor, the cost per annum of the insurance, which in good faith and by the exercise of reasonable judgment is estimated to cover the debt and the outlay. If it should so happen that by reason of the early death of the debtor the creditor receives a sum which actually exceeds the amount of the debt and expenses, that sum belongs to him; and, if not dispo-

portionate originally, taking the debt as a basis, it is not a wagering contract, and the insurer would be held to perform it. I make no attempt to collect authorities which support this proposition. They are very numerous, and are to be found in all books on insurance which treat the subject.

A distinction must be drawn between a contract of insurance on his own life, made by one who is indebted to another, and who transfers the policy to his creditor for the security of his debt, and a contract which is made directly by the creditor with the insurer to insure the life of his debtor. In the first instance the contracting parties are the person whose life is insured and the insurer. In that case the creditor has no rights except such as may be given to him by the assignment of the policy. The object of the transfer is to secure the payment of the debt due the creditor. The assignment accomplishes nothing else; and if, by any means, the debt be paid prior to the decease of the debtor, the assignment has no force or effect, and the original contract is in force, and the beneficiaries named in the contract will take the proceeds of the policy. But where a creditor contracts directly with the insurance company for a policy on the life of his debtor, neither the debtor nor his representatives will at any time thereafter have any interest in that contract, nor, under any circumstances, would either of them be entitled to the proceeds of such contract, because the contractual relations exist between the creditor and the insurer independent of the debtor. In this case the Equitable Company issued a policy payable to the representatives of Hudgins, and the contract entered into, and upon which the money in question was collected, was that on the death of Hudgins the company agreed to pay to his representatives the amount named in the policy. The policy, under the usual rules, was assignable. Hudgins, according to the testimony, declined to enter into this contract; but the Exchange Bank, which was the creditor of Hudgins, agreed that it would pay the premiums if it could have the benefits. To this Hudgins agreed, and transferred the policy. As a creditor, while the bank had a right to make a direct contract with the company to insure the life of Hudgins, it did not do so, but it received the policy, which was payable to the representatives of Hudgins, by assignment. Under the law the bank was not entitled to receive out of the assigned policy more than the amount of its debt and the expenses of keeping up the insurance. This being the limited right of the creditor, when, after the death of Hudgins, the money was paid to it as the holder of the policy, what direction should be given to the remainder of the fund? The answer is had by reference to the original contract. That contract was an agreement to pay to the representative of Hudgins. It can make no difference who paid the premiums, except as to determine what amount

the creditor should receive. That a creditor paid the premiums did not affect the contract. That contract required the company to pay the amount of the policy to the representative of Hudgins, and by a legal assignment the company was directed to pay to the bank the amount of the policy. Under the law the only amount that the bank was entitled to retain when it so collected the sum agreed to be paid was its debt, interest, and the expense of maintaining the insurance, and by virtue of the terms of the contract the balance which remained after such payment must go to the representative of Hudgins' estate. As stated, I have not attempted to collect the numerous authorities which support the proposition here laid down, but have contented myself in giving the line of reasoning which brings me to the conclusion at which a majority of the court has arrived, and, differing as to the reasoning of the case, I concur in the judgment.

(123 N. C. 164)

PRETZFELDER v. MERCHANTS' INS. CO.
et al.

(Supreme Court of North Carolina. Nov. 22, 1898.)

TRIAL—SUBMISSION OF ISSUES—FIRE INSURANCE—QUESTIONS OF LAW—PROOFS OF LOSS—WAIVER—ARBITRATION—APPEALS—INDEXING RECORD.

1. Where the issues submitted by the court embrace every phase of the case as to the facts which can be passed on, it is not error to refuse to submit additional issues.

2. In an action on a policy, where the evidence as to waiver of proofs of loss is undisputed, the question of a waiver is one of law.

3. A demand by an insurance company for a reference to appraisers, according to a provision of the policy, constitutes a waiver of proofs of loss, where the appraisers are to view the loss themselves, and adjust the damages.

4. Where a reference to appraisers of the loss under a policy, which was a waiver of proofs of loss, afterwards failed without the fault of insured, his failure to then furnish proofs does not bar his right to recover by action.

5. Where the arbitrators under a policy, or a majority of them, fail to agree on an award, unless he is shown to have acted in bad faith in selecting his arbitrators, is not compelled to submit to another arbitration, but may forthwith bring his action.

6. The points of law decided in a former appeal cannot be considered on a second appeal.

7. Where any part of the record on appeal is printed, the indexes required to be put in the original record by rules 19 and 20 (22 S. E. vii.) should also be printed.

Appeal from superior court, Guilford county; Coble, Judge.

Action by Max Pretzfelder against the Merchants' Insurance Company and others to recover on a fire insurance policy. From a judgment for plaintiff, defendants appeal. Affirmed.

John W. Hinsdale and J. T. Morehead, for appellants. R. R. King, A. L. Brooks, and J. B. Boyd, for appellee.

CLARK, J. The first exception, for failure to submit additional issues, is without merit.

Every phase of the dispute as to the facts could have been passed upon under the five issues submitted by the court. *Willis v. Railroad Co.*, 122 N. C. 906, 29 S. E. 941; *Patterson v. Mills*, 121 N. C. 258, 28 S. E. 368; *Coley v. City of Statesville*, 121 N. C. 301, 28 S. E. 482. The additional issue asked for which was most pressed was, "Did defendants waive proofs of loss?" Upon the issues found, and the undisputed evidence, that was a question of law; for the demand alleged by the defendants, for a reference of the loss to appraisers, under a provision in the policy, was a waiver of proofs of loss, which became useless if the appraisers were to view the loss themselves, and adjust the damages. *Allemania Fire Ins. Co. v. Pitts Exposition Soc.* (Pa. Sup.) 11 Atl. 572; 2 May, Ins. § 468; *Dibrell v. Insurance Co.*, 110 N. C. 193 (at page 206, and bottom of page 209), 14 S. E. 783. After the appraisal fell through, without plaintiff's fault, as the jury find, the plaintiff with propriety might, and probably should, have furnished proofs of loss; but, not being compelled to do so, the failure is rather a technicality than a meritorious defense, and should not work a forfeiture of all right of a recovery for the goods insured and damaged.

When this cause was here on the former appeal it was held that, if the appraisal fell through by no fault of the plaintiff, he is relegated to his right of action. It is there said (116 N. C., at pages 496, 497, 21 S. E. 303): "The arbitrators were appointed, but disagreed and refused to go on, and finally broke up without making an award. Subsequent attempts to agree upon another board failed. The parties were thus relegated to their legal rights, and the action can be maintained. *Braddy v. Insurance Co.*, 115 N. C. 354, 20 S. E. 477. Indeed, as was intimated in that case, we think the proper rule is laid down in *Insurance Co. v. Hocking*, 115 Pa. St. 416, 8 Atl. 592, that where the arbitrators, or a majority of them, fail to agree upon an award, the plaintiff, unless he is shown to have acted in bad faith in selecting his arbitrator, is not compelled to submit to another arbitration and another delay, but may forthwith bring his action in the courts." The defendants recognize that this was so held, but ask the court to "reconsider and re-examine" the point in the light of additional authorities and evidence. The proposition to rehear a cause by raising the same points upon a second appeal cannot be entertained. It was the duty of the judge below to follow the ruling made here. If there was additional testimony, it was all submitted to the jury upon the fifth issue. "Was the failure of the appraisers to make an award caused by the plaintiffs, or any of them?" which was found in the negative.

In this appeal there are 64 exceptions, but all of them which are worthy of any consideration are embraced in the three propositions we have discussed. Indeed, many of

them are repetitions, in slightly different words, of those three exceptions. If fatal errors have been committed on a trial, they can be surely summed up in less than 64 assignments. It would simplify an appeal, and give more time for argument on the really serious exceptions, if counsel, who naturally, in the hurry of a trial, take, out of abundant caution, numerous exceptions, should, in the cool and deliberate moments of making out their statement of case on appeal, sift out and abandon those they find trivial or untenable. This would aid the court to a just consideration of the appeal, by directing its attention to what counsel deem the fatal errors only, which in the vast majority of cases can be presented by a very few exceptions. Certainly it can never be necessary to attempt to convince an appellate court that 64 fatal errors, each justifying a new trial (and none other should be presented here), have been committed below. More than 8½ years have elapsed since this loss was sustained, and we find no error that would justify further delay of settlement.

The learned brief of appellant's counsel is well indexed, which is commendable; but there is no index to the transcript, which is required by rules of this court No. 19, subd. 3, and No. 20 (22 S. E. vii.). *Alexander v. Alexander*, 120 N. C. 472, 474, 27 S. E. 121.

Affirmed.

(123 N. C. 229)

SMITH v. SMITH.

(Supreme Court of North Carolina. Nov. 15, 1898.)

LIMITATION OF ACTIONS—PLEADING—REVIEW—REFERENCE—FINDING OF REFEREE—INJUNCTION—FORECLOSURE.

1. Allowance of an amendment setting up plea of limitation after a reference and report is within the court's discretion.

2. Plaintiff sued for an accounting, and to enjoin defendant from foreclosing a mortgage. A reference was had, and a finding that defendant owed plaintiff more than the mortgage, to which defendant pleaded limitations. This the court sustained, and disallowed the injunction, without making a finding. *Held*, that there was no finding on which to base a judgment sustaining the mortgage, as the findings of the referee in favor of plaintiff had not been set aside, nor findings made by the court.

3. Where plaintiff sues to enjoin foreclosure of a mortgage setting up overpayment, it is error to sustain plea of limitation to plaintiff's entire claim, since the limitation would only apply to the balance due mortgagor after liquidation of the mortgage debt.

Appeal from superior court, Cumberland county; McIver, Judge.

Suit by William T. Smith against W. Doug. Smith. The plea of the statute of limitations was set up by the defendant in this action, and the court adjudged that the plaintiff's action was barred, and the plaintiff appealed. Reversed.

The summons was issued on February 8, 1896. The plaintiff alleged in the complaint that on April 8, 1884, he executed to defend-

ant a promissory note for \$150, payable December 1, 1884, with interest, the consideration being a horse, to enable plaintiff to cultivate land which he had rented from defendant on the west side of the Cape Fear river, rent being 800 pounds lint cotton, and also another tract on the east side of the river, for \$75, money lent, etc. Defendant denied the allegations of the complaint. In the course of the action, a reference was had, to state an account between the parties, in which the referee finds a balance due the plaintiff of \$293.65. The date of the last item of the account is October 1, 1895, being a credit of a cash payment on note. Much evidence was introduced before the referee. The judgment of the court was: "It is adjudged that the plaintiff's cause of action is barred by the statute of limitations, and that the defendant's exceptions to report and account filed are allowed, and that the plaintiff's application for an injunction to restrain defendant from selling the land to collect the debt, referred to in the pleadings, as per note and mortgage dated December 31, 1884, is disallowed, and commissioners were appointed to make the sale of the land," etc. The plaintiff excepted to the judgment: (1) Because the statute was allowed to be pleaded after the reference was ordered, the evidence taken, the report made, and exceptions thereto filed by defendant, "and a trial by jury waived." (2) The plea of the statute was not applicable to the course of dealings between the parties, as disclosed in the evidence, the relation of principal and agent being shown, and a running account between the parties. (3) The statute of limitation is not applicable, so as to exclude evidence of payments on the note. (4) The finding of the court upon the effect of the statute upon the plaintiff's cause of action is erroneous, and without evidence to support it. The cause of action was the wrongful act of defendant in exposing plaintiff's land to sale under a mortgage which was itself more than ten years old, and which, according to the evidence reported and the findings of the referee, was overpaid. (5) Because the effect of the plea sustained by the court could only exclude the liability of the defendant in respect to the excess found in favor of the plaintiff over the satisfaction of the note and mortgage. The defendant's exceptions to the account and statement of the referee, which were allowed by the court, are as follows: (1) That defendant is charged with 1,900 pounds of cotton, at 9¼ cents, and with \$10 cash, in 1884,—\$195.25. (2) That defendant is charged with 2,000 pounds of cotton, at 9¼ cents, and 63 bushels of seed cotton, at 8 cents, in 1885,—\$197.54. (3) That defendant is charged with 1,740 pounds of cotton, at 8¼ cents, and 76 bushels seed cotton, at 8 cents, in 1886,—\$158.33. (4) That the defendant is charged with 2,433 pounds of cotton, at 9½ cents, and 80 bushels seed cotton, at 10 cents, in 1887,—\$239.13. (5) That defendant is charged

with 1,740 pounds of cotton, at 9% cents, and cash \$35, in 1888, making \$204.35. (6) That defendant is charged with cash \$10, February 17, 1889. (7) That defendant is charged with cash \$23, October 1, 1895; that the testimony does not support the above-mentioned items of charge. (8) That the referee failed to find as a fact that plaintiff, at the end of each and every year, had a settlement with defendant as to all matters connected with the rent of land and advances, and that nothing was due the plaintiff on those matters. (9) That the referee failed to find as a fact that defendant owed plaintiff nothing, and that plaintiff owed defendant the amount of the note secured by the mortgage referred to in the pleadings. (10) That the finding of fact as to plaintiff's indebtedness to defendant should have been \$159, and interest from December 31, 1884, as per note set out in the mortgage, \$150, and interest from April 8, 1894, as found by the referee. Defendant insists upon his right to a jury trial upon said exceptions as above set out, and upon all issues raised by the pleadings, and upon all the several exceptions made by him as to the reception and exclusion of testimony.

R. P. Buxton and N. A. Sinclair, for appellant. N. W. Ray, for appellee.

MONTGOMERY, J. At the term of the court to which the referee made his report, the defendant was allowed to file, as an amendment to his answer, the plea of the statute of limitations. The rule seems to be well settled by the decisions of this court that amendments to pleadings are left to the discretion of the presiding judge. In *Gilchrist v. Kitchen*, 86 N. C. 20, on that point, the court said: "But, independent of the Code, we hold that the right to amend the pleadings of a cause, and allow answers and other pleadings to be filed at any time, is an inherent power of the superior courts, which they may exercise at their discretion, unless prohibited by some statutory enactment, or unless vested rights are interfered with." There are some exceptions,—as, where an amendment should be desired to make a pleading conform to facts proved, it should not be allowed if it changes the claim or defense; or if an amendment is allowed in favor of one party to the suit, and a corresponding amendment is rendered thereby necessary on the part of the adverse party, a refusal to allow the latter would be appealable. *Knott v. Taylor*, 96 N. C. 553, 2 S. E. 680; *Brooks v. Brooks*, 90 N. C. 142. In the case before us, however, the rule prevails, and the matter was therefore in the discretion of the court. A hardship seems to have been put upon the plaintiff in the allowing of the amendment, but, as the matter was in the discretion of his honor, we cannot review it.

The complaint alleged that the defendant owed the plaintiff a balance for each of several years more than three years, however,

having elapsed since the date of the last item in the account. The answer was a simple denial of the indebtedness. Upon the motion of the plaintiff, an order of reference was made to have an account stated between the parties. This was a consent order, no objection having been made by the defendant. After the account was stated and reported by the referee, the defendant, finding that it was against him, was allowed to put in the plea of the statute of limitations. The defendant knew that he had this plea as well before the reference as afterwards. It looked like trifling with the court to go to trial on the merits of his case, and after being defeated to make, by way of amendment, a defense of the statute of limitations which he knew he could avail himself of at the start. But, as we have said, the matter is not an open question. That part of the judgment which concerned the plea of the statute was in this language: "The court allowed the motion of defendant for leave to amend the answer, and plead the statute of limitations, and defendant filed his plea accordingly. And thereupon the court doth adjudge that the plaintiff's cause of action is barred by the statute of limitations." The judgment further declared "that the defendant's exceptions to the report and account filed are allowed, and the plaintiff's application for an injunction to restrain the defendant from selling the land to collect the debt referred to in the pleadings, as per note and mortgage, * * * is disallowed." The last was clearly only the conclusion of the court as to the legal effect of the statute of limitations upon the indebtedness of the defendant to the plaintiff as set out in the complaint, for it was made without any finding of facts by his honor. When the judge finds no facts, it is presumed that he adopted those found by the referee. *McEwen v. Loucheim*, 115 N. C. 348, 20 S. E. 519; *Barcroft v. Roberts*, 91 N. C. 363. But it is apparent that he did not adopt the findings of the referee, for the referee found them all in favor of the plaintiff, and the judgment is against the plaintiff. In order that the defendant's exceptions to the report of the referee should have been sustained, it was necessary for the court to have reviewed and set aside the facts found by the referee, and to have found the facts himself in favor of the defendant. This he did not do. As, therefore, there was no finding of facts by his honor, and the findings of the referee were not approved, there is error in that part of the judgment which sustains the defendant's exceptions, and denies the application for the injunction.

There is partial error in the judgment concerning the plea of the statute of limitations. The plea of the statute was available only as to whatever amount was found to be due by the defendant to the plaintiff in excess of the amount which the plaintiff owed the defendant for the horse, the consideration of the note and mortgage. If it should be found that

the defendant owes to the plaintiff any amount, that amount, by force of the law, is a payment on the debt due by the plaintiff to the defendant on note and mortgage; and, if the defendant's indebtedness should exceed the amount due by the plaintiff for the horse, then the plea of the statute will apply to the excess. There was error, and the case is remanded, to the end that the report and the exceptions thereto filed by the defendant may be heard, and the law in reference to the statute of limitations be applied as herein declared. Error.

(123 N. C. 194)

ELLIS v. HAMPTON.

(Supreme Court of North Carolina. Nov. 9, 1898.)

MALICIOUS PROSECUTION—MALICE.

Though, in action for malicious prosecution, evidence of defendant's malice towards one prosecuted with plaintiff in the same warrant is competent to show malice against plaintiff, defendant's particular acts, and words showing malice towards such person cannot be considered to enhance plaintiff's punitive damages.

Appeal from superior court, Denham county; Robinson, Judge.

Action by George Ellis against W. B. Hampton. Judgment for plaintiff. Defendant appeals. Reversed.

Manning & Foushee and Graham, Green & Graham, for appellant. Winston & Fuller and Boone & Bryant, for appellee.

MONTGOMERY, J. The plaintiff, together with Adolphus Mangum, was arrested on the charge made by the defendant that in 1894 the plaintiff aided and abetted Mangum in unlawfully and willfully removing and disposing of certain crops grown by Mangum, as tenant of defendant, on the defendant's land, before Mangum had paid for advances of supplies made to him by the defendant to make the crop, without the knowledge and consent of the defendant, and without giving him notice as required by section 1759 of the Code. The plaintiff and Mangum were acquitted of the charge, and the plaintiff brought this action for damages against the defendant for alleged malicious prosecution. There was evidence received tending to show ill will and malice of the defendant towards Mangum. On this point his honor instructed the jury that, "in addition to malice, which may be inferred from want of probable cause, the jury will consider all the evidence offered by the plaintiff to show express malice on the part of the defendant towards both the plaintiff and Mangum, whom the defendant prosecuted with the plaintiff in the same warrant." In Brooks v. Jones, 83 N. C. 260, it was held that in actions for malicious prosecution the plaintiff must show particular malice as contradistinguished from general malice; a disposition to do wrong—malice against mankind—on the part of the

defendant towards him. The court in that case said: "This particular malice may be proved by positive testimony of threats or expressions of ill will used by the defendant in reference to the plaintiff, or it may be inferred from the want of probable cause and other circumstances." However, in Thomas v. Norris, 64 N. C. 780, apparently, a different rule is laid down. There evidence of malice on the part of the defendant against another person, who was arrested under the same warrant with the plaintiff, was received as evidence of malice towards the plaintiff also. We will not enter into a discussion of any seeming inconsistency between the rules of evidence laid down in the two cases. It is not necessary to a proper determination of the correctness of that part of his honor's charge which we are considering. We can only say that we cannot carry any further the rule laid down in Thomas v. Norris, supra. The charge of his honor went further. The effect of the instruction of the court was that the jury might estimate the punitive damages in favor of the plaintiff by their taking into consideration each and all of the defendant's words and acts which tended to show malice and ill will on the part of the defendant towards not only the plaintiff, but also towards Mangum. The jury were substantially instructed to add to the damages (punitive) which the plaintiff was entitled to recover for the malicious prosecution of himself by the defendant those which the defendant might have been liable for, for having prosecuted Mangum with malice. At the most, his honor should, under the ruling in Thomas v. Norris, supra, have told the jury that they might consider the evidence going to show malice against Mangum as tending to show malice against the plaintiff also; but that they must not consider the particular acts and words done and spoken by the defendant showing malice against Mangum to enhance the punitive damages to which the plaintiff might have been entitled for the injury done to himself. The evidence of malice on the part of the defendant towards Mangum was only competent as going to show the state of his mind at that time towards the plaintiff. For the error pointed out in the charge, there must be a new trial.

(123 N. C. 216)

GRAINGER et al. v. LINDSAY et al.

(Supreme Court of North Carolina. Nov. 9, 1898.)

SUBROGATION—CONVERSION—RIGHTS OF CHATTEL MORTGAGEE.

1. One who furnished seed and takes a mortgage on the crop cannot be subrogated to the rights of the insolvent mortgagor, who obtains a money judgment against a third person on a bond which he gives in an action against the mortgagor for possession of the crop, conditioned for return of the same, or for the money value thereof if return cannot be made.

2. A mortgagee may recover of a third person for conversion of the mortgaged chattels,

though the mortgagor obtains judgment for the value thereof against such person on a bond which he gives in an action against the mortgagor for possession of the chattels, conditioned for return of the same, or for the money value thereof if return cannot be made.

Appeal from superior court, Greene county; Robinson, Judge.

Action by J. W. Grainger and others against George M. Lindsay and others. Judgment for plaintiffs. Defendants appeal. Reversed.

Geo. M. Lindsay, for appellants. Y. T. Ormond, for appellees.

MONTGOMERY, J. In 1897 the defendants Bell and Nethicutt were tenants of the defendant Barwick. The plaintiffs furnished supplies to Bell and Nethicutt to make their crops, and took mortgages on the crops to secure their debts. In the fall of the same year the defendant Barwick, in an action to recover possession of personal property, took possession of the crops, and gave bond to Bell and Nethicutt for their return, or for the money value thereof if return could not be made, with the defendant Dixon as surety. At the August term following of Greene superior court final judgment was rendered for the defendants in that action for the return of the crops, and, in case return could not be made, for \$95, their value. The crops had been disposed of by Barwick, and Bell and Nethicutt were and are insolvent. Execution was about to be issued by Bell and Nethicutt against Barwick, and the plaintiffs brought this action, the object of which is to have them subrogated to the rights of Bell and Nethicutt in the judgment. The defendant Lindsay has bought the judgment, with knowledge of all the facts, and is now the owner of the same. The defendants demurred, alleging several grounds for the demurrer. One ground is for a misjoinder of parties plaintiff and defendant; another is for a misjoinder of actions; and still another is that the relief sought by the plaintiffs, to wit, subrogation to the rights of Bell and Nethicutt in the judgment, cannot be granted. In proceedings for an injunction in the cause the demurrer was overruled, the defendants given permission to answer, and Bell and Nethicutt were enjoined from collecting the judgment, and Barwick from paying the same, until the final hearing of the cause.

Whatever irregularities may appear in the case we need not notice, for the judgment or order, upon being reviewed here, puts an end to the case. It is only necessary to discuss and decide the question of subrogation raised by the demurrer. It is clear that the plaintiffs are not entitled to that relief. This doctrine of subrogation was born of equity, and the ground of relief is not founded on contract. The principle is usually applied in cases where the complainant has had to pay the debt of another to prevent injury to his own rights, or to save his own property.

There are other instances in the text-books and in the decisions of the courts where the doctrine is applied, but they are all founded on the general principle above stated. Under no head of the doctrine can the plaintiff's claim be classed. For a discussion of the principle of subrogation, see *Liles v. Rogers*, 113 N. C. 197, 18 S. E. 104, and *Vaughan v. Jeffreys*, 119 N. C. 135, 26 S. E. 94. Besides, the plaintiffs had their clear remedy in law. The defendant Barwick had taken and converted to his own use the property of the plaintiffs, and he was liable to them for its conversion. It matters not that Bell and Nethicutt, the mortgagors of the plaintiffs, had been permitted to recover the value of the mortgaged property from Barwick, the wrongdoer. And, whatever effect that recovery may have had between the parties to the suit, it could not and did not affect the plaintiff's right to recover against Barwick for his conversion of their property. There was error in granting the injunction, for it appears upon the complaint and the demurrer that the plaintiffs are not entitled to the relief they demand. Error.

(123 N. C. 300)

HILL v. JONES et al.

(Supreme Court of North Carolina. Nov. 9, 1898.)

WILLS—ACCRUAL OF RIGHTS.

Where testatrix provided that her real estate should not be sold or disposed of till her youngest child should become of age, when it should be divided in a specified manner, a purchaser under a mortgage by one of her children of his interest therein cannot, even if acquiring an interest, recover it before such time.

Appeal from superior court, Lenoir county; Allen, Judge.

Action by Nathan Hill against George F. Jones and others to recover an interest in lands. Judgment for defendants. Plaintiff appeals. Affirmed.

George Rountree, for appellant. N. J. Rouse, for appellees.

CLARK, J. By the terms of the will, no part of the real estate was to be sold or disposed of until the youngest child should become of age, and then it should be divided in manner specified. Until that time, the husband should occupy the premises, and use the surplus of income from the realty, after paying for necessary repairs thereon and the education of the children, in such manner as he should deem best, without being required to render any account thereof. The youngest child has not become of age, and the question intended to be presented—whether the purchaser of the share of one of the devisees now deceased (under a mortgage made by him on his undivided interest) is entitled to recover—cannot now arise. If such devisee were alive, he could not claim possession, or partition till the youngest child became of

age, and, of course, his mortgagee could acquire no greater right, even if the devisee possessed such an interest as could be mortgaged, as to which we express no opinion. In dismissing the action there was no error.

(123 N. C. 739)

STATE ex rel. ATTORNEY GENERAL v. BLAND.

(Supreme Court of North Carolina. Nov. 9, 1898.)

ACTION BY STATE—ANNULLING GRANT.

Code, § 2788, authorizing the state to bring actions to vacate letters patent, applies only where, on cancellation of grants, title will vest in the state; action by one claiming the land being authorized by section 2786, and action by the party in interest being required by section 177.

Appeal from superior court, Pender county; Adams, Judge.

Action by the state, on the relation of the attorney general, against John T. Bland. Demurrer to complaint was sustained, and plaintiff appeals. Affirmed.

The Attorney General and Stevens & Beasley, for appellant. Frank McNeill, for appellee.

CLARK, J. This is a civil action brought by the state to annul and vacate a grant. It is averred in the complaint, and is admitted by the demurrer, that the state has no interest in the land. The action is brought for the benefit of another claimant. In such case the other claimant has full relief by a direct action, as authorized by Code, § 2786, and should have brought it at his own cost and charges, and as required by Code, § 177, requiring all actions to be brought by the party in interest. *Carter v. White*, 101 N. C. 30, 7 S. E. 473. Code, § 2788, authorizing the state to bring actions to vacate and annul letters patent, applies to the canceling of grants only in those cases in which, upon the cancellation, the title to the realty would revert in the state, which is thus the party in interest. *State v. Bevers*, 86 N. C. 588. If this were not so, parties contesting the validity of grants, alleged to be junior, could overwhelm the state with the costs of litigation in which it has no interest. This action is not brought by the state "upon relation," in which the relator is the real party in interest; and, indeed, section 2786 of the Code does not authorize an action of that kind, but a direct proceeding in his own name by the party who conceives he has been injured by the grant he seeks to set aside. In dismissing the action there was no error.

(123 N. C. 239)

PEARRE et al. v. FOLB et al.

(Supreme Court of North Carolina. Nov. 15, 1898.)

ASSIGNMENT FOR CREDITORS—OATH—ESTOPPEL.

1. The oath required by Act 1893, c. 453, of an assignor for benefit of creditors, to a sched-

ule of preferred debts, is not sufficient, no Bible being used, as required by Code, § 3309, and it not appearing that the assignor had any conscientious scruples about taking an oath with a Bible, but merely that he had no Bible.

2. An assignee for creditors who, on levy and seizure by the sheriff, executes a bond for delivery of the goods to the sheriff if the plaintiff recover judgment in the action, and therein recites the fact of the seizure and levy, is, with the assignor and sureties, estopped to deny the sufficiency and validity of the seizure and levy.

Appeal from superior court, Cumberland county; Allen, Judge.

Action by Aubrey Pearre and others, trading as Pearre Bros. & Co., and others, against Mike Folb and B. R. Taylor, his assignee for benefit of creditors, and others, sureties on a replevy bond, to set aside the assignment, and for judgment of bond. Judgment for plaintiffs. Defendants appeal. Affirmed.

H. L. Cook, George M. Rose, and C. W. Broadfoot, for appellants. H. McD. Robinson, R. P. Buxton, MacRae & Day, E. K. Bryan, and S. H. MacRae, for appellees.

MONTGOMERY, J. Act 1893, c. 453, in a mandatory way, requires the assignors in deeds of trust or deeds of assignment for the benefit of creditors to file under oath a schedule of all preferred debts, with particulars, within five days of the registration of the deed. The first question presented for decision in this case is one that relates to the sufficiency and validity of the oath which the assignor made when the schedule of preferred debts was filed. The assignor was a Jew. When the justice of the peace administered what the defendants insist is a valid oath, that officer said to the assignor, "Hold up your right hand;" upon which being done, the justice said, "You do solemnly swear or affirm that the matters and things contained in the paper writing are correct, so help you God." There was no Bible used. The affiant was not a Quaker, nor a Moravian, nor a Dunkard, nor a Mennonist. He did not ask to affirm, nor did he express any conscientious scruples at touching the Bible or being sworn on that book, but, on the contrary, said he had none. That proceeding did not constitute a valid oath, under the laws of North Carolina. The preamble to chapter 40, vol. 2, of the Code, is in these words: "Whereas, lawful oaths for the discovery of truth and establishing right are necessary and highly conducive to the important end of good government; and being most solemn appeals to Almighty God, as the omniscient witness of truth, and the just and omnipotent avenger of falsehood, such oaths, therefore, ought to be taken and administered with the utmost solemnity." This "solemnity" applies not only to the substance of the oath, but to the form and manner of taking it, and of administering it," as was said by the court in the case of *State v. Davis*, 69 N. C. 383. And therefore the statute (section 3309 of the Code) provides that "judges and justices of the peace and other persons who may be em-

powered to administer oaths shall (except in the cases in this chapter excepted) require the party sworn to lay his hand upon the Holy Evangelists of Almighty God in token of his engagement to speak the truth, as he hopes to be saved in the way and method of salvation pointed out in that blessed volume, and in further token that if he should swerve from the truth he may be justly deprived of all the blessings of the Gospel and made liable to that vengeance which he has imprecated on his own head, and he shall kiss the Holy Gospel as a seal of confirmation to the said engagement." The only exception made in the statute to the general rule is, "Where the person to be sworn shall be conscientiously scrupulous of taking the Book oath in the manner aforesaid, he shall be excused from laying hands upon or touching the Holy Gospels;" and the oath required in such cases shall be administered in a certain prescribed manner in section 3310 of the Code, equally as solemn as the general law requires. And Quakers and some others, with conscientious scruples about swearing at all, "are permitted to affirm." In *State v. Davis*, supra, the court further said: "If the usual form of oaths upon the Holy Evangelists is dispensed with, and an 'appeal' or 'affirmation' is substituted, it must appear that the person sworn had conscientious scruples, else the appeal or affirmation is invalid." That decision has never been altered or modified by this court.

The only other question necessary for us to decide is as to the validity of the levy and seizure by the sheriff of the goods of the defendant Folb under the warrants of attachment. The defendant Taylor, the assignee, with sureties, executed to the sheriff a bond for the delivery of the goods, should the plaintiffs recover judgment in the action against Taylor, the assignee of Folb; and in that paper writing they recited the fact that the sheriff had made seizure and levy of the goods. The defendants are estopped to deny the sufficiency and validity of the seizure of the goods and levy of the attachments. *Hundley v. Filbert*, 73 Mo. 34; 7 Am. & Eng. Enc. Law, 8. There is no error, and the judgment is affirmed.

(123 N. C. 149)

MEADOWS et al. v. MARSH et al.

(Supreme Court of North Carolina. Nov. 22, 1898.)

TRUSTS—PETITION FOR INSTRUCTIONS—PARTIES.

The grantors of several deeds of trust to one property are necessary parties to a petition by one of the trustees for instructions as to the distribution of a surplus in his hands.

Appeal from superior court, Granville county; Timberlake, Judge.

Controversy without action between J. F. Meadows and others and R. H. Marsh and others. The latter appealed from the judgment rendered. Remanded.

Winston & Fuller and B. S. Royster, for appellants.

FAIROLOTH, O. J. This is a controversy without action, under the Code. The facts need not be stated, except to say that A. Crews and wife made several deeds of trust to secure creditors, and the second trustee sold a part of the property, and realized more than enough to pay the debt secured to him, and he asks the court to give him directions. Crews and wife are not parties to this proceeding. The proceeding is remanded, to the end that the trustors and other interested persons may be made parties, and allowed to plead or answer. Remanded.

(123 N. C. 203)

MEARES et al. v. DUNCAN et ux.

(Supreme Court of North Carolina. Nov. 9, 1898.)

CORPORATIONS—MARRIED WOMAN AS STOCKHOLDER.

A stockholder in a building association, and who owes it for balance of money borrowed, though a married woman, must, on the association becoming insolvent, contribute to the losses.

Appeal from superior court, Carteret county; Adams, Judge.

Action by Meares and Manning, receivers of the Interstate Building & Loan Association of Wilmington, against W. B. Duncan and wife. Judgment for defendants. Plaintiffs appeal. Reversed.

Charles R. Thomas and Allen & Dortch, for appellants.

FURCHES, J. The defendant Emily F. Duncan became one of the stockholders and incorporators of the Interstate Building & Loan Association of Wilmington. She subscribed for \$1,000 of the capital stock of said concern, which was issued to her. She then borrowed \$1,000 in money from said association, and she and her husband, W. B. Duncan, executed their bond and obligation to said association therefor; and at the same time the defendant W. B. Duncan and his wife, the said Emily F., made and executed a mortgage on the real estate of the said Emily F. to secure the payment thereof.

This statement of facts, about which there is no dispute, shows that this is the debt of the defendant Emily F. Duncan, evidenced by the bond of her and her husband, W. B. Duncan. *Mahoney v. Stewart* (at this term) 31 S. E. 384. This debt was secured by the mortgage of the husband and wife on the wife's property. This made the mortgaged property liable to the plaintiff for whatever may still be due thereon. This we do not understand the defendants to dispute, and the single question presented for our consideration is as to whether there is still due on said debt the sum of \$651.56, or only \$498.66.

with interest on the correct amount. This corporation has become insolvent. A creditors' bill has been filed, and it is now in the hands of the plaintiff receivers for liquidation and settlement. It has been ascertained that the defalcations of the concern, and the costs and charges incident to the winding up and closing out the same, amount to 30 per cent. of its assets. This is undisputed. But the defendant Emily F. claims that, as she is a feme covert, she is not liable for this deficiency, but that she is entitled to have credited all that she has paid in to the concern upon her bond; and it is admitted that, if she is so entitled, the amount still due is \$498.68, but, if she is liable for her part of the deficiency, then the balance due is \$651.56. The fund is now in the custody of a court of equity, and to be administered according to the principles of equity; and as the defendant Emily F. is one of the incorporators, and entitled to her part of the profits of the concern, if any had been made, equity says that she must bear her part of the losses as other stockholders have to do. Were she not so liable, the whole equitable settlement of the concern would be destroyed. She got in the same boat with the other stockholders, and, as it sank, she has to take her chances of escape with the others, though she is a married woman. This is the equitable solution of the matter.

But there is another solution that is more direct, and that is this: As the expenses and losses had to be paid out of the assets of the concern, and they have been ascertained to be 30 per cent. thereof, and her note being a part of the assets, and this expense and deficiency having first to be paid, she can claim no credits on her bond until this is paid. So, she has not, in legal contemplation, paid this 30 per cent. on her debt, but paid it to the concern, which went to the expense and loss account, and therefore she is not entitled to have it credited on her bond. This matter has been very much discussed in *Strauss v. Association*, 117 N. C. 308, 23 S. E. 450; *Id.*, 118 N. C. 556, 24 S. E. 116; *Thompson v. Association*, 120 N. C. 420, 27 S. E. 118; *Meares v. Davis*, 121 N. C. 126, 28 S. E. 188; and we think the principle involved in this case is settled by those cases. In our opinion, the defendant Emily F. Duncan, as well as her husband, is liable to the plaintiffs for \$651.56 and interest, and judgment should have been entered for that amount. There is error in the judgment to this extent. Error.

(123 N. C. 206)

MEARES et al. v. BUTLER et ux.

(Supreme Court of North Carolina. Nov. 15, 1898.)

USURY—PENALTY FOR EXACTING—RIGHT OF SURETY TO RECOVER.

Under Code, § 3836, permitting one paying more than 6 per cent. interest to recover twice the amount paid, a wife mortgaging her

land to secure her husband's loan in a building association cannot, in foreclosure, be credited with usury paid by him.

Appeal from superior court, Sampson county; Adams, Judge.

Bill by Iredell Meares and P. B. Manning, receivers of the Carolina Interstate Building & Loan Association, against O. T. Butler and Ella L. Butler. There was a decree for defendant Ella L. Butler, and against C. T. Butler, and plaintiffs and C. T. Butler appeal. Reversed.

Charles R. Thomas and Allen & Dortch, for appellants.

FURCHES, J. It is astonishing to see what amount of litigation can grow out of an insolvent building and loan association. The first case that came before us, growing out of this association, was *Strauss v. Association*, 117 N. C. 308, 23 S. E. 450. In that case the court undertook to mark out the principles upon which the concern should be wound up and settled; and, while the principles laid down in that case established the rules upon which the same should be settled, there are still troublesome questions arising all along the line. The last deliverance of this court upon questions growing out of the settlement of this insolvent concern is *Meares v. Duncan* (at this term) 81 S. E. 476. That case is only differentiated from this in one respect. In that case Mrs. Duncan was the borrower and one of the incorporators. In this case Mrs. Butler was not the borrower, and was not one of the incorporators. But her husband was the incorporator and borrower, and she mortgaged her land as security for the payment. *Sherrod v. Dixon*, 120 N. C. 60, 26 S. E. 770. And while Mrs. Butler is under no personal obligation to the plaintiff association, by reason of her mortgage, she occupies the relation of surety to the extent of her mortgaged property. *Sherrod v. Dixon*, *supra*; *Hinton v. Greenleaf*, 118 N. C. 6, 18 S. E. 56; *Smith v. Association*, 119 N. C. 257, 28 S. E. 40; *Hedrick v. Byerly*, 119 N. C. 420, 25 S. E. 1020. But these authorities only go to the extent of relieving the surety where the principal debtor is relieved, and to the extent of his relief; or where the plaintiff has done something that releases the surety (or security) from the payment of the debt, such as extending the time of payment without the consent of the surety; or the lapse of time, under the plea of the statute of limitations; or a tender of payment; or where the creditor has done something that the surety has a right to plead as a defense, independent of the rights of the principal. In this case the principal is not entitled to this defense, as is shown in *Meares v. Duncan*, *supra*. If he was, it would inure to the benefit of the wife's security, as in *Smith v. Association*, *supra*.

Nor is it a defense that the surety is enti-

pled to plead and set up as a counterclaim, as she would have the right to plead, the statute of limitations, or the extension of time, or the tender of payment. It is not claimed that a greater rate of interest is charged in this case than 6 per cent. Nor is it claimed that any payments made, whether as fines, fees, or assessments, have not been allowed the defendants by plaintiff. But it is alleged by defendants that these payments, when made, were upon a usurious contract, and that she (the surety) is entitled to set them up as counterclaims, under the statute. In this she is mistaken. The statute does not so provide. The Code (section 3836) provides that "in case a greater rate of interest has been paid [than six per cent.] *the person by whom it has been paid*, or his legal representative, may recover back, in an action * * * of debt twice the amount of interest paid." (The italics are ours.) The case states that what has been paid on this debt was paid by the principal, C. T. Butler, and not by the wife. This right, whether by action or by way of counterclaim, is purely statutory (Roberts v. Insurance Co., 118 N. C. 429, 24 S. E. 780); and Mrs. Butler has no cause of action,—could not sue the association, and recover for usurious interest not paid by her, and cannot recover by way of counterclaim, which is, in effect, a cross action.

This case is distinguishable from Smith v. Association, supra. The principal question decided in that case was that a tender of payment had been made by the principal and refused, which released the surety, though it did not release the principal debtor. That was a case where the creditor, by his act, had released the surety, and which she had the right to plead independent of the principal, as she would the statute of limitations. The other was the recovery of double the amount of usurious interest by the husband, who paid it; and, of course, when he recovered this, it inured to the benefit of his surety. There is no conflict in this opinion and that of Smith v. Association, supra. There is error in the judgment appealed from, in that it discharged the mortgage. The plaintiffs, upon the facts found, are entitled to a judgment of foreclosure of the mortgage for the satisfaction of their judgment. Error. Reversed.

(123 N. C. 168)

PULLY et al. v. PASS.

(Supreme Court of North Carolina. Nov. 9, 1898.)

CONTRIBUTION—ASSIGNMENT—ACCOUNT.

1. Payment of bond by one of the two obligors gives him a right of contribution to the extent of the other's primary obligation.

2. It is an assignment of the right of contribution which one of two obligors of a bond has on paying the bond, where he thereafter transfers it for the amount of the other's primary obligation.

3. Assignment of balance due by defendant on an open account having none of the qualities of an assignment of commercial paper, a claim against the assignor, held by defendant when action is brought by the assignee, gives a valid set-off.

Appeal from superior court, Person county; Adams, Judge.

Action by W. H. Pully and another against J. C. Pass. Judgment for plaintiffs. Defendant appeals. Reversed.

W. D. Merritt, for appellant. Boone & Bryant, for appellees.

DOUGLAS, J. This is an action brought to recover the balance found due upon a settlement in March, 1896, between the plaintiff Pully and the defendant, and subsequently assigned by the plaintiff Pully to his co-plaintiff, Long. The following is taken from the statement of the case: "The defendant set up several counterclaims; among others, a certain bond in words and figures, to wit: '\$220. One day after date, with 8 per cent. interest from date until paid, we promise to pay J. S. Merritt the sum of two hundred and twenty dollars for value received. Witness our hands and seals this, the 27th day of May, 1892. C. B. Brooks. [Seal.] W. H. Pully. [Seal.]' It is admitted that Pass came to the possession of said bond for value on the 16th day of December, 1896. C. B. Brooks then testified as follows: 'The bond set up as counterclaim in this action was executed by myself and Pully to Mr. Merritt for \$220. I paid the bond and took it up.' Merritt testified to the same as Brooks. Brooks further said he was owing Pass, and transferred the bond to him about the 16th of December, 1896, for the sum of \$150, same being the amount due by Pully on said note, including interest from May 27, 1892, at 8 per cent., up to date of transfer. After this evidence the defendant's counsel again offered to introduce said bond in evidence. Plaintiff objected, objection sustained, and defendant excepted. His honor submitted the issues to the jury after charging them on all matters of law, to which there was no exception. The jury returned a verdict for plaintiff, J. A. Long, finding the defendant indebted to him in the sum of \$482.34."

The only question before us is the admissibility of the bond, which we infer from the argument of counsel was excluded purely on the ground that, having been paid by one of the makers, it was thereby extinguished. The exact relation that Brooks and Pully bore to each other does not appear; but it is not denied that, as between them, Pully was primarily liable for the amount claimed by the defendant to be due on the bond. We do not think that the payment of the bond in full by Brooks defeated his right of recovery or contribution, as the case might be, from his co-obligor. Admitting that the original debt was extinguished by the payment by Brooks, that very payment at once vested in him a

right of action against Pully to the extent of Pully's primary liability, and this right or debt Brooks could assign to Pass, as he appears to have done. *York v. Landis*, 65 N. C. 535. This assignment to Pass, having taken place before the bringing of this action, gave him a valid set-off, as the assignment to Long of the balance due on an open account possesses none of the qualities of commercial paper. We are therefore of opinion that the defendant was entitled to maintain his set-off, and for that purpose to introduce the bond as evidence of the payment of the original debt. For the exclusion of such evidence a new trial must be ordered. New trial.

(123 N. C. 244)

WEBB et al. v. HICKS et al.

(Supreme Court of North Carolina. Nov. 15, 1898.)

PARTNERSHIP—CREDITORS OF INSOLVENT—CONTINUATION OF INSOLVENT'S BUSINESS—LIABILITY FOR LOSSES.

Defendants and other creditors of an insolvent firm agreed with the assignee thereof, who was also one of its creditors, that he should carry on, for a specified period, for the benefit of the creditors, the business in which such firm had been engaged, for which service he was to receive a certain compensation, in lieu of commissions under the assignment. In the course of his duties, he purchased of the plaintiff firm, which had knowledge of such agreement, sundry articles to be used in such business, and obtained from such firm money with which to carry it on. The business resulting in loss, the plaintiff firm sought to enforce its claim as against defendants. *Held*, that defendants became liable for expenses incurred in carrying it on.

Appeal from superior court, Cumberland county; Allen, Judge.

Action by Charles A. Webb and Oscar H. Webb, partners as A. L. Webb & Sons, and H. A. Sinclair, trustee of M. McD. Williams, an insolvent debtor, against R. W. Hicks and others. From a judgment in favor of defendants, plaintiffs appeal. Reversed.

N. A. Sinclair and N. W. Ray, for appellants. MacRae & Day, H. McD. Robinson, and S. H. MacRae, for appellees.

FAIRCLOTH, C. J. An action between the same parties, touching the same subject-matter, was before this court, and is reported in 116 N. C. 598, 21 S. E. 672, in which the facts were set out fully. On the trial of that action, the superior court dismissed it, and on appeal this court, as upon demurrer *ore tenus*, held that there was no error, on the ground that no cause of action was stated, and on the certificate of this court the action was dismissed below. The present action was begun within the time allowed by the statute. Jury trial was waived, and it was agreed by both parties that the court find as facts the same facts as are set out in the former case. For the purpose of determining the question now presented, the following facts may be stated: On the 12th of Decem-

ber, 1890, W. J. McDiarmid and A. K. McDiarmid, being insolvent, conveyed and assigned all their property to M. McD. Williams, in trust, to collect and sell the same, and pay their creditors in the order therein prescribed; that, prior to said assignment, the same property was incumbered with mortgages, deeds in trust, etc.; that these deeds were foreclosed by sales, and J. Y. Gossler and R. W. Hicks became the purchasers on January 5, 1892, and received a deed, and on same date the assignee, Williams, executed a quitclaim deed to Gossler and Hicks. It is admitted that in January, 1891, all the creditors of W. J. McDiarmid & Bro., including the defendants Hicks and Gossler, entered into a written agreement (Exhibit A) which differs in some respects from the assignment, reciting the several debts, and that Gossler & Co. had purchased from the debtor certain lumber, and that they were willing that it should remain to run the business therein contemplated; and "whereas it is to the interest of all parties concerned that the property shall not be sacrificed at a forced sale for cash under said mortgages, judgment, and assignment, but that the business should be carried on as it heretofore has been, for the benefit of the creditors, in order that the full value of said property shall be realized for the payment of the creditors in full." The agreement then provides that the assignee, Williams, and creditor, in consideration of the premises, "may and shall continue the business as it has heretofore been carried on [manufacturing and dressing lumber and distilling turpentine at the same places], for the term of one year from January 1, 1891, at the end of which time he shall render an account of the said business to the said creditors, at which time it may be determined whether the business shall be further continued or wound up by a sale of the property. Said Williams is to conduct the said business * * * economically and prudently." It also provides for his compensation in lieu of his commissions on receipts and disbursements under the assignment, and directs the order in which the creditors shall be paid by him. Said Williams, in the course of his duties under said agreement, bought some articles, and drew drafts on the plaintiffs for money to carry on the business, the plaintiffs having knowledge of the written agreement referred to, marked "Exhibit A," before the drafts were accepted. These are the facts. The judgment of dismissal in the first action, for the reason stated, cannot bar the present action, because there was nothing to adjudicate except that fact.

The main question is, do the facts show a partnership between those who signed Exhibit A? When the facts are undisputed, what constitutes a partnership is a question of law, and the usual, not the universal, test, is participation in the profits and losses attending the enterprise. *Jones v. Call*, 93 N.

C. 170; *Kootz v. Tuvian*, 118 N. C. 893, 24 S. E. 776. "A partnership is the contract relation subsisting between persons who have combined their property, labor, or skill in an enterprise or business as principals for the purpose of joint profit." 1 Bates, Partn. § 1; Story, Partn. c. 1, § 2. In determining whether the relation constitutes a partnership, the intention is to be considered. If that relation is established, however, it matters not whether they declare that they are or are not partners. The intention of the parties will be determined from the effect of the whole contract, regardless of special expressions. If the actual relation assumed and the rights and obligations created are those of partners, the actual intention or declared purpose of the parties cannot suspend the consequences. 1 Bates, Partn. § 17. The contract where third persons' claims are not in question will be liberally construed as to the actual understanding and the purposes the parties had in view. *Hitchings v. Ellis*, 12 Gray, 449; *Taylor v. Bush*, 75 Ala. 432. The creditors had the right to have the property sold by the assignee at once, and the proceeds applied to their debts; but for the expressed purpose of gain and enhancement of the value, and to avoid loss and sacrifice by sale, they agreed to have the business continued, and thereby obtain a profit, and they were to reap the profit, if any, and must bear the loss and expense, if any. As we understand it, the barrels bought and the money drawn was turned into the new business, as it could not be continued well without expense, and that would render the defendants liable, on the ground that whoever gets and uses goods ought to pay for them. *Poole v. Lewis*, 75 N. C. 417. Our conclusion is that the judgment of his honor was erroneous. Reversed.

(122 N. C. 275)

MENDENHALL v. NORTH CAROLINA R. CO.

(Supreme Court of North Carolina. Nov. 22, 1898.)

DEATH — MEASURE OF DAMAGES — INSTRUCTIONS — ERROR.

1. In an action for wrongful death, an instruction that no damages should be awarded unless intestate made more than a living for himself was properly refused where there was no evidence of such fact, and there was evidence to the contrary.

2. The refusal to instruct as to a point not material to the verdict is not prejudicial error.

Appeal from superior court, Davidson county; Allen, Judge.

Action by E. E. Mendenhall, administrator, against the North Carolina Railroad Company. From a judgment for plaintiff, defendant appeals. Affirmed.

G. F. Bason, for appellant. B. F. Long, for appellee.

MONTGOMERY, J. The intestate of the plaintiff was so badly injured on the railroad

track of the defendant company in a collision with its engine that he died a few hours after he received the injury; and this is an action brought by the administrator to recover damages on the allegation that they were caused by the death of the intestate, and that his injury and death were caused by the negligence of the defendant. The defendant made numerous exceptions to the charge of the court below, but argued none of them in this court, nor are they alluded to in the brief filed in the case. We have, however, examined the charge carefully, and find in it no error of which the defendant company could complain. The defendant asked the court to charge the jury that, "if they should believe that the intestate made no more than a living for himself, there should be no damages awarded on account of his death." The court could not have given that instruction as asked, for the reason that there was no evidence going to support that view to the extent requested in the instruction. There was, indeed, a witness (George Kinney) who said that "the intestate's farm was a tolerably large old farm, a little run down, what he would call rather a poor farm; that he did not know a great deal about what kind of crops the intestate made, but that he made a plenty to support himself; and that, if he made anything more than a support for himself, it was not much more." That evidence tended to show that the intestate did not earn as much as the verdict of the jury declared; but certainly it did not tend to show that he made nothing more than a support for himself. There were other witnesses who testified that his net earnings were from \$300 to \$400 a year. The tax lists showed, for the year in which the intestate was killed, about \$700 worth of personal and real estate. Under some circumstances, that might have been evidence against him as to the value of his property at the time it was listed, but it hardly could be considered evidence as to what his services were worth or what he had earned in the year before. The instruction which his honor gave followed the rulings of this court upon the subject. Upon the whole evidence, his honor on this point instructed the jury as follows: "The measure of damages is the present value of the net pecuniary worth of the deceased, to be ascertained by deducting the cost of his own living and expenditures from the gross income, based upon his life expectancy. As a basis on which to enable the jury to make their estimate, it is competent to show, and for them to consider, the age of the deceased, his prospects in life, his habits, his character, his industry and skill, the means he had for making money, the business in which he was employed; the end of it all being to enable the jury to fix upon the net income which might be reasonably expected if death had not ensued, and thus arrive at the pecuniary worth of the deceased to his family. You do not undertake to give the equivalent of hu-

man life. You allow nothing for suffering. You do not attempt to punish the railroad, but you seek to give a fair, reasonable pecuniary worth of the deceased to his family, under the rule which I have laid down. You should rid yourself of all prejudice, if you have any, and of sympathy. It is not a question of sympathy. It is just a plain, practical question, and you should give a reasonable and fair verdict upon all the issues." The defendant requested the court to charge that, "if the jury believed the evidence, the crossing itself, up to and including the boxes on each side, was in good condition, and that there is no evidence that any defect in the road within the limit of the two boxes was out of repair or caused the injury." Upon a superficial view, it might appear that the matter to which that instruction pertained was material to the case, but, in reality, it is not so. The wagon in which the intestate was seated was struck by the pilot of the engine between the first and rear wheels. The contention of the plaintiff was that the defendant's engineer was negligent in not keeping a proper lookout; that the train was not properly equipped with employes and with brakes and other necessary appliances to check its speed after the intestate had been discovered on the track; and that the defendant's engineer failed to sound the whistle at the signal post. The contention of the defendant was that the plaintiff's intestate had crossed the track in the clear, but that his horse, having become frightened, backed the wagon on the track so suddenly that the engineer did not have time to check the speed of the engine, and thereby to prevent the injury. The condition of the roadbed, therefore, had no connection with the collision from the standpoint of either the plaintiff or the defendant. The defendant's position was that, regardless of the condition of the roadbed, whether it was good or bad, the engineer could not have prevented the injury for want of time, owing to the sudden backing of the horse. The judgment is affirmed.

(123 N. C. 308)

BOARD OF COM'RS OF WILKES COUNTY v. CALL et al.

(Supreme Court of North Carolina. Nov. 9, 1898.)

RAILROAD AID BONDS—COUNTY SUBSCRIPTIONS—VALIDITY—CONSTITUTIONAL LAW—BONDHOLDERS—ESTOPPEL—IMPAIRMENT OF CONTRACT—SELF-EXECUTING PROVISIONS.

1. Where an act authorizing municipalities to issue bonds in behalf of a railroad company was not passed by a call for the yeas and nays, and the vote on the second reading was not recorded in the journal of the house, as provided by Const. art. 2, § 14, the act is invalid.

2. An ordinance of the constitutional convention of 1868, which created the Northwestern North Carolina Railroad Company, provided that the capital stock of the company might be created in part by subscriptions on the part of counties, and (section 12) that all counties or towns subscribing stock to said company

should do so "in the same manner and under the same rules, regulations and restrictions" as are set forth and prescribed in the act incorporating the Atlantic & North Carolina Railroad Company (Act 1852, c. 136). Held that, under the rule of strict construction of charters granting special privileges or powers, section 12 does not refer to Act 1852, § 33, which confers the "power" on certain counties to subscribe to the capital stock of such road, but is limited to sections 84 and 86, prescribing the "manner" in which such power must be exercised by the counties or towns to which it may be granted.

3. The charter of the Atlantic & North Carolina Railroad Company referred to provides that, if the road be not completed within six years after the ratification of the act, the charter shall be forfeited. The Northwestern road was not completed within six years from its incorporation, in 1868. Held that, admitting the constitutional ordinance of itself conferred authority on counties to subscribe to the latter road, county bonds issued therefor in 1888 are invalid, by force of the above provision in the charter of the former road.

4. Where county bonds issued to pay for a subscription to the capital stock of a railroad company recite that they were issued under a certain act of the legislature, the bondholders are estopped from setting up facts to show that the bonds were valid, as authorized by some other law or constitutional provision.

5. The mere authority in a charter to a railroad company to receive subscriptions to the capital stock from municipal corporations, where no consideration is given, and where there is no attempted exercise of the power, has none of the essential elements of a contract, and hence is held subject to constitutional restrictions, and at the pleasure of the law-making power.

6. Code, §§ 1996-2000, authorizing county commissioners to subscribe stock to a railroad company when necessary to aid in the "completion" of a railroad, do not include a railroad not commenced before the constitution of 1868 was adopted.

Furches, J., and Faircloth, C. J., dissenting.

Appeal from superior court, Wilkes county; Starbuck, Judge.

Action by the board of commissioners of Wilkes county and another against Clarence Call, sheriff and ex officio treasurer of Wilkes county, and others. From a judgment refusing to vacate an order enjoining defendant sheriff from paying any portion of the principal or interest of the bonds in controversy until the final hearing, defendants J. M. Turner and another appeal. Affirmed.

A. C. Avery, for plaintiff.

DOUGLAS, J. This is an action brought to test the validity of certain bonds issued by Wilkes county in payment of its subscription to the stock of the Northwestern North Carolina Railroad Company. The suit was brought by the commissioners of the county of Wilkes against the county treasurer. The defendants Turner and Wellborn, who had become the owners of one of the bonds after the bringing of this action, by leave of the court, became parties defendant, and invited all other bondholders to come in and join them in resisting the action.

On the face of each bond, dated October 1, 1889, appears the explicit statement that "this

bond is one of a series of one hundred bonds, of the denomination of one thousand dollars each, issued by authority of an act of the general assembly of North Carolina, ratified the 20th day of February, A. D. 1879, entitled 'An act to amend the charter of the North-western North Carolina Railroad for the construction of a second division from the towns of Winston and Salem in Forsyth county, up the Yadkin valley, by Wilkesboro, to Patterson's Factory, Caldwell county,' etc. The bond does not allude in any way to any other legislative act, nor does it profess to claim further validity than that derived from the recited act. It is admitted, as well as clearly shown by the evidence, that this act of February 20, 1879, was not passed in accordance with the mandatory provisions of the constitution of this state, as construed by this court, inasmuch as upon the passage of said bill, upon its second reading in the house of representatives, there was no call of the ayes and noes, and, further, that the vote upon such reading was not recorded in the journal of the house. Const. art. 2, § 14. The amendatory act of 1881 is subject to the same objection. In view of the recent decisions of this court, it is useless to discuss this question now, as the rule has been definitely settled in the following cases: *Union Bank of Richmond v. Commissioners of Town of Oxford*, 119 N. C. 214, 25 S. E. 966; *Commissioners v. Snuggs*, 121 N. C. 394, 28 S. E. 539; *City of Charlotte v. Shepard*, 120 N. C. 411, 27 S. E. 109; *Id.*, 122 N. C. 602, 29 S. E. 842; *Rodman v. Town of Washington*, 122 N. C. 39, 30 S. E. 118. Under the authority of these decisions, we are compelled to hold that the entire issue of these bonds is null and void, for want of legislative authority. An act of the legislature passed in violation of the constitution of the state, or in disregard of its mandatory provisions, is, to the extent of such repugnance, absolutely void; and all bonds issued thereunder bear the brand of illegality stamped upon their face by the hand of the law. The act under which these bonds profess to have been issued was never legally passed, and never became a law. As was said in *Norton v. Shelby Co.*, 118 U. S. 425, 6 Sup. Ct. 1121: "An unconstitutional act is not a law. It confers no rights. It imposes no duties. It affords no protection. It creates no office. It is, in legal contemplation, as inoperative as though it had never been passed." The constitution of the state is plenary notice to the world of its organic law. There can be no bona fide holders of unconstitutional obligations, nor can ignorance of public statutes and legislative journals be deemed otherwise than willful or negligent. The journals are published for the information of the public, and are widely distributed and easily accessible, fully as much so as the public records of a county. Surely, no one would be heard to say that he was the bona fide owner of a piece of land simply because he held a deed therefor, when an in-

spection of the records would show that his grantor had no power to convey. It has been well said in *U. S. v. Macon Co.*, 99 U. S. 582: "The difficulty lies in the want of original power. While there has undoubtedly been great recklessness on the part of the municipal authorities in the creation of bonded indebtedness, there has not unfrequently been gross carelessness on the part of purchasers when investing in such securities. Every purchaser of a municipal bond is chargeable with notice of the statute under which the bond was issued. If the statute gives no power to make the bond, the municipality is not bound."

A careful distinction should be drawn between the want of power to issue bonds, and mere irregularities in the exercise of that power. The latter, under certain circumstances, may be cured by recitals, or eliminated by estoppel; but a want of power goes to the very root of the transaction, and destroys its vitality. A tree may yet live though its branches are badly shattered by the storm, but the last leaf falls when the root is dead. This rule has been clearly laid down by the supreme court of the United States in the oft-cited case of *Anthony v. Jasper Co.*, 101 U. S. 693, where Chief Justice Waite says: "Dealers in municipal bonds are charged with notice of the laws of the state granting power to make the bonds they find on the market. This we have always held. If the power exists in the municipality, the bona fide holder is protected against mere irregularities in the manner of its execution; but, if there is a want of power, no legal liability can be created. When the bonds now in question were put out, the law required that, to be valid, they must be certified to by the auditor of state. In other words, that officer was to certify them before their execution was complete, so as to bind the public for their payment. We had occasion to consider in *McGarrahan v. Mining Co.*, 96 U. S. 316, the effect of statutory requirements as to the form of the execution of patents to pass the title of lands out of the United States, and there say: 'Each and every one of the integral parts of the execution is essential to the validity of a patent. They are of equal importance under the law, and one cannot be dispensed with more than another. Neither is directory, but all are mandatory. The question is not what, in the absence of statutory regulations, would constitute a valid grant, but what the statute requires.' The same rule applies here. The object to be accomplished is the complete execution of a valid instrument, such as the law authorizes public officers to put out, and bind for the payment of money the public organization they represent." By repeated adjudications, this has become the settled rule of that court. *Police Jury v. Britton*, 15 Wall. 566, 570, 572; *Claiborne Co. v. Brooks*, 111 U. S. 400, 406, 4 Sup. Ct. 489; *Northern Bank of Toledo v. Porter Tp. Trustees*, 110 U. S. 608, 618, 4

Sup. Ct. 254; *Concord v. Robinson*, 121 U. S. 165, 167, 7 Sup. Ct. 937; *Kelley v. Milan*, 127 U. S. 139, 150, 8 Sup. Ct. 1101; *Norton v. Dyersburg*, 127 U. S. 160, 175, 8 Sup. Ct. 1111; *Young v. Clarendon Tp.*, 132 U. S. 340, 10 Sup. Ct. 107; *Hill v. Memphis*, 134 U. S. 198, 203, 10 Sup. Ct. 562; *Merrill v. Monticello*, 138 U. S. 673, 686, 687, 11 Sup. Ct. 441; *City of Brenham v. German-American Bank*, 144 U. S. 173, 12 Sup. Ct. 559; *Citizens' Sav. & Loan Ass'n v. Perry Co.*, 156 U. S. 692, 704, 15 Sup. Ct. 547.

But it is urged that, while the bonds were expressly issued under the act of 1879, there was, apparently unknown to both parties to the transaction, and certainly ignored by them, an existing authority to issue said bonds, derived from an ordinance of the constitutional convention passed in 1868; and that, therefore, we should hold that these bonds were unwittingly issued under that ordinance, and are therefore valid. The only authority we can find in that ordinance in any way authorizing the subscription to the stock of the company or the issuing of the bonds is as follows:

"Sec. 2. That the capital stock of said company may be created by subscriptions on the part of individuals, corporations and counties, in shares of one hundred dollars."

"Sec. 12. Be it further ordained that the stockholders of said company may pay the stock subscribed by them either in money, labor or material for constructing said road, as the board of directors may determine, and that all counties or towns subscribing stock to said company shall do so in the same manner and under the same rules, regulations and restrictions as are set forth and prescribed in the act incorporating the North Carolina and Atlantic Railroad Company, for the government of such towns and counties as are now allowed to subscribe to the capital stock of said company."

That said ordinance cannot be relied on to support the validity of the bonds at issue is apparent for several reasons:

First. We do not see that any authority whatever is given or attempted to be given by either of these sections to Wilkes county to subscribe to the capital stock of this company. But it is said that section 12, by referring to the charter of the "North Carolina and Atlantic Railroad Company," by which we presume is meant the Atlantic & North Carolina Railroad (chapter 136 of the Laws of 1852), confers upon the different counties through or near which the Northwestern North Carolina Railroad may run the same authority to subscribe as was given to the counties tributary to the former company. Said section does not refer generally to the act of 1852, nor does it profess to confer any of the powers therein granted. It simply says that those counties and towns that do subscribe "shall do so in the same manner and under the same rules, regulations and restrictions" as are prescribed in the former act. The words

"same restrictions" are peculiarly significant here, as the act of 1852 (section 45) provides in express terms that, "If the said road be not completed within six years after the ratification of this act, this charter shall be forfeited. Therefore, even if the powers granted in the act of 1852 had been given to the Northwestern North Carolina Railroad Company, or the counties in its interest, subject to the "same restrictions," those powers would have expired by their own limitation long before their attempted exercise 23 years thereafter. As all such powers must be strictly construed, this restrictive provision must be held to be in the nature of a limitation, and not a condition subsequent; that is, the authority given to the counties to subscribe, if it ever existed, expired at the end of six years, unless already exercised in such a way as to create vested rights. But it makes no difference how the power was exercised, if there was no power. Section 12 of the ordinance of 1868 does not refer to section 33 of the act of 1852, which confers the power, but is evidently limited by its very terms to sections 34-36, which prescribe the manner in which that power must be exercised by the counties or towns to which it may have been granted. It would have been very easy for the convention to have given the same authority granted in section 33, either in express terms or by reference to said section; but it has not done so, and we cannot do so by judicial construction.

There is no principle better settled than that all charters granting special privileges or powers must be not only strictly construed, but must be construed most strongly against the grantee. This rule, with the reasons therefor, has been so clearly stated by Chief Justice Pearson in *Railroad Co. v. Reid*, 64 N. C. 155, 158, that we can do no better than to quote his language, as follows: "It is equally well settled that contracts made by the state with individuals, in granting charters, are not to be construed by the same rules as contracts between individuals. In the latter case, the rule of the common law, which is the same as common sense, is, 'Words are to be taken in the strongest sense against the party using them,' on the idea that self-interest induces a man to select words most favorable for himself. It is otherwise where the state is a party; for it is known that in obtaining charters, although the sovereign is presumed to use the words, in point of fact the bills are drafted by individuals seeking to procure the grant, and that the 'promoters,' as they are styled in England, or the 'lobby members,' as they are styled on this side of the Atlantic, have the charters or acts of incorporation drafted to suit their own purposes; and a matter of this kind, instead of being in its strict sense a contract, is more like the act of an indulgent head of the family dispensing favors to its different members, and yielding to importunity. So, the courts, to save the old

gentleman from being stripped of the very means of existence by sharp practice, have been forced to reverse the rule of construction, and to adopt the meaning most favorable to the grantor." The same rule is laid down in *Pennsylvania R. Co. v. Canal Com'rs*, 21 Pa. St. 9, 22, where Chief Justice Jeremiah S. Black says for the court: "It may be that the privilege which the relators claim might arise by implication out of their charter or some other of the acts cited by their counsel, if we were at liberty to give to them the broad construction which we sometimes apply to other laws of a different character. But corporate powers can never be created by implication nor extended by construction. No privilege is granted unless it be expressed in plain and unequivocal words, testifying the intention of the legislature in a manner too plain to be misunderstood. When the state means to clothe a corporate body with a portion of her own sovereignty, and to disarm herself to that extent of the powers which belong to her, it is so easy to say so that we will never believe it to be meant when it is not said; and words of equivocal import are so easily inserted by mistake or fraud that every consideration of justice and policy requires that they should be treated as nugatory when they do find their way into the enactments of the legislature. In the construction of a charter, to be in doubt is to be resolved; and every resolution which springs from doubt is against the corporation. This is the rule sustained by all the courts in this country and in England. No other has ever received the sanction of any authority to which we owe much deference. This court has asserted it times without number. We have ruled five or six important cases upon it within the last year. We seem not to have made much impression on the professional mind, and we are probably making as little now. But, when respectable counsel call upon us hereafter (as they doubtless will) to enlarge corporate powers by construction, we can only repeat again and again that our duty imperatively forbids it. The privileges of the Pennsylvania Railroad Company may be too rigidly restricted. If the usefulness of the company would be increased by extending them, let the legislature see to it. But let it be remembered that nothing but plain English words will do it." It should be borne in mind that there is no pretense of authority for the issue of these bonds outside of the charter of the Northwestern North Carolina Railroad Company and its amendments. It has been the actor as well as the beneficiary throughout, and therefore the acts under consideration come peculiarly within the rule of strict construction laid down by the two great chief justices from whom we have quoted.

We have not overlooked the fact that in *Reio v. Commissioners*, 76 N. C. 489, this court strongly intimates that section 12 of the charter did confer the authority given in section

33 of the act of 1852; but it does so incidentally, and with little discussion, because it was not denied in the pleadings. This was not the determining point in the case, which turned chiefly upon the recitals in the bonds and the ratifying act of 1868. This is clearly shown in the opinion itself, which devotes four pages to the discussion of equitable estoppel arising on the recitals, and about half a page to the possible binding effect of the ordinance, winding up with the significant sentence on page 497 that, "as the case is presented to us, that question does not arise, and we do not decide it." It evidently did not receive careful investigation, as it apparently did not arise on the pleadings. The court stated that "the principle of equitable estoppel is a most important element in the transaction," and that the recitals in the bonds (which were essentially different from those now before us) constituted an estoppel in pais upon the county of Forsyth. Can it be questioned that estoppels must be mutual, and that he who relies upon the recitals in the bond to estop another must himself be bound by them? If this is so, it ends the case at bar, as all the recitals point to the unconstitutional act of 1879.

The case of *Hill v. Commissioners*, 67 N. C. 367, considering simply the power of the legislature to authorize the issue of bonds, has no bearing upon the present case. The Forsyth county bonds recited that they were "authorized by an ordinance of 1868, by an order of the court of pleas and quarter sessions of Forsyth county, at June term, 1868, and re-enacted and ratified and confirmed by an act of the general assembly ratified the 11th of August, 1868." The cases are clearly distinguishable. Another important point of difference is that the Forsyth county bonds were voted and subscribed within a few months after the passage of the ordinance, before whatever power it may have given, if any, had expired by its own limitation. It is evident that the legislature as well as the railroad company itself thought that the authority given in the ordinance was not sufficient, as in both cases additional legislation was sought and obtained, but with this essential difference: In the case at bar, the amendatory act, having been passed in violation of mandatory provisions of the constitution, in legal contemplation, was never passed. As it has no legal existence, we have no authority to construe it, but simply to obliterate it. In *Jarrolt v. Moberly*, 103 U. S. 580, 588, the court, in discussing a similar case, says: "Further legislation was needed. Such was the evident opinion of the legislature of the state, for by an additional act, passed on the 29th March, 1872, the authority was given in terms." And on page 586 it says: "A constitutional provision should not be construed so as to defeat its evident purpose, but rather so as to give it effective operation, and suppress the mischief at which it was aimed."

Secondly. The bonds on their face profess

to have been issued under an entirely different statute. The principle laid down by the federal authorities, and practically of universal acceptance, is that estoppels rest upon the recitals in the bond. The rule is generally cited as laid down in *Town of Coloma v. Eaves*, 92 U. S. 484, as follows: "When legislative authority has been given to a municipality, or to its officers, to subscribe to the stock of a railroad company, and to issue municipal bonds in payment, but only on some precedent condition, such as a popular vote favoring the subscription, and where it may be gathered from the legislative enactment that the officers of the municipality were invested with power to decide whether the condition precedent has been complied with, their recital that it has been, made in the bonds issued by them, and held by a bona fide purchaser, is conclusive of the fact, and binding upon the municipality; for the recital is itself a decision of the fact by the appointed tribunal." *Buchanan v. Litchfield*, 102 U. S. 278; *Northern Bank of Toledo v. Porter Tp. Trustees*, 110 U. S. 608, 616, 4 Sup. Ct. 254.

In the case at bar the bonds recite that they were issued under the act of 1879; and as all estoppels of this nature, to be operative, must be mutual, are not the bondholders themselves estopped from setting up any facts to the contrary? These recitals point out the very act under which the power is claimed, and it was the duty of all persons claiming thereunder to see that the act met the constitutional requirements. Certainly, the estoppel can never go further than the recital itself. It cannot operate upon any other act, nor as to the validity of any act. In *Gilson v. Town of Dayton*, 123 U. S. 59, 8 Sup. Ct. 66, it was held that "as it appears on the face of the bonds sued on in this action that they were issued under the special act of February 18, 1857, which was held void in *Post v. Supervisors*, 105 U. S. 667, and not under the general law of March 6, 1867, the judgment dismissing the action is affirmed." As was said in *Davless Co. v. Huldekoper*, 98 U. S. 98, 100: "There must, indeed, be power, which, if formally and duly exercised, will bind the county or town. No bona fides can dispense with this, and no recital can excuse it." In *Dixon Co. v. Field*, 111 U. S. 83, 92, 4 Sup. Ct. 315, 319, it was held that the estoppel arising from recitals, in the face of the bonds, never extended to or covered matters of law, and could arise only "upon matters of fact which the corporate officers had authority to determine and to certify."

Thirdly. That ordinance did not create a contract between the railroad company and the county of Wilkes. The only contract that has ever existed between them was the contract of 1888, which was subject to all the constitutional provisions then existing. The mere authority given in the charter of a railroad company to receive subscriptions from municipal corporations, where no consideration is given, and no attempted exercise of the

power, has none of the essential elements of a contract, and is held at the pleasure of the lawmaking power. Much more so is it subject to constitutional restrictions. *Town of Concord v. Portsmouth Sav. Bank*, 92 U. S. 625, 630; *Concord v. Robinson*, 121 U. S. 165, 169, 7 Sup. Ct. 937; *Citizens' Sav. & Loan Ass'n v. Perry Co.*, 156 U. S. 692, 697, 15 Sup. Ct. 547. *Town of Concord v. Portsmouth Sav. Bank*, supra, was overruled in *Fairfield v. Gallatin Co.*, 100 U. S. 47, only in so far as it applied to the constitution of Illinois, and for the only reason that the supreme court of the United States deemed it proper, in the construction of a state constitution, to follow the state decisions, instead of their own view of the law. The general principle remains unchanged, and meets our approval.

The ratification of the constitution on the 24th day of April, 1868, when it went into effect for all domestic purposes, annulled all special powers remaining unexecuted, and not granted in strict accordance with its requirements. Article 2, § 14, is as follows: "No law shall be passed to raise money on the credit of the state or to pledge the faith of the state, directly or indirectly, for the payment of any debt, or to impose any tax upon the people of the state, or to allow the counties, cities or towns to do so, unless the bill for the purpose shall have been read three several times in each house of the general assembly, and passed three several readings, which readings shall have been on three different days, and agreed to by each house respectively, and unless the yeas and nays on the second and third reading of the bill shall have been entered on the journal." Article 7, § 7, is as follows: "No county, city, town or other municipal corporation shall contract any debt, pledge its faith, or loan its credit, nor shall any tax be levied, or collected by any officers of the same, except for the necessary expenses thereof, unless by a vote of a majority of the qualified voters therein." The intention of the constitution is obvious. Profiting by the sad experience of other states, it intended to restrict the granting of public aid, and to hold to the strictest accountability every member of the legislature who assisted in such grant by forcing him to twice record his vote on the journal, where it would be open to public inspection. It further intended that every such grant should be the deliberate and intelligent act of the legislature itself, as well as of the community affected thereby. It is our duty to give to these salutary provisions that just construction, required alike by the rules of law and of common sense, that will effectuate, and not destroy, their beneficial purpose.

This view, we think, is sustained by the uniform decision of the supreme court of the United States, the only tribunal before which this decision can ever lawfully come for review. In *Wadsworth v. Supervisors*, 102 U. S. 534, 537 (citing and reaffirming *Aspinwall v. Commissioners*, 22 How. 364), the court

says: "We held in that case that the popular vote did not itself create a vested right in the railroad company to the bonds, and that a subscription was necessary to create a contract binding the county to issue bonds in payment of the stock, and binding the company to receive stock for the bonds. 'Until the subscription is made,' said Mr. Justice Nelson, speaking for the whole court, 'the contract is unexecuted and obligatory on neither party.' Hence the new state constitution was held to govern the case, and from the time of its adoption to have withdrawn from the county commissioners all authority to make subscriptions to the stock of incorporated companies except in the manner and under the circumstances prescribed in that instrument." In *Norton v. Commissioners*, 129 U. S. 479, 490, 9 Sup. Ct. 322, 326, Chief Justice Fuller, speaking for the entire court, says: "These cases [referring to *Town of Concord v. Portsmouth Sav. Bank*, 92 U. S. 625; *Falconer v. Railroad Co.*, 69 N. Y. 491; *Railroad Co. v. Falconer*, 103 U. S. 821; *Wadsworth v. Supervisors*, 102 U. S. 534; and *Aspinwall v. Commissioners*, 22 How. 364] sufficiently illustrate the distinction between the operation of a constitutional limitation upon the power of the legislature and a constitutional inhibition upon the municipality itself. In the former case past legislative action is not necessarily effective, while in the latter it is annulled. Of course, if an entirely new organic law is adopted, provision in the schedule or some other part of the instrument must be made for keeping in force all laws not inconsistent therewith, and this was furnished in this instance by the first section of article 11; but such a provision does not perpetuate any previous law enabling a municipality to do that which it is subsequently forbidden to do by the constitution. The inhibition being self-executing, and operating directly on the municipality, and not in itself enabling the latter to proceed in accordance with the rule prescribed, further legislation is necessary before the municipality can act." In the late case of *Galveston, H. & S. A. Ry. Co. v. State of Texas*, 170 U. S. 226, 18 Sup. Ct. 603, it is held that "a clause in a charter of a railroad company granting it power to consolidate with or become the owner of other railroads is not such a vested right that cannot be rendered inoperative by subsequent legislation passed before the company avails itself of the power thus granted." It is useless to cite the cases themselves cited in the cases referred to herein.

It is further urged on the part of the defendants and those whom they represent that the issuing of these bonds was authorized by sections 1996 to 2000 of the Code. This question was definitely settled in *Commissioners v. Snuggs*, 121 N. C. 394, 400, 401, 28 S. E. 539, and we see no reason to reverse our ruling, nor do we find any facts taking this case from its operation. We can add nothing

on this point to what was therein so fully and ably said in the opinion of the court, except to say that, if the construction contended for by the defendants must be placed upon those sections, then they are in direct violation of the letter and spirit of the constitution, inasmuch as they practically annul one of its essential provisions. If the word "uncompleted" can refer to any road not yet begun, and the word "interest" apply to a mere friendly feeling or supposed advantage to be derived from the general building up of the country, then the several counties may go on forever subscribing unlimited amounts to any railroad in esse or in futuro that may be located within the range of their knowledge. Such a construction would simply nullify the constitution, by making its explicit restrictions vain and worthless. It cannot be adopted by us; but, if we were forced to adopt it, we would be equally forced to declare those sections null and void. If they mean that, they have no place upon the statute books. While the legislature may, in individual cases, grant to specific counties the necessary authority in accordance with the provisions of the constitution and subject to its restrictions, it cannot, by a sweeping act of unlimited application, utterly destroy its operation. If the legislature or the railroad company or the county had placed any such construction on those sections, additional legislation would have been deemed useless, and the recitals in the bonds would have been different. It is true that this road had been begun, and was in one sense uncompleted, when the subscription was made; but it was not begun when the constitution was ratified, and the county at that time had no pecuniary interest in it, nor any interest contemplated by the statute. It is not necessary for us to consider the fact that the first section of the road had been completed to Winston, beyond which all idea of extension seems for years to have been abandoned. The act of 1881 has no reference to the bonds in question, and is subject to the same objections as the act of 1879, which we have been discussing.

We have given this case the most thorough investigation and careful consideration on account of the important principles and the large amount involved. We deeply deplore the fact that many parties must suffer, who are in morals, if not in law, innocent holders of the bonds; but their loss comes from their misplaced confidence in those from whom they received the bonds, and the negligence of the corporation to which the power was professedly given and the bonds were issued. The only authority for their issue is found in a railroad charter, and we cannot undertake to validate defective or unconstitutional legislation by judicial construction. The suggestion of repudiation, so strongly urged here and elsewhere, has no weight with us. The so-called "repudiation" of an unconstitutional obligation is a contradiction in terms, and

its assertion amounts simply to a moral and legal absurdity.

It has been said that the usual difference between heterodoxy and orthodoxy is the difference between your doxy and my doxy, and that in financial ethics the same distinction exists between stealing and financiering. This distinction we cannot indorse. It is just as wrong to wring from an unwilling and perhaps a suffering debtor an unjust debt as it is to deprive a creditor of a just debt. We will try to do neither, but will hew to the line. The strictly moral aspect of the case is not before us, but it is possible that the plaintiffs, representing an honest, industrious, and intelligent people, may have reasons for their action as strong in morals as in law. Enough appears to indicate, what is common knowledge, that the stock for which these bonds were issued has been swept away in the maelstrom of corporate reorganization. It may be that the plaintiffs, deprived of every vestige of consideration by the decree of a court of equity, may not feel any moral obligation beyond the strict letter of the law. They may see no difference between repudiation and reorganization when both accomplish the same result, to retain the benefit and shift the burden.

In *Lewis v. Palma Co.*, 155 U. S. 54, 58, 15 Sup. Ct. 22, it was held that bonds issued under an act of the legislature of the territory of Arizona, which was in violation of the Revised Statutes of the United States, were void, and "created no obligation against the county which a court of law can enforce." In the carefully considered case of *City of Brenham v. German-American Bank*, 144 U. S. 173, 182, 188, 12 Sup. Ct. 563, 565, the court says: "It is easy for the legislature to confer upon a municipality, when it is constitutional to do so, the power to issue negotiable bonds; and, under the well-settled rule that any doubt as to the existence of such power ought to be determined against its existence, it ought not to be held to exist in the present case. * * * As there was no authority to issue the bonds, even a bona fide holder of them cannot have a right to recover upon them or their coupons,"—citing *Marsh v. Fulton Co.*, 10 Wall. 676; *East Oakland Tp. v. Skinner*, 94 U. S. 255; *Buchanan v. Litchfield*, 102 U. S. 278; *Hayes v. Holly Springs*, 114 U. S. 120, 5 Sup. Ct. 785; *Davless Co. v. Dickinson*, 117 U. S. 657, 6 Sup. Ct. 897; *Hopper v. Town of Covington*, 118 U. S. 148, 151, 6 Sup. Ct. 1025; *Merrill v. Monticello*, 138 U. S. 673, 681, 682, 11 Sup. Ct. 441.

It has been suggested that the defense in this case has been only colorable, as but one of the bonds was represented. Under the circumstances, we think, that was sufficient. An elaborate answer, evidently prepared by able counsel, has been filed, presenting every reasonable defense; and, while no argument was made before us for the defendants, every phase of the case has been carefully examined by us in the five months during which we

have held it under advisement. The plaintiffs had no means of knowing who held the bonds, as they are payable to bearer, and pass from hand to hand without indorsement or registration. The bondholders themselves could have become parties at any stage of the proceedings, and would have been gladly heard by us; but the mere fact that they deliberately refrained from any participation in the defense when they had every opportunity of doing so should not deprive the plaintiffs of all power to protect the rights of the people they represent in a court of competent jurisdiction, where alone this action could be brought by them. The current of authority from other states sustains the conclusions we have reached in this case; but, owing to the large number of cases, we have thought it best to cite only from our own decisions and those of the supreme court of the United States. For the reasons stated in this opinion, the judgment of the court below is affirmed. Affirmed.

FURCHES, J. (dissenting). On the 9th of March, 1868, the constitutional convention of North Carolina passed an ordinance chartering and authorizing the formation of a corporation, to be known as the "Northwestern North Carolina Railroad Company." Under this charter said company was formed and organized; and on the 25th of March, 1868, the county of Forsyth subscribed \$100,000 to said corporation, which subscription was held to be valid in *Hill v. Commissioners*, 67 N. C. 367. In payment of this subscription, the county of Forsyth issued coupon bonds to the amount of \$100,000, and they were held to be valid against the county in *Belo v. Commissioners*, 76 N. C. 489, and the work of constructing said road between Greensboro, in the county of Guilford, and Winston, in the county of Forsyth, was commenced. This part of the road was completed and put into operation within the next few years, and has continued to be run and operated ever since. This charter made Winston a point to which the road should run, west of its starting point on the North Carolina Railroad. From this point (Winston) it was authorized to build branch roads, but none were built until 1887, when the company proposed to build a branch of its road from Winston to or near Wilkesboro, in Wilkes county, provided Wilkes county would make a subscription of \$100,000 to the capital stock of said company. This proposition to subscribe \$100,000 to the capital stock was submitted to the qualified voters of said county, by the commissioners thereof; the vote taken; a majority of the whole qualified voters of said county voted for the subscription. The subscription was made, and the road built to Wilkesboro, in compliance with the agreement of the railroad company; and the bonds now asked to be declared invalid were issued by the county, delivered to the railroad company, and the interest thereon regularly paid until the commencement of this action. All these facts are shown by the rec-

ord, and are admitted to be true. But there having been a change in the personnel of the board of commissioners since said bonds were issued, and since said road was built, this new board is seeking in this action to repudiate the action of the former board.

I understand the court to rest its opinion on two grounds,—the want of power in the commissioners to submit the proposition to the voters, and to issue the bonds; and the doctrine of estoppel. If there is error in these positions, I shall contend that the conclusion to which the court has arrived is erroneous, and should be reversed. I admit that, if the commissioners had no legislative authority to submit the proposition of subscription to the voters of Wilkes, these bonds are void, and the judgment of the court is correct. But I propose to show that they had this authority, and that the bonds are valid.

The charter (the ordinance of the convention) in express terms makes the charter of the Atlantic & North Carolina Railroad Company a part of the charter of the Northwestern North Carolina Railroad Company, so far as it relates to the subscription of counties to the capital stock of the company. This being so, the charter of the Atlantic & North Carolina Railroad Company is to be read and considered as a part of the charter of the Northwestern North Carolina Railroad Company. *Range Co. v. Carver*, 118 N. C. 828, 24 S. E. 352; *Commissioners v. Higginbotham*, 17 Kan. 62. It is like an instrument referring to another instrument (*Flaum v. Wallace*, 103 N. C. 296, 9 S. E. 567), or where the complaint in one action refers to the complaint in another action for data (*Alexander v. Norwood*, 118 N. C. 381, 24 S. E. 119); they are to be read and considered together as one instrument. I have shown that the subscription made to this company (the Northwestern North Carolina Railroad Company) by the county of Forsyth, under the charter as originally passed, has been sustained, and held to be valid by this court in *Hill v. Commissioners*, supra. This decision established the power—the authority—to submit the proposition of subscription to the voters of the county, and to issue bonds. But the validity of the bonds issued on this subscription of Forsyth was again put directly in issue in the case of *Belo v. Commissioners*, in a mandamus proceeding, to compel their payment, and their legality was again sustained by this court. *Belo v. Commissioners*, 76 N. C. 489. This case, also, as I contend, established the authority to submit the question to the voters, and to issue these bonds. It is true that the submission of this question in Forsyth was made by the justices of the peace, acting as a county court; and it is true that the charter provides that the question should be submitted by them. But this charter was passed, and this submission was made, and bonds issued, before the adoption of the constitution of 1868, which did not go into effect until the 24th of April of that year. By this constitution and subsequent legislation, the

county court was abolished, and the county commissioners succeeded to their powers in this matter, and in all such cases. It is so held by this court in *Belo v. Commissioners*, supra, and it is expressly so provided by the legislature. Code, § 1997. Therefore, while the submission of the question in Wilkes was by the commissioners, they were the successors of the justices and the county court, fully and clearly authorized to make the submission and the subscription and to issue the bonds.

But it is contended by the court that, if the charter authorized this subscription and the issue of the bonds now sought to be repudiated, it was passed before the constitution of 1868 went into effect, and that it was thereby repealed. To support this position, *Aspinwall v. Commissioners*, 22 How. 364, and *Lewis v. Pima Co.*, 155 U. S. 54, 15 Sup. Ct. 22, are cited by the court. Neither of these cases, in my opinion, sustains the position for which they are cited. The first case cited (22 How.) is intended to raise the question of violating a contract under the constitution of the United States, and nothing more. The submission in that case was made, and the vote thereon was had, in 1849; but the subscription to the capital stock was not made, and the bonds were not issued, until 1852. In the meantime the constitution of the state (Indiana) had been amended so as to prohibit any county in the state from issuing such bonds. But Daviess county proceeded to issue the bonds under said submission and vote, and to put them on the market, but afterwards refused to pay them; and the plaintiff, being the holder of a part of these bonds, undertook to enforce their payment. There was no question made in that case but what the constitution had inhibited their issue. But the plaintiff claimed that the submission and the vote thereon, which were before the amended constitution, amounted to a contract; and that the new constitution, which prohibited the county from issuing the bonds, was an impairment of the obligation of this contract, and therefore in violation of the constitution of the United States. No such question as this arises in this case. There is no pretense that these bonds are protected by any provision of the constitution of the United States.

But it is denied by the defendants that the constitution of 1868 repealed the charter of this road, or that it prohibited Wilkes county from making this subscription or from issuing these bonds, as I expect to show. The case of *Lewis v. Pima Co.* arose out of the legislation of Arizona territory. The legislature of this territory passed an act authorizing Pima county to issue bonds for the construction of a railroad. This being a territorial government, it had no legislative powers except those granted by congress. And it was held in that case that congress had not only failed to grant such legislative power, but had in express terms prohibited its exercise, and the bonds were held to be void. I fail to see the argument to be drawn from this case against the

validity of the bonds under consideration. As has been stated, the charter of the Northwestern North Carolina Railroad was passed before the adoption of the constitution of 1868, which took effect on the 22d of April of that year. But the legislature passed an act, ratified on the 11th of August, 1868, as follows: "Section 1. The general assembly of North Carolina do enact, that an ordinance entitled 'An ordinance to incorporate the Northwestern North Carolina Railroad Company,' ratified the 9th day of March, A. D. 1868, be and the same is hereby re-enacted, ratified and confirmed." If there had been a repeal of this charter by the constitution, which I contend there had not been, it seems to have been expressly re-enacted in August, 1868. It has not escaped my attention that there is in the printed record an agreement as to what acts are to be considered by the court in deciding this case, and the act of 1868 is not one of those named. This agreement is signed by the counsel for plaintiffs, and by counsel for Mr. Turner and Mr. Wellborn, but it is not signed by any one for the defendant Call. But, if it had been signed by Call, I would have to disregard it. Parties may agree upon facts, that I would feel bound by, but I cannot feel bound by an agreement as to what is the law. I refer to this act of 1868 for the purpose of meeting an argument in the opinion of the court, and not for the reason that I consider it necessary to sustain the position I have taken, as to the authority of the commissioners of Wilkes county to submit this question to the voters, and to subscribe the stock, and to issue the bonds. The charter provides for submitting the question to a vote of the people in almost, if not, the language of the constitution of 1868, with the single exception that it shall be sufficient if a majority of the qualified voters "voting thereon shall be in favor of the subscription." To this extent, and no further, did the constitution of 1868 conflict with the provisions of this charter; and this was cured by section 1997 of the Code, which was admitted to have been passed as the constitution requires, and which provides that it shall take a majority of the qualified voters of the county to authorize the subscription, as was done in this case. Suppose that section 1997 of the Code had been passed by the legislature, as an amendment to this charter, with all the formalities and requirements of the constitution; would it be contended that the submission was without legislative authority, and that these bonds were void? And, if not, why is it that a general law, applying to all cases of submission, has not the same effect?

The next ground upon which the court rests its opinion is that of estoppel. This ground of alleged invalidity to the bonds arises in this way: The legislature, at its February session (1879), attempted to pass, and did pass, an act providing for the extension of the Northwestern North Carolina Railroad, from Winston to Wilkesboro, for

the subscription of counties to its capital stock, and the issues of bonds. But it is claimed by the plaintiff, and such appears to be the fact, that this act did not receive the three several readings, on three several days, with a call of the yeas and noes, as provided by the constitution, and, for that reason, that the said act is void, under *Union Bank of Richmond v. Commissioners of Town of Oxford*, 119 N. C. 214, 25 S. E. 966, and *Commissioners v. Snuggs*, 121 N. C. 400, 28 S. E. 539. But the commissioners, when they issued these bonds, did not know that this act was unconstitutional and void, and they recited in the bonds that they were issued under the act of 1879. This act does not purport to be an original act, but it is stated in the act itself that it is an amendment to the ordinance of the convention chartering said road. So that any one seeing these bonds would be led by the statements therein to know that they depended upon authority derived from the original charter; that is, the ordinance of the convention of 1868. And it is claimed in the opinion of the court that this recital in the bonds, put there by the plaintiffs, estops the holders and those representing them from showing any other authority in the commissioners, except the act of the 20th of February, 1879, and that, that act being void for the reasons heretofore stated, the commissioners had no power to issue the bonds. I admit that this act is a nullity, and cannot benefit the bondholders; and as it is void, and can do them no good, it can do them no harm. The court therefore, upon this recital in the bonds that they were issued under the act of February 20, 1879, again rests its judgment upon the doctrine of estoppel, and holds that the bondholders and the defendants in this action are estopped to show that the commissioners had any other authority except the said act of 1879. With the greatest respect and deference to the opinion of the court, it seems to me that the doctrine of estoppel is not only misapplied, but that its use and purpose are misconceived in this application by the court. Estoppels are as to facts, and not of law. In such transactions as this, they are made to apply to a party stating the facts, and not to the party to whom they are stated. This seems to me to be elementary learning. But see *Bigelow*, *Estop.* pp. 4-7, and 356, and note 1: "It is not the deed of the defendant, but of Isham [the grantor] only, by whom alone it is executed; and, not being the deed of the defendant, it cannot, as a deed, estop him from denying that the grantor had title." And the same principle is held in the case of *Northern Bank of Toledo v. Porter Tp. Trustees*, 110 U. S. 608, 4 Sup. Ct. 254, near the end of the opinion (cited by the court). In that case the bondholder was trying to estop the maker by holding him to the statements in the bond; and the court says that the maker is estopped by the recital of such facts as it was supposed to have special knowledge of,—such as

that there had been a submission to a vote, and that a majority of the qualified voters voted for the bonds. But it was held that the defendant (the maker) was not estopped to show the law,—to show that the township had no legal authority to make the subscription and to issue the bonds. If the maker of the bonds was not estopped by the recitals in the bond from showing the want of legal authority to make the bonds, what rule of law or justice is there to estop the defendants in this case from showing that the commissioners of Wilkes county had the power—legal authority—to issue these bonds? It is said in the opinion of the court that “estoppels are mutual,” and, as the plaintiff would be estopped by the recitals, that the defendant must be. This rule obtains in many instances, but I deny its application in this case, as I have shown above, from Bigelow on Estoppel and from Northern Bank of Toledo v. Porter Tp. Trustees. But, were I to admit the rule to be that, where one party is estopped, the other party is also, what would be the result of the reasoning of the court, when I have shown that the maker would not be estopped to show the want of power?

The court, in its opinion, says that certain positions were strenuously insisted on by the defendants. I think this must be a mistake, as the case was not argued before us, either by brief or by oral argument, on behalf of the defendants. Mr. Turner and Mr. Wellborn, by leave of court, made themselves parties defendant after the action was brought, but they have given the case no further attention. Why they did this I do not know. The case appears to be a controversy so far as parties are concerned, for there are plaintiffs and there are defendants. But, as to the conduct of the case before this court is concerned, it has been unilateral. The opinion of the court speaks of the reorganization of the railroad company, thereby defrauding some one out of his stock. The record furnishes no evidence of any reorganization of the railroad company. It is stated in the opinion of the court that the supreme court of the United States is the only court authorized to review this opinion. I agree with the court in this expression of opinion, but I have no idea that it will ever be reviewed by that court, as the case is decided in favor of plaintiffs, and the defendants have not taken interest enough in it to be represented by counsel, and it is not likely they will appeal. It is said that the talk of repudiation has had no effect on the court, and I have no idea that it has; and I hope that my aversion to repudiation has had no influence on me in coming to the conclusions I have reached. My opinion is that the bonds are valid, and that their payment should be enforced by the courts.

FAIRCLOTH, C. J. I concur in the dissenting opinion.

(123 N. C. 236)

KELLY v. MANESS et ux.

(Supreme Court of North Carolina. Nov. 15, 1898.)

GIFT—DELIVERY.

1. Though a father tell his daughter that, if she will take a calf and raise it, she may have it, there is no delivery to support the gift, where it remains and is fed and pastured with the other stock of the father till after his death.

2. It is sufficient to constitute a delivery where a father buys bedroom furniture, puts it in his daughter's room, and always afterwards speaks of it as hers.

Appeal from superior court, Moore county; Allen, Judge.

Action of claim and delivery by E. H. Kelly, guardian of Lucy Grimm, a lunatic, against Thomas Maness and wife. Judgment for plaintiff. Defendants appeal. Reversed.

W. C. Douglass, for appellants. Black & Adams, for appellee.

FURCHES, J. This action is for the possession of certain articles of personal property. The plaintiff claims them as the property of his ward, Lucy Grimm, widow of Lewis Grimm, who was and is now a lunatic. The defendant claims that her father, Lewis Grimm, who was the husband of Lucy Grimm, during his lifetime gave them to her. The plaintiff claims that this was the property of Lewis Grimm at the time of his death, except the sewing machine, which the plaintiff says belonged to Lucy before her marriage with Lewis. The other property claimed by plaintiff, except the sewing machine, was laid off and assigned to the widow, Lucy, as a part of her year's support. The court left it to the jury to say from the evidence whether the sewing machine belonged to Lucy or not, and there is no exception to his honor's charge as to this. There was evidence tending to show that Lewis had given the other property to the defendant Maggie, who is his daughter; that he had told Maggie that, if she would take the calf and raise it, she might have it; that he had after this said he had given it to Maggie, and that he would not take it from her. But the evidence was that the calf remained with the other stock of Lewis, was fed and pastured with them until it was grown, and had remained there until after the death of Lewis, and was laid off to the widow as a part of her year's support. The other articles were bedroom furniture bought by Lewis, put in the bedchamber of Maggie, which he said he had fitted up for her, and frequently spoke of it as Maggie's; that he bought it and gave it to her. As we see no evidence of a delivery as to the cow, we would not disturb the verdict and judgment as to her, nor as to the sewing machine, if there was no error as to the other property,—the bedroom furniture. But we said in *Newman v. Bost*, 122 N. C. 524, 29 S. E. 848, that two things are necessary to constitute a gift,—the intention to give, and a de-

livery, actual or constructive,—and these are facts to be found by the jury, where there is evidence tending to establish them, and that where the donor in that case bought a set of bedroom furniture, put it in plaintiff's room, and always after that spoke of it as hers, this was sufficient evidence of a delivery to sustain a finding by the jury that it was her property. Under the authority of this case, we are of the opinion that the question as to the title to this property, under proper instructions as to what it takes to constitute a gift, should have been submitted to the jury, and that it was error for the court to instruct the jury "that, if they believed the evidence, they should find this issue in favor of the plaintiff." For this error there must be a new trial.

(123 N. C. 219)

WOOTEN v. WOOTEN.

(Supreme Court of North Carolina. Nov. 15, 1898.)

HUSBAND AND WIFE—ADMINISTRATION.

Under Code, § 1479, providing "if the husband shall die after his wife, but before administering, his * * * administrator * * * shall receive the personal property of the said wife, as part of the estate of the husband, subject as aforesaid" (i. e. to her debts), he having died after her, before administration on her estate, there can be no administration on it, except through his administrator.

Furches and Douglas, JJ., dissenting.

Appeal from superior court, Greene county; Adams, Judge.

Action by A. S. Wooten, administrator of Julia L. Wooten, against Simeon Wooten. Judgment for defendant. Plaintiff appeals. Affirmed.

Geo. M. Lindsay, for appellant. Swift Gal-
loway and J. B. Batchelor, for appellee.

CLARK, J. The Code (section 1479) provides: "If the husband shall die after his wife, but before administering, his executor or administrator or assignee shall receive the personal property of the said wife, as part of the estate of the husband, subject as aforesaid" (i. e. to her debts). This changed the rule of the common law, which was that the personalty of the wife did not go to the husband when he died without having reduced it to possession by administration. And further, in conformity to this change, it devolves the right of administering upon the wife's estate upon the executor or administrator of the husband, ex officio. The object was evidently to save the cost and expense of two administrations and two sets of commissions, by making the cestui que trust (the husband's representative) ex officio the representative of the wife. If there was an executor or administrator of the husband, an appointment of an administrator of the wife, who had predeceased him, would be a nullity, because not authorized by law. If there is a creditor of the wife, when there is default in taking out letters of adminis-

tration upon the husband's estate his remedy is not (as here attempted) by taking out administration upon the wife's estate, but to apply for administration upon the husband's estate; and then, as the law provides, he "shall receive the wife's personalty," and apply it to her debts. As in this case, it seems, there was no creditor of the wife (who died, indeed, eight years before her husband), the proceeding was probably taken by some creditor of the insolvent husband, with the view of applying to his debts the property of the wife, which, having become his, was liable to such application. But, in any event, whether the plaintiff was creditor of the wife or of the husband, his remedy, under this statute, was to take out administration upon the husband's estate. The court below properly held that there is no authority to appoint an administrator upon the estate of a wife who dies before her husband, and, such appointment being void, dismissed the action. Affirmed.

FURCHES, J. (dissenting). Julia L. Wooten, plaintiff's intestate, was the wife of W. I. Wooten, and W. I. Wooten was the intestate of the defendant. The plaintiff's intestate died in 1888, and the defendant's intestate died in 1896. In 1896, but after the death of W. I. Wooten, the husband, the plaintiff was appointed and qualified as the administrator of Julia L. Wooten, the wife. On the 3d day of December, 1887, the defendant, Simeon Wooten, made and executed his promissory note to Julia L. Wooten, plaintiff's intestate, for \$500, with interest at the rate of 8 per cent. On the 25th day of July, 1896, and after the plaintiff had been appointed administrator of his intestate, Julia, he commenced this action against the defendant to recover the money due on said note. The defendant answered, admitting the execution of the note, but alleging, among other things, that, while the note was given to the wife, it was for the benefit of the husband, who was insolvent, to the amount of \$30,000, \$20,000 of which was due the defendant; that said note had been paid; and that the administration of plaintiff and this action are for the purpose of delaying the settlement of the estate of W. I. Wooten, the husband. This answer was filed at August term, 1896, and at February term, 1897, the defendant (having then qualified as the administrator of W. I. Wooten, the husband), by leave of court, filed another answer, in which he claimed that as such administrator he was the owner of said note, and entitled to the possession of the same, and asked that the plaintiff's action be dismissed. The judge so held, and dismissed the plaintiff's action, and taxed the plaintiff and his bondsman with the costs of action. This is a short-handed way of getting shut of paying a debt, and imposing a bill of costs on a plaintiff who had a right of action when the action was commenced. I do not think it can be

done in this way. At common law the husband had the right to administer upon the estate of his deceased wife. And, as there was no provision for distribution, he was entitled to hold all that remained after paying debts and costs and charges of administration. *Williams, Ex'rs*, *357. And, by the law of this state, if the husband does not administer, but another does, the husband is entitled to all over paying debts and cost of administration. *Hoskins v. Miller*, 13 N. C. 360. If the husband dies after the wife, but before administration, the next of kin of the wife are entitled to have administration on her estate. But such administrator will have to account to the personal representative of the husband for his administration on the wife's estate (*Whitble v. Fraizer*, 2 N. C. 275; *Weeks v. Weeks*, 40 N. C. 120); thus showing that the personal estate of an intestate deceased person only passed from such estate by the means and the intervention of a personal representative. For, if it had passed to the husband by the death of the wife, she would have had no estate to administer. This seems to be admitted to have been the law until 1871. Section 1479 of the Code. And, while this section does modify the law to some extent, this modification does not affect the law as applied to this case. It does not change, or profess to change, the rights of the husband. He can only become the owner by and through an administration, either by himself or some one else. And, as he died before there was an administration, he never was the owner of this note. It is clear, then, that it was not his at the time of his death, and is no part of his estate. There is no change or modification of his rights by this statute, so long as he is living. And as we have seen, upon his death the next of kin of the wife are entitled to administration. *Whitble v. Fraizer* and *Weeks v. Weeks*, supra. This is still law, unless it has been changed by section 1479 of the Code. The first paragraph of this section is an affirmation of the common law, as I have stated it. The other paragraph of said section is as follows: "If the husband shall die after his wife but before administering, his executor or administrator or assignee shall receive the personal property of the said wife, as a part of the estate of the husband, subject as aforesaid, and except as herein provided." This paragraph still treats the wife's property as belonging to her estate,—that "his executor or administrator shall receive the personal property of the said wife, as a part of the estate of the husband"; still treating it as the wife's property, until the administration upon the husband's estate. The plaintiff having the right to administer, and the note belonging to his intestate's estate when he administered, he had the right, and it was his duty, to bring this action, as he did, upon defendant's refusing to pay the same. So the question comes down to this: Can the defendant, by such legerdemain as

this appears to be, free himself from the demands of the law, and impose a bill of costs on the plaintiff, who was in the rightful discharge of his duty? The law will not allow such juggling as this. It will not allow a defendant to set up a counterclaim or to plead a set-off against a plaintiff's demand, unless he was the owner of it before suit was brought. Will it allow such a defense in this case? It was said that the object of this statute was to prevent the necessity of two administrations, and I think this is so. But it has not prevented two in this case, and the second administration is brought about by the defendant, and, as it seems to me, to prevent having to pay this debt, as he did not administer on the husband's estate until long after this action was brought, and after he had answered, denying that he owed the debt; and then he administered on an estate that he says is insolvent to the amount of \$30,000, and it does not appear that there are any assets except this note. The defendant says in his first answer that the note was given for the benefit of the husband, as he was insolvent, and in fact it was his note. This is a very singular statement for him to make, when he alleges that the insolvent husband was owing him \$20,000. If this be true, why did the defendant give the note for \$500, to bear interest at the rate of 8 per cent. till paid? It is said by the court that it appears that the wife owed no debts. This may be so, but there is nothing in the record that shows it to be so. It is also said by the court that, if there were creditors of the wife, they should have administered on this insolvent estate of the husband, to get their debts. This would be a great hardship, and I do not believe the law makes any such requirement of them. My opinion is that, if the defendant had administered on the estate of the husband before the plaintiff administered on the estate of the wife, he would have been entitled to receive this note, as he would have been the administrator of the wife, by force of the statute. The note belonged to her estate until there was an administration. But when there was an administration on her estate the title to the property (the note) passed to her administrator, and he alone had the right to collect the same. *Williams, Ex'rs*, *700, *722. In my opinion, there was error in the judgment appealed from.

DOUGLAS, J. I concur in the dissenting opinion.

(123 N. C. 283)

DAVIS v. BOYDEN et al.
(Supreme Court of North Carolina. Nov. 22, 1898.)

TRUSTS — ASSIGNMENTS FOR CREDITORS — LIMITATIONS.

Where an express trust, created by an assignment for benefit of creditors, is still subsisting and unexecuted, limitations are not a

bar to a creditor's claim which was not barred at the time of the assignment.

Appeal from superior court, Rowan county; Allen, Judge.

Action by O. D. Davis, administrator of E. H. M. Summerill, against John L. Boyden and another, on a note. From a judgment for defendants, plaintiff appeals. Modified.

Kerr Craige and L. H. Clement, for appellant. L. S. Overman, for appellees.

FAIROLOTH, C. J. John L. Boyden, with sureties, executed his note, not under seal, to the plaintiff's intestate in 1884; and the last payment was on May 8, 1891, and this action was commenced November 8, 1895. On January 25, 1892, the said John L. Boyden made an assignment for the benefit of creditors, including the plaintiff's claim; and the defendant Henderson is now the trustee, and has taken no steps to close his trust. The defendant Boyden pleaded the statute of limitations, the trustee not filing or relying on such plea. The effect of the statute pleaded is the only question. The plea is a bar to the plaintiff's action, and protects the defendant Boyden. It is urged that, as the principal debtor is discharged by the statute, therefore the plaintiff cannot recover of the trustee. That is a mistake. The assignment established an express trust in favor of the creditors, and, as the trust has not been closed, that relation still exists. It is very well settled that the statute will not bar the cestui que trust pending that relation. It is only where the fiduciary character of the trustee has ceased, as by repudiating the creditor's rights, or by claiming the absolute ownership, or by refusing to account for the property, that the statute will operate; that is, when the trustee assumes an adversary character towards the beneficial owners. *Patterson v. Lilly*, 90 N. C. 87; Ang. Lim. §§ 176, 468, approved in numerous other cases. No reason appears why the trust is not closed, nor why no order was made declaring the rights of the plaintiff against the trustee. The plaintiff is entitled to have the trust closed, and to a judgment against the trustee for his proportion of the trust fund. Remanded for proceedings according to this opinion.

(123 N. C. 267)

CASHION v. WESTERN UNION TEL. CO.
(Supreme Court of North Carolina. Nov. 22, 1898.)

TELEGRAM—DELAY IN DELIVERY—DAMAGES—MENTAL ANGUISH.

1. Substantial damages may be recovered for mental anguish, irrespective of physical injury, caused by negligently delaying delivery of telegram.

2. Mental anguish entailed by the nonarrival of a brother-in-law, in consequence of negligent delivery of a telegram announcing the death of the sender's husband, must be affirmatively proven in order to recover; it is not presumed,

as in case of a husband or wife or near blood kindred.

Appeal from superior court, Iredell county; McIver, Judge.

Action by Anna Cashion against the Western Union Telegraph Company. There was a judgment for plaintiff, and defendant appealed. Reversed.

Jones & Tillett, for appellant. J. F. Gamble and L. C. Caldwell, for appellee.

DOUGLAS, J. This is an action brought to recover damages for mental anguish suffered by the plaintiff from the neglect of the defendant to promptly deliver a telegram. The facts material to its present determination are few. On the 17th day of August, 1897, the husband of the plaintiff was killed while at work in Morganton, N. C., leaving the plaintiff and an infant child. Having no relations in the town, which was the residence neither of her own nor of her husband's family, she caused the following telegram to be sent to J. W. Mock, her brother-in-law, who had been living with her in Morganton, but was then visiting his relatives in Davidson, N. C.: "Morganton, N. C., Aug. 17, 1897. J. W. Mock, Davidson: Come at once. Mr. Cashion is dead. Killed at work. John Payne." This telegram was received at the office of the defendant company at Davidson at 5 o'clock the same evening, but was not delivered until the following morning. Mock testifies that, if the telegram had been promptly delivered, he would have ridden through the country to Statesville in time to take the train that arrived at Morganton about 11 o'clock that night. The plaintiff left Morganton the following morning with the body of her husband, and arrived at Statesville about 7 o'clock a. m., where she remained awaiting a train until 7 o'clock that evening. Mock arrived in Statesville about 10 o'clock the same morning, and returned to Davidson that evening with the plaintiff. Issues were submitted and answered as follows: "(1) Was the defendant guilty of negligence as alleged in the complaint? Ans. Yes. (2) What damage, if any, has the plaintiff sustained by reason of the negligence of the defendant? Ans. \$1,000."

There was sufficient evidence upon the first issue to be submitted to the jury, and we think it was submitted under proper instructions. After the well-considered opinion delivered at this term in *Lyne v. Telegraph Co.*, 31 S. E. 350, it must be deemed the settled rule of this court that damages may be recovered for mental anguish, irrespective of any physical injury, caused by the negligence of a defendant in failing to exercise reasonable care and diligence in the delivery of a telegram. The principles therein so clearly given need not now be repeated, as they are founded upon a sound public policy as well as natural justice, and are sustained equally by reason and precedent. *Young v. Telegraph Co.*, 107 N. C. 370, 11 S. E. 1044;

Thompson v. Telegraph Co., 107 N. C. 449, 12 S. E. 427; *Sherrill v. Telegraph Co.*, 109 N. C. 527, 14 S. E. 94; *Id.*, 116 N. C. 654, 21 S. E. 400; *Id.*, 117 N. C. 353, 23 S. E. 277; *Havener v. Telegraph Co.*, 117 N. C. 540, 23 S. E. 457. The doctrine is of comparatively recent origin, but has already been adopted with varying modifications by the states of Alabama, Illinois, Indiana, Iowa, Kentucky, North Carolina, Tennessee, and Texas, and is recognized in 2 *Shear. & R. Neg.* (5th Ed.) § 756; *Thomp. Elect.* § 379; 3 *Suth. Dam.* §§ 975-980; 2 *Sedg. Dam.* § 894. The rule was perhaps suggested by the following passage in *Shear. & R. Neg.* (3d Ed.) § 605: "In case of delay or total failure of delivery of messages relating to matters not connected with business, such as personal or domestic matters, we do not think that the company in fault ought to escape with mere nominal damages, on account of the want of strict commercial value in such messages. Delay in the announcement of a death, an arrival, the straying or recovery of a child, and the like, may often be productive of an injury to the feelings which cannot be easily estimated in money, but for which a jury should be at liberty to award fair damages." The doctrine first appears, but only inferentially, in 1877, in *Logan v. Telegraph Co.*, 84 Ill. 468. It was for the first time, as far as we are aware, distinctly enunciated in 1881 in *So Relle v. Telegraph Co.*, 55 Tex. 308. This celebrated case was subsequently distinguished, doubted, modified, and finally practically reaffirmed by the supreme court of Texas. The following suggestion from that opinion strongly commends itself to our approval. It says: "That great caution ought to be observed in the trial of cases like this, as it will be so easy and natural to confound the corroding grief occasioned by the loss of the parent or other relative with the disappointment and regret occasioned by the default or neglect of the company; for it is only the latter for which a recovery may be had, and the attention of juries might well be called to that fact." This is a very important distinction, as mental anguish is naturally so intangible, and, when proceeding from two concurring causes, so difficult of apportionment, that jurors should be careful not to give the plaintiff more than such a just and reasonable compensation as proceeds from the negligence of the defendant. This very difficulty, emphasized by the excessive damages occasionally given, is the strongest reason urged against the adoption of the rule in those jurisdictions where it does not prevail. On the other hand, to say that in such cases the plaintiff can recover only the pittance paid for sending the telegram seems so utterly subversive of every principle of justice and of public policy as to commend itself neither to the judgment nor the conscience of the court. A quasi public corporation, exercising extraordinary powers and receiving enormous profits solely in consideration of

the performance of its public duties, cannot be permitted to neglect or evade those duties with practical impunity. To allow it to cancel all liability for a negligence that may have wrung the heartstrings of the citizen for whose service it was created, by simply refunding the 25 cents which it had received but never earned, would destroy all sense of responsibility. All privileges have their corresponding duties, and all powers their equivalent responsibilities. As was said in *Reese v. Telegraph Co.*, 123 Ind. 294, 24 N. E. 163, the failure to promptly deliver a telegram "is not a mere breach of contract, but a failure to perform a duty which rests upon it as the servant of the people." This liability on the part of public servants to respond in civil damages to the injured party is the surest guaranty for the proper performance of their duties to the public, as criminal and penal statutes are difficult of enforcement. A suitor for a mere penalty does not receive much sympathy, while few care to undertake the criminal prosecution of a powerful corporation for mere witness fees, which are necessarily much less than their actual expenses. But an action for compensatory damages is looked upon as an effort on the part of the plaintiff to obtain simply what belongs to him as the just equivalent of the injury he has sustained at the hands of the defendant. He has thus the chance to recover a substantial compensation without the risk or odium of a penal suit. The public servant, knowing this, is more careful to avoid such liability, which it can always do by the proper performance of its public duties. A recent and interesting case, especially valuable for its long list of citations, is *Mentzer v. Telegraph Co.*, 93 Iowa, 752, 62 N. W. 1. The question of damages is peculiarly within the province of the jury, and should be settled by them, under proper instructions from the court, in accordance with the dictates of conscience and of common sense, giving to the plaintiff the just measure of compensation for the unlawful injury he has sustained, but remembering always that generosity is not a virtue when dealing with the property of others.

Coming to the second issue of the case at bar, as to the amount of damages, we think that the defendant's ninth prayer for instructions, or its equivalent, should have been given, and that the failure of the court to do so is such material and substantial error as entitles the defendant to a new trial. That prayer is as follows: "That, upon all the evidence in the case, the plaintiff, if entitled to recover anything, can recover no more than the amount paid by her for sending the telegram, and in no aspect of the case can the jury answer the second issue more than 25 cents." This prayer is not as definite as it might be, but it is sufficient to cover the point that there was no evidence of mental anguish on the part of the plaintiff arising from the failure of her brother-in-law to arrive on the night of the 17th. Mental anguish must be

something more than mere disappointment, and, like every other material allegation relied upon by the plaintiff, must be alleged and proved. It is true that there are certain facts which, when proved, presume mental anguish. The tender ties of love and sympathy existing between husband and wife or parent and child are the common knowledge of the human race, as they are the holiest instincts of the human heart. It is useless to tell the jurors of the anguish of a true wife, waiting for hours to take the train to the bedside of a dying husband, knowing well that the sands of life are falling fast, but uncertain of the vital measure, and finally reaching her journey's end only to bestow her last greeting upon lifeless clay. But, beyond the marriage state, this presumption extends only to near relatives of kindred blood, as acute affection does not necessarily result from distant kinship or mere affinity. A brother's love is sufficiently universal to raise the presumption, but not so with a brother-in-law, who is often an indifferent stranger, and sometimes an unwelcome intruder, into the family circle. It is true that with him such affection may exist, and in the present case doubtless does exist, but it must be shown. Moreover, there is a difference between those cases where the plaintiff is herself kept away from the bedside of a dying relative, and where she is merely deprived of the company of another relative, whose sympathetic love might tend to comfort and console her in her hour of sorrow. This difference may be considered by the jury in fixing the damages. We do not mean to say that damages for mental anguish may not be recovered from the absence of a mere friend, if it actually results, but it is not presumed. The need of a friend may cause real anguish to a helpless widow, left alone among strangers with an infant child and the dead body of her husband. In the present case the plaintiff seems to have received the full measure of Christian charity from a generous community, but it may be that she did not expect it, and looked alone to her brother-in-law, whose absence she so keenly felt. If so, she may prove it. We think that the allegations in the complaint are sufficient. An interesting case upon this point is *Telegraph Co. v. Coffin* (Tex. Sup.) 30 S. W. 896, which is copied, with a very full note, in 5 Am. Electrical Cas. 781. For failure of proper instruction, a new trial is ordered upon the entire case. New trial.

(123 N. C. 248)

WARD v. ODELL MFG. CO.

(Supreme Court of North Carolina. Nov. 22, 1898.)

NEGLECT—QUESTIONS FOR JURY—INSTRUCTIONS
—MASTER AND SERVANT—VICE PRINCIPAL
—BURDEN OF PROOF.

1. The question of negligence is for the jury where the facts are conflicting and more than one inference can be drawn from them.

2. Where a witness for defendant makes a statement as to the cause of the injury, from which the jury might infer negligence, and afterwards makes an entirely inconsistent statement, the question of negligence is for the jury.

3. It is error in giving an instruction to assume as a fact a matter as to which the evidence is conflicting.

4. The master is liable for an injury caused by a fellow servant of plaintiff employé, in doing an act under the instructions of a vice principal of the master.

5. In an action by a servant against his master for injuries caused by the cutting of wire by a co-employé in an alleged negligent manner, the burden of showing negligence is on plaintiff.

Appeal from superior court, Iredell county; Starbuck, Judge.

Action by Ebbirt Ward, by his next friend, Samuel P. Ward, against the Odell Manufacturing Company. From a judgment for defendant, plaintiff appeals. Reversed.

Armfield & Turner and H. P. Grier, for appellant. Long & Long and W. J. Montgomery, for appellee.

MONTGOMERY, J. This action was brought by an infant of 11 years, through his next friend, to recover damages of the defendant for a personal injury alleged to have been suffered by the plaintiff through the negligent keeping and use of a workbench and tools, by the defendant, in the manufactory where the plaintiff was employed. In the building of the defendant company in which was manufactured its goods, there was, at the time of the alleged injury of the plaintiff, a very large room, divided into two well-defined sections, but by an imaginary line, each section being under the control of a superintendent, who was called a "boss," and who supervised the machinery and controlled the employées. The plaintiff worked under the supervision of Ward, one of the section bosses, his business being to carry quills from the looms to the quillers; and the workbench at which the plaintiff alleged he was injured was in the corner of the room, and in the section under the control of Suter, another section boss. Upon this workbench were nippers, and also a cold-chisel and hammer and other tools, with which wires were cut to be used in the business of the defendant. The plaintiff testified on the trial below that, on the day he was injured, the quill carrier in Suter's section was sick, and that he was instructed by Ward to do the work of the other boy in addition to his own, and that his duties took him all over the room; that, in carrying quills to the quiller room, he had to pass about five feet from the bench, and between a loom and the bench. He said he could have gone up the middle of the room, but it would have been much further; that at the bench they would cut wires by setting the cold-chisel, and then hit it with a hammer; that he did not know there was any danger in passing the bench; and that while engaged in his work, and as

he was passing, a piece of wire flew from the workbench, and struck him in one eye, inflicting a serious injury.

The main contention of the plaintiff's counsel was that the defendant was negligent in allowing the workbench and tools, and the work thereon and therewith to be carried on, in its manufactory, so close to the pass-way, along which the plaintiff and other employes were compelled or permitted to go in the discharge of their duties, as to make it dangerous to pass by while the work was going on. Another contention of the plaintiff was that, even if the act of the defendant in keeping the workbench and tools and the use of the same for the purposes described by the witnesses was not in itself negligence, yet that the manner in which the tools were used on the occasion when the plaintiff was injured was imprudent and negligent.

His honor instructed the jury on these points as follows: "I will tell you that the mere having and maintaining of the workbench and those tools used for the purposes for which witnesses say they were used was not in itself negligence, because the evidence shows that the bench could have been operated, and the work necessary to be done upon it could have been performed, without injury to any one if proper precautions had been taken." We think that there was error in that instruction, and that the error arose from his honor's inadvertence to or misunderstanding of a part of the evidence. The evidence on this point was not all one way. There was evidence tending to prove that it was dangerous to cut wires on the bench with either chisel or nippers. The witness Ryan said that nippers were furnished by the defendant with which to cut the wires, and that, if nippers were used, wires would not fly out. The witness Wood said "that wires were cut with nippers which always stayed on the bench, and that there was no danger in using nippers." But Suter, who was the boss in charge of the section in which the bench was, said: "We did not allow the boys to work around the workbench. There would be danger in a boy's being around while wire is being cut. Fragments are likely to fly off in cutting wire with nippers." It is true that this witness (Suter) also said "that the proper way to cut wires was with nippers, and that the company furnished nippers for that purpose; and he also said he did not think there was any danger in cutting wires with nippers,—a statement inconsistent with his first statement. Whatever effect that inconsistency may have had upon his evidence, he unmistakably said that fragments were likely to fly off in cutting wires with nippers, and the jury ought to have been allowed to say whether or not such flying off of fragments of the wires from being cut with nippers was dangerous, under the particular circumstances of this case.

Negligence is not a pure question of law,

unless from the evidence a reasonable person could draw only one inference as to whether it existed or not. *Tillett v. Railroad Co.*, 118 N. C. 1031, 24 S. E. 111. In *Ellerbee v. Railroad Co.* (N. C.) 24 S. E. 806, the court said: "It is the province of the court, where the facts are undisputed, or where but a single inference can be drawn from the testimony, to instruct the jury whether either of the parties has been negligent, and what culpable act must be deemed the proximate cause of an injury. Where the facts are in dispute, or more than one inference might be drawn from the testimony by fair-minded men, it is the duty of the court to instruct the jury, when requested to do so, whether, in any aspect of the case arising out of the testimony, the acts of either party would constitute culpable carelessness; but in such cases it is always the province of the court to tell the jury that they are to determine whether, under all the circumstances, the party charged with culpability acted as would the ideal prudent man, and to make their verdict depend upon their decision of that question."

His honor further instructed the jury that "the mere having of the workbench and the tools in the room, apart from other considerations, would not amount to negligence in itself; and if you find that the workbench and the tools were used in a proper and prudent manner, as I will hereafter explain, then you will answer the first issue 'No,' in favor of the defendant." A part of the explanation of that instruction was as follows: "If you find that the safe way to cut wire was with nippers, and the defendant furnished nippers for the cutting of the wire, and the witness Ryan used a chisel to cut the wire, and by so doing hurt the plaintiff's eye, it was the negligence of Ryan (a fellow servant), for which the defendant would not be liable, and you should respond 'No' to the first issue, unless Wood, as the representative of the company, was responsible for this negligence, as I will hereafter explain." If we are right in our conclusion that there was error in the first instruction pointed out, then the same error appears in the last instruction. His honor assumes that the cutting of the wires with nippers was a safe way to cut them. As we have said, the evidence about that matter was conflicting, and it should have been left to the jury for their finding.

But, besides that, there was further error in the last instruction. According to the testimony of the defendant's witness Suter, it was the duty of Wood, another boss of a section, and himself, to do this work. He said: "Wood and I had control of this room, employes, and machinery. Workbench there for making picking sticks and filling up chains. It was the duty of Wood and myself to do this work. The boys did go and do this work. If they wanted to use hammer and chisel for the purpose of cutting wires, they were there for that purpose." And J. Car-

ter, another witness for the defendant, said he was a loom fixer, and that he never used a chisel for small wire, but used it for cutting large wire. That evidence tended to show that the defendant put the chisel and wire upon the bench for the purpose of having the wires cut with it, as well as with the nippers; and the matter ought to have been submitted to the jury under instructions that, if they believed that testimony, they ought to find that the injury to the plaintiff was caused by the defendant's negligence, and not by Ryan's,—that is, if they believed from the evidence that Suter was a vice principal of the defendant, and that he had instructed Ryan to cut those wires, under the evidence in this case.

We think the issues as submitted were sufficient; that the burden of proof to show negligence was on the plaintiff (*Hudson v. Railroad Co.*, 104 N. C. 491, 10 S. E. 669); and that the charge of his honor on the law governing negligence, as applicable between employers and employes of tender years, was correct, and substantially what the plaintiff requested him to charge. For the errors pointed out, however, there must be a new trial.

FURCHES, J., did not sit on the hearing of this case.

(123 N. C. 265)

RICKERT v. SOUTHERN RY. CO.

(Supreme Court of North Carolina. Nov. 22, 1898.)

CARRIERS—INJURY TO PASSENGERS—INSTRUCTIONS.

1. It is not error to refuse an instruction to find for defendant on an issue of negligence where there is evidence tending to show there was such negligence.

2. Plaintiff cannot recover for injuries sustained while stealing a ride on defendant's train.

3. Where a passenger riding on a flat car mistook the conductor's signals, not intended for him, for orders to get off while the train was slowly approaching a station, and, in getting off, was injured, he could not recover.

Appeal from superior court, Iredell county; McIver, Judge.

Action by M. J. Rickert against the Southern Railway Company. There was a judgment for plaintiff, and defendant appeals. Affirmed.

Charles Price, G. F. Bason, and A. B. Andrews, Jr., for appellant. Armfield & Turner, for appellee.

FURCHES, J. The facts disclosed by the trial of this case strongly impress us with the belief that the plaintiff was not entitled to a verdict in his favor. At the same time, we cannot say that there was not evidence that entitled him to go to the jury, and, if believed, to a verdict; and we cannot review the findings of the jury, however much we might differ with them. But we will say that, outside of all the evidence on the part

of the defendant contradicting the evidence offered by the plaintiff, it was not a very reasonable statement that if the plaintiff paid his fare from Salisbury to Statesville, as he says he did, he would have ridden all the way from Salisbury to Statesville in an open coal car, early in the morning of December 23d (only two days before Christmas), when he was entitled to a comfortable seat in the caboose. But if there is error in the findings of the jury, as we have said, they cannot be corrected in this court, unless the judge who tried the case committed an error of law on the trial. If this were so, and a new trial ordered on that account, this would vitiate the verdict; but it would not be because we have the power to review the findings of the jury, or had done so; and, upon a careful examination of the record, we find no error in law committed by the court below on which we can give a new trial.

There are several exceptions taken by the defendant, and, while none of them are formally abandoned, the defendant, in its brief, discusses but one of them. The issues submitted are as follows: "(1) Was the plaintiff injured by the negligence of the defendant, as alleged in the complaint? Ans. Yes. (2) Was the plaintiff guilty of contributory negligence? Ans. No. (3) What damage is the plaintiff entitled to recover by reason of said injuries? Ans. \$500." For the purpose of sustaining the plaintiff's contention, the plaintiff testified that he paid his fare as a passenger from Salisbury to Statesville on the defendant's freight train, leaving Salisbury early in the morning of December 23, 1896; that he rode in an open box car used for hauling coal, where he could be seen and was seen; that he only paid his way from Salisbury to Cleveland station, and at Cleveland he paid his fare from that place to Statesville; that, when the station whistle sounded at Statesville, the train "slowed up" to three or four miles an hour, and the conductor, from the window of the caboose, signaled him to get off, and, in attempting to do so, he slipped, caught his foot in the stirrup, and was injured. He was corroborated by other testimony as to the conductor's giving the signal by the wave of the hand, and as to the fall and injury. All this evidence was flatly contradicted by the engineer and crew of the train. But, still, it was evidence for the jury, which they might believe, and did believe. It would seem that the defendant thought it material, if believed, as it offered evidence to contradict it. But, whether the defendant thought it material or not, it was material if believed, and the court could not say it should not be believed. As to whether it should be believed or not was a question for the jury alone.

Upon this evidence, the defendant's first prayer for instructions, and the only one discussed in the brief, was that, upon all the evidence, the court should instruct the jury to find the first issue, "No." The court re-

fused to give this prayer, and committed no error in doing so. Had the court given this prayer for instruction, it would have been deciding upon the credibility of witnesses, the weight of the evidence, and the facts in the case, and would have been in direct violation of section 413 of the Code. This prayer is, in effect, a demurrer to the evidence, and admits, for the purposes of the prayer, that all the evidence is true. Such prayer can only be given in cases where the party asking the instruction is entitled to a finding upon the issue in his favor, taking all the evidence for the other side to be true, considered in the most reasonable light for the other side. *Baker v. Brem*, 103 N. C. 72, 9 S. E. 629; *Nelson v. Whitfield*, 82 N. C. 46; *Hopkins v. Bowers*, 111 N. C. 175, 16 S. E. 1. Taking the plaintiff's evidence to be true, he was a passenger on the defendant's train, and when it slowed up, he was told to get off, and was injured in so doing. This was negligence. *Lambeth v. Railroad Co.*, 66 N. C. 495; *Hinsshaw v. Railroad Co.*, 118 N. C. 1047, 24 S. E. 426.

We have examined the charge of the court, and find it full, fair, and correct. The court, among other things, charged the jury that, if they believed (found) from the evidence that the plaintiff was stealing a ride, he could not recover, or if the conductor did make signals with his hand, not intended for the plaintiff, and the plaintiff mistook them, and undertook to get off the train, and was injured, he could not recover. We find no error in refusing the instructions asked, nor in the instructions given. Affirmed.

(53 S. C. 519)

STAHN v. CATAWBA MILLS et al.
(Supreme Court of South Carolina. Nov. 9, 1898.)

STOCKHOLDER'S ACTION—COMPLAINT—DEMURRER—ELECTION.

1. It is not error to require defendant to elect between demurring to complaint and answer to the merits filed at the same time.

2. A complaint of a stockholder against directors for fraudulent disposition of corporate assets, showing facts from which it can reasonably be inferred that plaintiff could not get redress within the corporation, need not show an effort to procure corporate action.

3. A joint demurrer to a complaint stating a cause of action against certain of defendants is bad.

Appeal from common pleas circuit court of Chester county; James Aldrich, Judge.

Action by E. C. Stahn against the Catawba Mills and others. Demurrer to complaint was overruled, and defendants appeal. Affirmed.

Wilson & Wilson and Henry & McLure, for appellants. Barber & Marlon, for respondent.

JONES, J. This appeal comes up from an order overruling a demurrer to the complaint, with leave to answer. The complaint is by a stockholder in the Catawba Mills, a manufacturing corporation, against said corpora-

tion, its directors and others, seeking redress for alleged mismanagement and misappropriation of the corporate property. The grounds of demurrer may be stated to be substantially (1) that the complaint does not state facts sufficient to constitute a cause of action, in that it does not appear that the Catawba Mills, or its officers, have been requested, and have neglected or refused, to institute this suit, nor does it appear that such request, if made, would have been useless; (2) that several causes of action have been improperly united, in that plaintiff seeks judgment in favor of the Catawba Mills against the Chester Mills for goods sold and delivered, and also against the officers of the Catawba Mills who should be found responsible for said loan or credit to the defendant Chester Mills. At the same time, and indeed in the same paper containing the demurrer, defendants also answered to the merits. The circuit court, on motion duly noticed, required defendants to elect whether they would stand upon the demurrer or the answer. This ruling is the basis of one of the grounds of appeal; but appellants have not argued or pressed the point, and we need only say that it was not erroneous.

Does the complaint state facts sufficient to constitute a cause of action? Judge Aldrich, in his opinion overruling the demurrer, shows conclusively that it does, and we can add very little to what he has said. In the case of *Wenzel v. Brewing Co.*, 48 S. C. 80, 26 S. E. 1, which followed *Latimer v. Railroad Co.*, 39 S. C. 44, 17 S. E. 258, this court stated the principle which must govern this case in this language: "The general rule undoubtedly is that, when the directors or managing board of a corporation are charged with mismanagement or misappropriation of the corporate property, the action to restrain or redress such wrong must be instituted by the corporation, since the conduct complained of is a breach of the trust relation between the directors and the corporation. But to this general rule there are well-recognized exceptions, viz. when the directors or managing board do, or threaten to do, some act ultra vires, or some act of fraud, oppression, or illegality, injurious to the corporation, or in violation of the rights of the stockholders, to prevent injustice, a stockholder is permitted to maintain an action in his own name. This is substantially the rule declared in *Latimer v. Railroad Co.*, 39 S. C. 44, 17 S. E. 258, following and approving the principles announced in *Hawes v. Oakland*, 104 U. S. 450. Further, before a stockholder can maintain a suit in these exceptional cases, he must show that he has endeavored to get redress of his grievances within the corporation, or he must show facts which would justify a court in concluding that an effort for redress within the corporation would be unavailing." It is also a well-established rule that an application for redress within the corporation and refusal need not be alleged, if it be shown

that the directors or managing board are themselves the wrongdoers in some alleged breach of trust or fraudulent misappropriation of the corporate property, and have control of a majority of the stock, so as to control corporate action. In such a case it is reasonable to infer that an effort for redress within the corporation would be unavailing. *Brewer v. Boston Theatre*, 104 Mass. 387; *Eschweiler v. Stowell*, 78 Wis. 316, 47 N. W. 361; *Miner v. Ice Co. (Mich.)* 53 N. W. 218, and cases cited; *Wheeler v. Steel Co. (Ill. Sup.)* 32 N. E. 420, and cases cited.

The complaint alleges substantially that the boards of directors of both the Catawba Mills and the Chester Mills consist of seven each, and that defendants Tompkins, Wylie, Smyly, and Miller are directors of the Catawba Mills and Chester Mills; that Tompkins, Wylie, and Miller are, respectively, president, vice president, and secretary and treasurer of both mills, and that Smyly, director of both mills, is superintendent of the Chester Mills; that neither Smyly nor Miller is a bona fide owner and holder of stock in the said Catawba Mills, but that they hold their said stock for the use and benefit of the said Tompkins and his "dummies" on the said board of directors; that said Tompkins, in actual control of both mills, holds stock in the Chester Mills of the par value of \$35,000, while his stock in the Catawba Mills is only of the par value of \$2,100; that said Tompkins, Wylie, Smyly, and Miller, a majority of the directors in both mills, have, in the aggregate, larger pecuniary interests as shareholders and bondholders of the Chester Mills than of the Catawba Mills; that the Chester Mills is insolvent, or in imminent danger of insolvency, and has been so for some time past; that, with full knowledge thereof, the officers of the Catawba Mills (which must mean the directors, or the president, vice president, secretary and treasurer thereof) have for months past sold on open account, and without security, to the said Chester Mills, and are continuing to furnish to said insolvent corporation, large quantities of yarns, etc.; that the said Chester Mills is now indebted to the Catawba Mills on account of products so furnished in an amount aggregating \$20,000; that said officers of the Catawba Mills have made no arrangement to collect or secure said indebtedness, although repeatedly urged to do so by plaintiff and other stockholders of the Catawba Mills; that, on the contrary, they are ever increasing the amount of said indebtedness; that the Catawba Mills has no business office in this state, but conducts its business in the office of said Tompkins and Miller, in Charlotte, N. C., where all the books and financial accounts are kept; that a personal inspection of said books has heretofore been denied to other stockholders of the Catawba Mills; that an application by letter on the part of plaintiff to said Miller, secretary and treasurer, failed to elicit the definite information desired, etc.; that the

capital stock of Catawba Mills is not excessive, its plant practically new and well equipped, its indebtedness not large; and that, if wisely, discreetly, and honestly managed, in the interest of its stockholders, it would earn a reasonable dividend upon its stock, etc. Then follow paragraphs 10, 11, and 12 of the complaint, which we quote in full: "(10) That, by reason of the gross mismanagement on the part of the defendant, the said D. A. Tompkins, president, and his coadjutors and dummies in control of the said Catawba Mills, and of his and their unreasonable, unwarranted, and fraudulent extension of credit to the Chester Mills, in which said corporation he and they hold much larger pecuniary interests, as aforesaid, the Catawba Mills has not only failed to pay any dividends to its stockholders under their management, but the stock of the said corporation has depreciated in market value more than forty per cent., and, as the plaintiff verily believes, will continue to depreciate as long as the managing officers are permitted to conduct the business of said mills, in the state of North Carolina, in an arbitrary and secretive manner, and to operate the same in the interest of the said insolvent Chester Mills, to the great and irreparable damage of this plaintiff and other stockholders of the said Chester Mills. (11) That no regular monthly meetings of the board of directors of said Catawba Mills, of which this plaintiff is a member, have been held as required by the by-laws of the corporation, or, if held, they have been had without this plaintiff's knowledge; that the failure to hold said directors' meetings has been due, as plaintiff is informed and believes, to the machinations of the said D. A. Tompkins, president, in endeavoring to invest himself with absolute control in the management of the said corporation; that, at such irregular and infrequent intervals as the said board of directors may have met for the transaction of business, the said D. A. Tompkins, president, submitted inadequate and evasive reports as to the condition of said corporation, and of his administration of its said affairs; that, by reason thereof, the said unwarranted and fraudulent credit or loan of \$20,000 to the insolvent Chester Mills, as aforesaid, was made without the knowledge or consent of this plaintiff, and, as he is informed and believes, without the knowledge or consent of other members of said board of directors, being, in effect, a credit sale by D. A. Tompkins, president of the Catawba Mills, to D. A. Tompkins, president of the Chester Mills. (12) That, by reason of the fact that the said defendant, D. A. Tompkins, and his coadjutors, inclined and committed by pecuniary interests in the said Chester Mills to a continuance of the present policy of managing and operating the said Catawba Mills, either own or control by proxy a majority of the stock of the said Catawba Mills, this plaintiff and other stockholders similarly situated are powerless to obtain redress or the protection of their

property rights within the corporation itself; that the said parties, interested as aforesaid in the continuance of the present management of the Catawba Mills, have for some time past been engaged in a canvass of the stockholders of said corporation, for the purpose of obtaining proxies of stock for the approaching annual stockholders' meeting; and that by so obtaining the proxies of a number of shareholders, unaware or ill informed, as plaintiff believes, of the true condition of said corporation's affairs, and by the purchase in the market of a number of shares of its said depreciated stock, the said parties have secured, as plaintiff is informed and believes, a sufficient majority to control in said stockholders' meeting; and that, unless this plaintiff can obtain at the hands of this honorable court the relief hereinafter prayed for, his stock and the stock of other stockholders in the said Catawba Mills will continue to depreciate in value, to his and their irreparable damage and injury." We think the complaint shows facts from which the court could reasonably infer that plaintiff could not obtain redress within the corporation, in which case it is not necessary to allege facts showing an honest effort to procure corporate action.

As to the second ground of demurrer, we agree with the circuit court in overruling the same. Directors are personally liable to the corporation, or, in a proper case, to any stockholder, for losses arising from their fraud, breach of trust, or gross negligence in the management or disposition of the corporate property; and any person or corporation participating in such fraudulent conduct, or corruptly receiving the corporate property fraudulently disposed of, is likewise liable. The complaint does not attempt to declare on two or more causes of action, based on the right of a stockholder to fidelity and ordinary care on the part of directors in the management and disposition of corporate assets, the duty of the directors in that regard, and the alleged delict or wrong, whereby, it is said, loss to the corporation or stockholder has been sustained. The demurrer in this case is joint as to all defendants. Being bad as to such defendant directors as are properly alleged to have fraudulently disposed of corporate property, or allowed it to be so disposed of by their gross negligence, it must be held bad as to all other defendants joining in the demurrer. *Lowry v. Jackson*, 27 S. C. 318, 3 S. E. 473. The judgment of the circuit court is affirmed.

(53 S. C. 539)

ARMOUR PACKING CO. v. LONDON et al.
(Supreme Court of South Carolina. Nov. 17, 1898.)

APPEAL—EXCEPTIONS—FRAUDULENT CONVEYANCES—ACCOUNTING FOR PROCEEDS—ORDER—LIABILITY OF TRANSFEREE—CLAIMS OF CREDITORS—LIENS—LIMITATIONS—REFERENDUM.

1. Exceptions that the court erred "in sustaining each and all of plaintiff's exceptions to

the accounting," or "in overruling all of defendant's exceptions to the accounting," are too general to be considered.

2. An order requiring an accounting by assignees on setting aside the assignment is final as to the scope of the accounting, where it is not appealed from.

3. A stock of goods was transferred to preferred mortgagees for an inventoried price of \$1,345, which was credited on the mortgages, and the mortgagees took possession and ran the business, purchasing new goods and mingling them with the stock. The transfer was afterwards set aside, and the mortgagees were ordered to account "for the proceeds of the property transferred to them." *Held*, that they should account for \$1,345, such sum being the value of the property, with interest from the date of the transfer, and not for the amounts realized from sales of the property.

4. A purchaser of a stock of goods under a fraudulent conveyance afterwards set aside, who takes charge of the stock and also of the book accounts, is liable for interest on the amounts collected by him on such accounts from the dates of collection.

5. A purchaser of property under fraudulent conveyance afterwards purchased a claim which was a subsequent lien on the property. The conveyance being set aside, he was ordered to pay the proceeds of the property into court. *Held*, that the claim in his hands was not a lien on the fund in court.

6. A purchaser of property under a fraudulent conveyance afterwards purchased a claim against the property for half its face value. *Held* that, on the former conveyance being set aside, he could prove his claim only for the amount which he paid for it.

7. Property on which there were two mortgages of different dates was conveyed to the first mortgagee to apply on his mortgage, and was converted by him. The conveyance being set aside, he was ordered to pay into court the amount which he allowed for the property. *Held*, that the second mortgage was not a lien on the fund in court.

8. A mortgagor transferred the property to the mortgagee to apply on the mortgage, and afterwards gave him a note. Subsequently a decree was entered setting aside the transfer as a fraudulent assignment for creditors, and ordering the proceeds of the property paid into court for the benefit of creditors. *Held*, that as the rights of creditors were fixed as existing at the date of the decree, and not the date of the transfer, the note might share in the fund.

9. A note which was made the basis of a claim against a fund placed in the hands of the court for the benefit of creditors had been given in payment of an account which was barred by the statute of limitations. *Held*, that the claim consisted of the note, and not the account, and therefore was not barred.

10. In an action to set aside a fraudulent conveyance, an order appointing a referee to inquire into and report a suitable amount to be allowed plaintiff's counsel, made after the sale was set aside and at the date of rulings on exceptions to the report of the clerk on an accounting as to the amount for which the purchaser was liable and to which the creditors were entitled, is not premature.

Appeal from common pleas circuit court of York county; R. C. Watts, Judge.

Action by the Armour Packing Company against F. A. London and others to set aside a conveyance as fraudulent. The conveyance was set aside, and the purchaser ordered to pay the proceeds into court for the benefit of creditors. From rulings on exceptions to the report of a referee appointed to take an accounting of the proceeds of the

property and pass upon claims of creditors, defendants appeal. Modified and remanded.

The defendants appealed upon the following grounds, to wit: "That his honor erred (1) in sustaining plaintiff's exceptions as to the method of accounting before the clerk, in not charging the defendants with the sum of \$1,345.84, as the proceeds of the mortgaged property, and interest on this sum from May 4, 1894; (2) in sustaining each and all of plaintiff's exceptions to the accounting made before W. B. Wylie, clerk of said court; (3) in finding that in restating the account the clerk will charge the defendants with interest on the choses in action collected in the aggregate sum of \$481.30 from the time the several items making up the same were collected; (4) in finding that the J. A. Durham & Co. claim is not a mortgage claim, and is only provable for 50 per cent. of its face value by J. R. London; (5) in sustaining plaintiff's second exception to the clerk's report on claims, and not allowing the note of F. A. London to J. R. London for \$894.11, dated January 9, 1897; (6) in sustaining plaintiff's third exception to said report, and in not allowing the account of John B. London against F. A. London for \$493.51; (7) in sustaining plaintiff's fourth exception, and in finding that the mortgage executed by F. A. London to J. G. Suther is not admissible as a lien; (8) in overruling all the defendants' exceptions to the accounting and report on claims made by W. B. Wylie, clerk; (9) in failing to find that the defendants J. R. London and Mary B. Moore should not account for any of the proceeds of the property transferred to them by F. A. London on May 4, 1894; (10) in failing to find that the defendant F. A. London is entitled to receive as a homestead exemption \$500 out of the property involved in this action or the proceeds thereof; (11) in ordering a reference to inquire and report a suitable amount as compensation to counsel engaged for the plaintiff, such reference being premature."

Wilson & Wilson, for appellants. Hart & Cherry, for respondent.

JONES, J. On the 27th of April, 1894, F. A. London, an insolvent merchant, executed two mortgages on his stock of goods, store fixtures, books of account, and other credits, horse, dray, and other rolling stock,—one to J. R. London to secure three notes, aggregating \$1,625.74, and the other to M. B. Moore to secure a note for \$640.25,—all the notes being dated 27th April, 1894, and payable on May 10th following. Before the maturity of the notes, being pressed by creditors, F. A. London, on May 4, 1894, sold the stock of merchandise, fixtures, and rolling stock to the defendant J. R. London and M. B. Moore at the agreed price and valuation of \$1,345.84, which amount was credited on the notes secured by the mortgages,—to the notes of J. R. London, \$964.90; to the note of M. B. Moore, \$380.94. The mortgagees at

once took possession of the goods, etc., and also received the books of account of F. A. London, and for a time continued the business as their own, buying other goods, and intermingling the same with the original stock of F. A. London, selling said stock, with the additions thereto, and collecting the accounts, etc., of F. A. London. A short time after the sale to defendants (some time in May, 1894) the plaintiff, suing for itself and other creditors that might come in, brought this action, which on January 14, 1897, resulted in the decree of Hon. R. C. Watts, from which no appeal was taken, adjudging the said mortgages void, both under the statute of Elizabeth and under the assignment act, being held to be, in effect, an assignment by an insolvent debtor with preferences. The decree further required the defendants J. R. London and M. B. Moore to account before W. Brown Wylie, as referee, "for the proceeds of the property transferred to them." It also provided for calling in the creditors of F. A. London to establish their claims.

As to the accounting:

The referee, construing the decree of Judge Watts to require defendants to account for the proceeds of the sale of the goods, etc., as made by them after May 4, 1894, held defendants accountable as follows:

To net amount arising from sale of stock	\$ 536 22
To net amount arising from sale of rolling stock	120 00
To net amount arising from collections on F. A. London accounts..	481 30
To net amount John R. London accounts	206 99
To net amount Mary B. Moore accounts	72 80
To net amount to open accounts and balance on ledger of London & Moore	113 58
Total	\$ 1,530 89
Credited by amounts paid for collecting, taxes, and wages.....	99 28

Total amount for which the defendants should account to this court is \$ 1,431 63

The defendants excepted to this report, alleging error (1) in finding that the defendants should account for any of the proceeds of the property transferred to them by F. A. London, May 4, 1894; (2) in finding that defendants should account for any of the items in the report except the item of \$481.30, amount arising from collections on F. A. London's accounts; (3) in not finding that F. A. London was entitled to receive \$500 from said funds as a homestead. The circuit court, Hon. W. C. Benet, overruled the exceptions of defendants. In sustaining the exceptions of plaintiff, his honor held, in reference to the matter of accounting, (1) that the referee erred in not charging the defendants J. R. London and M. B. Moore with the sum of \$1,345.84, and interest thereon from May 4, 1894, the same being the price at which defendants took the stock, etc., after a full inventory and valuation; (2) that the

defendants having intermixed the goods of F. A. London coming into their hands with other goods of their own, so that the mass of goods and sales thereof became indistinguishable, it was error to adopt the method of accounting by supposed retail sales; (3) that it was error to allow the defendant J. R. London to testify as to sales of goods at retail, in contradiction of the allegations of his answer in the cause; (4) that interest should be charged against the defendants on the choses in action collected, and stated to aggregate the sum of \$481.30, from the time the several items making up this sum were collected.

Appellants' first, second, third, eighth, and ninth exceptions allege error in reference to the matter of accounting. The second and eighth exceptions are so general they need not be considered. The first exception assigns error "in sustaining plaintiff's exceptions as to the method of accounting before the clerk, in not charging the defendants with the sum of \$1,345.84 as the proceeds of the mortgaged property, and interest on this sum from May 4, 1894." We do not think there was error in the ruling of the circuit court. The order of Judge Watts required defendants to account "for the proceeds of the property transferred to them." As this order has not been appealed from, it is final as to the scope of the accounting. The word "proceeds" is of such general signification that resort must usually be made to the context, and to the subject-matter to which it relates, in order to ascertain its meaning. It is conceded that it includes in this case the receipts from the collection of the accounts and notes of F. A. London transferred to defendants May 4, 1894. Just previously, in the same decree, Judge Watts used this language, " * * * applied the proceeds of the personal property by crediting the notes secured by the mortgages"; alluding to the fact that defendants, when they bought the stock, etc., for \$1,345.84, applied this sum, the purchase price of the stock, etc., to the credit of the notes secured by the mortgages. Here, evidently, the circuit judge meant by the word "proceeds" to include the price agreed to be paid by defendants for the goods, etc.

We think it fairly within the terms of the decree of Judge Watts to hold the defendants accountable for \$1,345.84 as the proceeds of that part of the assets of F. A. London claimed to have been purchased by them on May 4, 1894. Appellants have no ground for complaint in being held accountable for this sum, for, by their answers in this case, such sum was the fair value of the property. This valuation was ascertained by taking an inventory of the stock of goods, store fixtures, and rolling stock at a stated valuation, and then estimating the true value at 75 per cent. thereof. Clearly, defendants were liable to account for the property or its value. Having intermingled this property with other

goods purchased by them, so as to render it impossible to account with accuracy and certainty for their receipts from the sale thereof, they cannot complain that they must account for its value, as estimated by themselves before the intermingling. The proceeds of this transaction, \$1,345.84, being illegally retained and appropriated by the defendants, they are liable for interest thereon from the time of retention and appropriation. *Southern Ry. Co. v. City Council of Greenville*, 49 S. C. 449, 27 S. E. 652, and authorities cited. It follows also that defendants are liable for the interest on the collections aggregating \$481.30 from the time of collection, and so appellants' third exception must be overruled. As we have held that defendants must account for \$1,345.84 as the value or proceeds of the stock of goods, store fixtures, and rolling stock transferred to them, it is unnecessary to further notice the ninth exception, which imputes error in failing to find that the defendants should not account for any of the proceeds of the property transferred to them on May 4, 1894.

As to contested claims:

1. The claim of J. A. Durham & Co. It appears that F. A. London, on April 28, 1894, gave his note to J. A. Durham & Co. for \$152.09, in settlement of a simple contract debt existing prior to the mortgages to defendants, and to secure said note executed a mortgage the same day on the property mortgaged to defendants. Some time afterwards J. R. London bought this note and mortgage for 50 per cent. of its face. The claim was contested on the ground that it did not constitute a lien on the property or fund in question, and was provable for only the amount paid therefor by J. R. London. The circuit court took this view. We concur in this. Whatever may have been the legal rights of J. A. Durham & Co. against the specific property mortgaged while in the hands of F. A. London, the mortgage is not a lien on the fund in court. J. R. London, holding the relation of a trustee as to the assets of F. A. London in his hands, could not speculate in reference to the trust estate. The claim is provable as an unsecured claim for the amount J. R. London paid therefor.

2. As to the claim of J. G. Suther. This is a note by F. A. London to J. G. Suther dated April 30, 1894, for \$155.35, secured by a mortgage on the stock of goods, etc., executed same day. The circuit court allowed this claim to be established as an unsecured claim. We concur in this. The court did not take charge of the estate of F. A. London for the purpose of administration until the filing of the decree of Judge Watts, January 14, 1897, when creditors were called in to establish their claims, and the assets then brought into court were not the specific property mortgaged, but the liability of defendants to account for the proceeds thereof, they having disposed of and appropriated the mortgaged property. If the mortgaged

property had been brought into court, and sold under its order, a different question would be presented as to whether the mortgages to J. G. Suther and J. A. Durham & Co., executed after the void mortgages to defendants were executed, but before sequestration of the property by the court, constitute liens upon the fund in court. In *re Spragins*, 44 S. C. 65, 21 S. E. 543.

3. Note by F. A. London to J. R. London for \$894.11, dated January 9, 1897. This note shows that it was given for balance due on account March 1, 1883. The claim was rejected by the circuit court on the ground that it was a debt created after the assignment of F. A. London to his co-defendants, on the 27th day of April, 1894. This was error. The rights of creditors in this case are to be determined with reference to the filing of the decree, January 14, 1897, when all creditors of F. A. London were required to establish their claims. When the court took charge of the assets and called in creditors, this note was outstanding. The principle announced in *Ragsdale v. Bank*, 45 S. C. 575, 23 S. E. 947, that debts arising after an assignment is made are not provable against the assigned estate, is not applicable in this case, where there was no valid assignment, and the claims are not presented against an assigned estate, but are presented against a fund in court under a call of the court for all creditors to come in and establish their claims. Respondents gave due notice that they would urge that the judgment as to this claim be sustained, on the ground that the claim was barred by the statute of limitations, as urged below. Clearly, the note was not barred, and that was the claim presented. The account of March 1, 1883, although barred by the statute of limitations, was a good consideration for the note. *McGrath v. Barnes*, 13 S. C. 338. The defense of the statute of limitations is the personal privilege of the debtor, which he will not be compelled to exercise, since the law allows a man to be honest and to acknowledge his debts. There is no suggestion of fraud or collusion as to this claim. If it be conceded that in insolvency proceedings, after the court takes the matter of claims out of the debtor's hands, one creditor may set up such plea as to the claim of another, the claim in this case is not the account of 1883, but the note of 1897, based on good consideration, and given before the court called in creditors. The fifth exception as to this claim is sustained.

4. The account of J. R. London against F. A. London for \$403.51. This account was from March 19, 1894, to December, 1896. This claim, except for the item of cash loaned March 19, 1894, \$50, was rejected by the circuit court on the ground that the items were for goods purchased after the date of F. A. London's assignment, on April 27, 1894. This was error, for reasons already stated. The sixth exception is therefore sustained.

As to the F. A. London's claim of homestead.

The tenth exception alleges error in failing to find that defendant F. A. London is entitled to receive, as a homestead exemption, \$500 out of the property involved in this action or the proceeds thereof. We are relieved of any necessity of passing upon the right of defendant F. A. London to a homestead exemption, in view of the following notice in the record: "To Messrs. Willson & Willson, Attorneys for Appellants: Take notice that on the argument before the Hon. W. C. Benet, at November term, 1897, respondents announced that they had no valid objections to oppose to the claim of F. A. London to an exemption of \$500 out of the proceeds of the assets in issue. They repeat this announcement as a full answer to appellants' 10th exception. [Signed] Hart & Cherry, Attorneys for Respondent." The right of homestead claimed must therefore be considered as conceded by respondent.

We find no error in the order for reference to inquire and report a suitable amount as compensation to counsel for plaintiff. Whether such fee can be paid out of what may be assigned to F. A. London as a homestead has not been considered as passed upon in the circuit court, nor will it be considered by this court at this stage.

The judgment of the circuit court is modified as hereinabove stated, and the case is remanded for further proceedings in accordance with the principles herein announced.

(96 Va. 306)

FOSTER v. COMMONWEALTH.

(Supreme Court of Appeals of Virginia. Sept. 15, 1898.)

RAPE—CAPACITY TO COMMIT.

A boy under 14 years of age is conclusively presumed to be incapable of committing either rape or an attempt to commit rape.

Error to circuit court, Roanoke county.

One Foster was convicted of an attempt to commit rape, and he brings error. Reversed.

W. W. Ballard, for appellant. The Attorney General, for the Commonwealth.

RIELEY, J. This case presents for decision the important question whether a boy under 14 years of age is capable, under the law, of committing the crime of rape or of the attempt to commit it. It does not appear ever to have been passed upon in this state by any court of last resort.

In *Law v. Com.*, 75 Va. 885, it was stated, as the result of all the authorities, that a boy under 14 years of age, who aids and assists another person in the commission of the offense of rape, may be convicted as principal in the second degree, if it appear from all the circumstances of the case that he had a mischievous discretion; but the particular question we are now called upon to decide was not involved in that case, and, though

adverted to, the court refrained from expressing any opinion upon it.

By the common law, a boy under 14 years of age is conclusively presumed to be incapable of committing the offense, whatever be the real fact. Evidence to rebut the presumption is inadmissible. 1 Hale, P. C. 630; 4 Bl. Comm. 212; 2 Russ. Crimes (9th Ed.) 1117; 2 Archb. Cr. Prac. & Pl. 156; Rex v. Eldershaw, 3 Car. & P. 396; Rex v. Groombridge, 7 Car. & P. 582; Reg. v. Phillips, 8 Car. & P. 736; Reg. v. Jordon, 9 Car. & P. 118; Reg. v. Brimilow, Id. 366; Reg. v. Waite [1892] 2 Q. B. 600; and Reg. v. Williams [1893] 1 Q. B. 320.

In the United States the rule of the common law has not been uniformly followed. It was adhered to in *State v. Handy*, 4 Har. (Del.) 566; *State v. Sam*, 60 N. C. 293; in *Williams v. State*, 20 Fla. 777; and in *McKinny v. State*, 29 Fla. 565, 10 South. 732. See, also, *Com. v. Green*, 2 Pick. 380.

In *Williams v. State*, supra, it was held that as there was no statute in Florida fixing the age within which a person is capable of committing the crime of rape, the rule of the common law prevailed, and that a boy under 14 years of age could not be guilty of the offense.

In some of the other states the rule of the common law has been laid down in a modified form.

In *Williams v. State*, 14 Ohio, 222, it was held that an infant under the age of 14 years is presumed to be incapable of committing the crime of rape, or of an attempt to commit it; but that the presumption may be rebutted by proof that he has arrived at puberty, and is capable of consummating the crime. This decision was made in 1846. The question was again before the court in 1878, in the case of *Hiltabiddle v. State*, 35 Ohio St. 52; and the rule in its modified form, as laid down in *Williams v. State*, supra, since it had stood as the law of that state for many years, was followed, but it is strongly implied in the opinion that, except for the previous decision, the court would have adhered to the rule of the common law.

The rule in its modified form, as adopted in *Williams v. State*, 14 Ohio St. 222, has been followed in New York, Tennessee, Kentucky, Louisiana, and Georgia. *People v. Randolph*, 2 Parker, Cr. R. 174; *Wagoner v. State*, 5 Lea, 352; *Heilman v. Com.*, 84 Ky. 457, 1 S. W. 731; *State v. Jones*, 39 La. Ann. 935, 3 South. 57; and *Gordon v. State*, 93 Ga. 531, 21 S. E. 54. See *State v. Yeargan* (N. C.) 36 Lawy. Rep. Ann., note 203 (s. c. 23 S. E. 153).

The American text writers upon criminal law, so far as we have had access to them, adhere to the rule of the common law. Davis, Cr. Law, 26, 29; Minor, Syn. Cr. Law, 73; Whart. Cr. Law, § 551; 3 Greenl. Ev. § 215; and 1 Blsh. New Cr. Law, § 373; 2 Blsh. New Cr. Law, § 1117.

The last-named author, who is universally recognized as one of the ablest and most

philosophical writers upon law in this country, in his latest work on Criminal Law, approves unqualifiedly the rule of the common law for the sake of convenience and decency as well as for its justice, and doubts "whether physical capacity in boys below fourteen is sufficiently frequent to call for the abolition of a technical rule so well adapted as this to prevent those particular statements of indecent things which wear away the sense of the refined, placed by the Maker in the human mind as a protector of its virtue." 2 Blsh. New Cr. Law, § 1117.

The convention of May, 1776, which declared our separation from England, and framed the first constitution of the state, ordained that "the common law of England, all statutes or acts of parliament made in aid of the common law prior to the fourth year of the reign of King James the First, and which are of a general nature, not local to that kingdom, together with the several acts of the general assembly of this colony now in force, so far as the same may consist with the several ordinances, declarations, and resolutions of the general convention, shall be the rule of decision, and shall be considered as in full force, until the same shall be altered by the legislative power of this colony." St. 9 Hen. p. 127, § 6; St. 13 Hen. p. 23, c. 17; and 1 Rev. Code, pp. 135, 136, cc. 38, 40.

In the year 1792, so much of the ordinance of 1776 as adopted the acts of parliament of a general nature, made in aid of the common law, prior to the fourth year of James I., was repealed by the legislature; but that part of the ordinance of 1776 which established the common law until it should be altered by legislative power has never been repealed.

The revisers of the Code of 1849 prepared, and the legislature adopted, the following statute, prescribing the force and effect to be given to the common law:

"The common law of England, so far as it is not repugnant to the principles of the bill of rights and constitution of this state, shall continue in force within the same, and be the rule of decision, except in those respects wherein it is or shall be altered by the general assembly." Code 1849, c. 16, § 1.

And this is, by statute, the force and effect to be given to it at the present time. Code 1887, § 2.

Consequently the common law of England, so far as it is not repugnant to the principles of the bill of rights and constitution of this state, or has not been modified by our written law, is in full force in this state, and constitutes the rule of decision on all subjects, whether of a civil or criminal nature. See Report of Revisers of Code 1849, p. 68, note.

Although, by the terms of the ordinance of 1776, the common law was adopted generally, and without a qualification similar to that annexed to the adoption of the British statutes, yet it has always been considered that the

same principle governs the adoption of the common law. Such of its doctrines and principles as are repugnant to the nature and character of our political system, or which the different and varied circumstances of our country render inapplicable to us, are either not in force here, or must be so modified in their application as to adapt them to our condition. It is a reasonable and substantial compliance with the common law, "whose peculiar beauty is that it adapts itself to the rights of parties under every change of circumstances," rather than a literal one, which is exacted by its adoption. 1 Tuck. Comm. 9; *Coleman v. Moody*, 4 Hen. & M. 20, 21; *Findlay v. Smith*, 6 Munf. 148; *Stout v. Jackson*, 2 Rand. (Va.) 147; and *Stokes v. Upper Appomattox Co.*, 3 Leigh, 337.

The legislature, which is the representative of the sovereign power of the people, and specially charged with the duty of making or amending laws to meet their needs, has not at any time enacted any law changing the rule of the common law with respect to the matter under consideration. The presumption, from the inaction of the legislature, is that it has not been found that the climate of our state or the habits and condition of our people require any change or modification of the rule. And, in this connection, it is significant, and tends to confirm the presumption from the inaction of the legislature, that in the judicial history of the state, extending over a period of more than 100 years, no case drawing in question the rule of the common law in respect to the age of puberty in males can be found in any court of last resort in the state.

We are not aware of any climatic influence on our people, by reason of their locality, or difference in their habits or condition, that calls for a modification of our unwritten laws as to the age of puberty, even if we were satisfied that we had the power to make it, in view of the force and effect the statute requires shall be given to the common law. The inconvenience, if not absolute inability, of obtaining evidence of the puberty of a boy under the age of 14, and his capacity to commit the crime of rape, except by the exposure of his person, either voluntary or compulsory, and the questionable right of the commonwealth to obtain it by compulsion, do not invite a modification of the arbitrary rule of the common law; while the unreliable and unsatisfactory evidence of the capacity of the accused to commit the crime, when so obtained and adduced, and the statement and discussion of indecent things which must attend its introduction before the jury, would cause us to hesitate to depart from a long-established rule, which has had the sanction of the wisest judges and undergone the test of years.

The circumstances under which the evidence to establish the puberty of the accused in the case before us was obtained, together with its nature and doubtful character, are

well calculated to deter any modification of the rule of the common law, unless made necessary by the social condition of our people and required for the protection of virtue.

The accused being under 14 years of age, and conclusively presumed to be incapable of committing the crime of rape, it logically follows, as a plain legal deduction, that he was also incapable in law of an attempt to commit it. He could not be held to be guilty of an attempt to commit an offense which he was physically impotent to perpetrate. 1 Bish. New Cr. Law, § 746; 2 Bish. New Cr. Law, § 1136; 2 Russ. Crimes, 676; 3 Greenl. Ev. § 215, note; *State v. Sam*, 60 N. C. 293; *Reg. v. Waite* [1892] 2 Q. B. 600; and *Reg. v. Williams* [1893] 1 Q. B. 320.

The judgment of the circuit court must be reversed, and a new trial awarded the plaintiff in error, to be had in accordance with the views expressed in the foregoing opinion.

(96 Va. 337)

LYNCHBURG PERPETUAL BUILDING & LOAN ASS'N v. FELLERS et al.

(Supreme Court of Appeals of Virginia. Sept. 15, 1898.)

MORTGAGES—SEPARATE TRANSFERS OF PREMISES—ORDER OF SUBJECTION—PARTIAL RELEASE—EFFECT—BONA FIDE PURCHASERS—DEEDS—RECORDATION.

1. Where a mortgagee released one portion of the premises knowing that a third person had purchased another portion subsequent to the mortgage, and he was paid part of the proceeds of the released portion, such other portion will be discharged from an amount of the mortgage debt equal to the difference between the value of the property released and what was applied on the debt out of its proceeds.

2. Where portions of mortgaged premises are sold at different times, they are liable for the mortgage debt in the inverse order of their sale.

3. The grantee of a parcel of mortgaged premises was trustee of a church when it had purchased another parcel and assumed the mortgage, and when the purchase was rescinded, and when the church purchased a part of the former parcel on condition that the lien should be released, which was done, and he was an active participant in these transactions, and had knowledge of all the facts. *Held*, that his parcel was liable to satisfy that portion of the mortgage debt which was discharged from a parcel purchased subsequent to that of grantee, by the release of the parcel purchased by the church.

4. The registry of a deed by a subsequent purchaser is no notice to parties who acquired their rights before the deed was registered.

Appeal from circuit court of city of Roanoke.

Bill by the Lynchburg Perpetual Building & Loan Association against M. L. Fellers and others. There was a decree for complainant for less relief than that demanded, and it appeals. Reversed in part.

Moomaw & Woods, for appellant. Hansbrough & Hall, Scott & Staples, and S. H. Graves, for appellees.

BUCHANAN, J. In February, 1891, W. P. Huff, who was the owner of a lot of land in

the city of Roanoke on which there were three houses, executed a deed of trust to secure the payment of the sum of \$2,000, which he had borrowed from the appellant. In July following, Huff sold and conveyed a part of the lot to the trustees of the United Brethren Church for \$2,600. They paid \$600 in cash, and assumed, it is alleged, payment of the debt due the appellant. At or about the same time, Huff sold and conveyed another portion of the lot, with a house on it, to W. H. Strickler, one of the trustees of the church. In November of the same year, M. L. Fellers purchased another portion of the lot, upon which the other two houses were located, from Huff, and received a conveyance therefor. The trustees of the church, after paying three monthly installments (July, August, and September) of \$42.94 each upon the debt secured by the deed of trust, notified Huff that they could not and would not proceed further with their purchase. Between that time and November, 1892 (precisely when does not clearly appear), Huff and the church trustees agreed to rescind the contract between them for the sale and purchase of the lot. No reconveyance was made, but the deed from Huff to them, which had never been recorded, was destroyed. Prior to the 26th day of November, 1892, Huff agreed to sell to the trustees of the church a portion of the lot embraced in their first contract, which had been rescinded. The trustees of the church required, as a condition precedent to their purchase, that Huff should have that portion of the lot released from the lien of the deed of trust. The lien was released by the appellant by deed dated November 12, 1892, as to that portion of the lot, and on the 26th of the month Huff conveyed it to the trustees of the church.

A large part of the appellant's debt remains unpaid, and the questions presented by this record are what property is liable for its payment, and the order in which the property liable should be subjected.

The second, third, fourth, fifth, and sixth assignments of error raise substantially the same question, viz.: To what extent, if at all, had the land purchased by Fellers been released from the lien of the deed of trust by reason of the conduct of the appellant?

The conduct relied on to show that it had been absolutely released was that Huff and the trustees of the church had rescinded the contract between them of July, 1891, by which the latter had assumed the payment of the debt secured by the deed of trust, and that this rescission was with the assent of the appellant.

The burden of proving that the appellant had assented to the rescission of the contract was upon Fellers. He had purchased with full knowledge of the appellant's lien, and in order to prevent the land so purchased from being subjected to its payment it was necessary for him to show that the appellant, with notice of his equities, had done some act to

his prejudice. The evidence does show, we think, that the appellant had notice of Fellers' purchase, or that he had an interest in the land, when the appellant executed the release of November 12, 1892. After his purchase was made, and the policy of insurance had expired which had theretofore been taken out by Huff on the property for the benefit of appellant, and as a further protection to the debt secured by the deed of trust, Fellers obtained a new policy in his own name on the house on that portion of the property purchased by him. That policy was sent to the appellant by the secretary of the insurance company, accompanied by a letter dated July 7, 1892, in these words: "Please find inclosed fire insurance policy, \$1,200, in renewal of policy of W. P. Huff, expired on the 9th, on property on which you have a lien. It was the opinion of Mr. Fellers that houses insured would not stand more insurance than \$600 each, and for that reason the amount was reduced." It is proven that it appeared from the Fellers policy of insurance that the title was in him, and that the appellant had a deed of trust upon the property. It further appears that in December, 1893, after the property had been advertised for sale under the deed of trust, Fellers went to the office of appellant to see the secretary in order to get an extension of time, and while there he inquired if the policies of insurance had not expired, thinking that he had only taken them out for 12 months, when the secretary replied that they had not, that they were three-year policies, went to his safe, and took them out, and said, "Here are the policies and deed of trust." When asked if the appellant knew before that time that he was a purchaser of the property, he replied that he could not say that it did, as there had never been any correspondence between them, but that the facts seemed to be familiar to the secretary when he (Fellers) told him who he was.

Unexplained (and the appellant made no effort to explain them), these facts show that the company must have known, when it released the church lot from the lien of the deed of trust, that Fellers had acquired an interest in the property embraced in the deed of trust. Upon no other reasonable theory can its acceptance and retention of Fellers' policy of insurance be explained or justified. The evidence, however, does not show, in our opinion, that the appellant was a party to or knew of the rescission of the contract of July, 1891, by which the trustees of the church assumed to pay the debt secured by the deed of trust. The circuit court erred, therefore, in holding that the Fellers property was absolutely released from the lien of the deed of trust. It was only discharged from an amount of the deed of trust debt equal to the value of the parcel released, so far as the proceeds of that parcel had not been applied to the payment of the lien. The injury done to Fellers by the release was the

difference between the value of the property released, and what was actually paid out of its proceeds, or on account of it, upon the lien.

In the event the proceeds of the Fellers lot is not sufficient to satisfy that portion of the appellant's debt chargeable upon it as hereinbefore shown, the Strickler lot will be liable, being next in order of alienation by Huff. It will also be chargeable with that portion of the debt of appellant from which the Fellers lot was discharged by the release of the church lot from the lien of the deed of trust. Ordinarily, when the equities of the various owners of lands subject to a deed of trust are unequal, so that their respective parcels are liable in the inverse order of their alienation, if the deed of trust creditor, having notice of this situation, releases a parcel which is primarily liable, he thereby discharges or releases those parcels which are subsequently liable, in the order of their several liabilities, from an amount of the deed of trust debt equal to the value of the parcel released. But this effect of the release may be obviated by the conduct of the parties to be affected. 3 Pom. Eq. Jur. § 1226.

In this case Strickler's conduct has been such that he cannot claim the benefit of the general rule. He was one of the trustees of the church when their first purchase was made, when that contract was rescinded, when they made their second purchase upon the condition that the lien of the deed of trust upon it should be released, and when that release was made. He was an active participant in all these various transactions between Huff and the trustees of the church, and had full knowledge of all the facts. The evidence does not show that the appellant had notice of his rights or interest in the property when it released its lien, even if notice under the facts of the case could affect the question. There is no pretense that Strickler informed the appellant of his purchase.

The registry of his deed was not notice to the appellant. It is true, we think, as stated by counsel, that this court has never passed upon that question, but it is well settled, both upon principal and authority, that the registry of a deed by a subsequent purchaser is no notice to parties who have acquired their rights before the time when the deed is registered. Neither the language nor the policy of the registry acts was intended to affect the holders of antecedent rights, but only such persons as are compelled to search the records in order to protect their own interests. *Cheesebrough v. Millard*, 1 Johns. Ch. 409, 414; *George v. Wood*, 9 Allen, 80; notes to *Aldrick v. Cooper*, 1 White & T. Lead. Cas. Eq. (4th Am., from 4th London, Ed.) pp. 307-312; 1 Jones, *Mortg.* §§ 372, 562; 2 Pom. Eq. Jur. §§ 656, 657, 1226.

Neither is it satisfactorily shown that Judge Woods was such an agent of the appellant, and acquired his knowledge of

Strickler's purchase under such circumstances, as that his knowledge would be notice to it.

Whether the trustees of the church, who, it is alleged, assumed payment of the appellant's debt, are personally liable for it, and, if so, whether Fellers is substituted to the appellant's rights against them, or their rights, if any, against the church property, are questions which cannot be passed upon at this time. Only two of the five or more trustees of the church who are charged with having assumed the payment of the appellant's debt are parties to this suit. They are necessary parties, and, before any decree is made affecting their rights, they should be made parties to this suit.

We are of opinion, therefore, that the decree complained of must be affirmed in so far as it fixes the amount due appellant on its debt, and directs the vacant lot situated on the southeast corner of Franklin road and Day avenue, still owned by Huff, to be first subjected to its payment, and that in all other respects the decree must be reversed, and the cause remanded to the circuit court, to be proceeded with in accordance with the views expressed in this opinion.

CARDWELL, J., absent.

(36 Va. 330)

FRANKLIN COUNTY et al. v. GILLS et al.
(Supreme Court of Appeals of Virginia. Sept. 15, 1898.)

COUNTIES—OFFICERS' AUTHORITY—PROPERTY.

Officers of a county, having control of property of the county for county purposes, cannot authorize its use for purposes other than those provided by law; and when they attempt to do so the county may recover the property from the person so authorized.

Appeal from circuit court, Franklin county.

Ejectment by Franklin county and others against Gills & Johnson. There was a judgment for defendants, and plaintiffs appeal. Reversed.

L. W. Anderson and B. A. Davis, for appellants. E. W. Saunders, for appellees.

BUCHANAN, J. This is an action of ejectment brought by the plaintiffs to recover the possession of a room in the court house of Franklin county, in the possession of the defendants.

The facts in evidence, as agreed and certified by the circuit court, are as follows:

"The property in controversy, as set forth in the plaintiffs' declaration, is the property in fee simple of Franklin county; that the deed under which the said county holds the land on which the room in controversy is located specifically provides that the land conveyed shall be used for public purposes only, and none other whatsoever; that the judge of the county court of Franklin county em-

ployed one Dock Webb as keeper or janitor of the court house, at a salary of \$100 per year; the said Webb out of said salary was to furnish fuel for the court and jury rooms when needed, and was permitted by the said judge to use the room in controversy for the storage of the same and other things, such as stoves, etc.; that some time afterwards, to wit, about the year 1890 or 1891, the said Webb, being right largely in debt to the said defendants, who are merchants doing a general mercantile business in a building adjoining the public square, and about twenty-five or thirty feet from the room in controversy, told the said defendants that they might use the said room for a storage room until the use of same should be worth a sufficient sum to extinguish his said indebtedness, or as long as his said contract with the said judge continued; that the said defendants thereupon entered into the said room, and ever since that time have been using it as a storage room for corn, meat, empty boxes, and barrels, etc.; that the said Webb, ever since he was first employed by the said judge as keeper or janitor of the said court house, has used a portion of the said room (which is very large), whenever needed, for the storage of fuel, etc.; that no one other than the said Webb has at any time given the said defendants permission to use or occupy the said room, but that the said judge of the county court has never objected to this arrangement between Webb and the said defendants, but tacitly allowed the same as an addition to the janitor's salary; that before the county judge allowed the janitor to take possession of this room, which is in the basement of the court house, same was open to the public at large, was in a dilapidated condition, and was indiscriminately used as a necessary and resort for stock."

From the evidence it clearly appears that the purposes for which the defendants took possession and have been using the property in controversy was purely a private one, and wholly disconnected with any purpose for which the property was acquired and held.

The only question, therefore, for our consideration, is whether the county has the right to recover the possession of the property of the county where the agents or officers of the county who have control of the property for county purposes have placed it in possession of, or assented to its occupation and use by, third persons for purposes other than those provided by law.

This question was carefully considered in the case of *Alleghany Co. v. Parish*, 93 Va. 615, 25 S. E. 882, and a decision rendered, which, in our opinion, controls this case.

The conclusion reached in that case was that the inhabitants of a municipal corporation or of a county are its corporators, and that the officers are but the public agents of the corporation; that their duties and powers are prescribed by statute or by charter, which all persons not only may know, but are bound

to know; that from this doctrine it follows that contracts not authorized by the charter or by statute, and which are, therefore, not within the scope of the powers of the corporation, are void; that lands acquired for court house, jail, and other public buildings, being acquired by the county under a special power, and for special purposes only, the county was of necessity confined in its use of the land to the purposes for which authority to acquire was given, and subject to the restrictions imposed.

In that case it was decided that neither the county court nor the board of supervisors had the power to authorize or permit property of the county to be used for purposes other than those provided by law, and that any effort to do so was not only beyond the scope of their powers, but in violation of their duties. There the board of supervisors, as well as the county court, had attempted to enter into contracts with the occupant of the land and those under whom he claimed, by which property of the county was to be held and used for law offices. This, it was held, could not be done. The alleged contracts were treated as nullities, and the right of the county of Alleghany to recover sustained.

It is clear that the judge of the county court of Franklin county had no authority to authorize or assent to a lease to the defendants of the room in controversy, to be used, in connection with their mercantile business, for storing corn, meat, etc. It was in excess of his power, and gave no right to the defendants to take or hold possession of the property. They were, therefore, in the unlawful possession of the property, and the county of Franklin, the fee-simple owner, had the right to recover possession of it, in order that it might be held and used for the purposes for which it was acquired.

We are of opinion that the verdict of the jury in favor of the defendants was erroneous, and that the circuit court erred in refusing to set it aside and grant a new trial upon the motion of the county. The judgment of the circuit court must therefore be reversed, the verdict set aside, and the cause remanded for a new trial.

CARDWELL, J., absent.

(96 Va. 322)

PEOPLE'S BUILDING, LOAN & SAVINGS ASS'N v. TINSLEY.

(Supreme Court of Appeals of Virginia. Sept. 15, 1898.)

BUILDING ASSOCIATIONS—CONTRACTS—WHAT LAW GOVERNS—USURY—VALUE OF SHARES OF STOCK.

1. A by-law of a building association located in New York required all payments to be made to its secretary, at its principal office. *Held*, that a member residing in Virginia must be considered as having contracted with reference to such by-law, which made his contract performable in New York.

2. A contract with a building association

was, by its terms, to be performed in New York. *Held*, that the fact that some of his payments by a member residing in Virginia were made to an agent of the association therein, for the convenience of both parties, did not make the contract a Virginia contract.

3. A contract made in Virginia with a building association provided for payment of premiums, dues, fines, etc., to the association in New York. *Held*, that such contract, being performable in New York, and valid under its laws, would not be usurious, though usurious under the laws of Virginia.

4. A member of a building association borrowed from it, pledging his shares of stock as security. By his contract of subscription to the stock, he was to pay thereon for 96 months, when it was estimated the same would mature. Before its maturity he asked to have its value credited on his indebtedness to the association, which value he ascertained by deducting from the matured value of the shares at the end of the 96 months the amount of the monthly payments still due. *Held*, that he was entitled to be credited with a sum equal to the value of his shares on the books of the association, which value should be ascertained by adding together the monthly installments paid on his stock, and all dividends declared thereon, and deducting the percentage of the losses of the association with which his shares were chargeable.

Appeal from hustings court of Radford.

Bill by J. W. Tinsley against the People's Building, Loan & Savings Association. From the decree, defendant appeals. Reversed.

Smith & King, for appellant. W. R. Wharton, for appellee.

BUCHANAN, J. On April 2, 1892, J. W. Tinsley and R. G. Noel, then members of the People's Building, Loan & Savings Association, and owners of 87 shares of its stock, borrowed from it the sum of \$2,500, payable in eight years. To secure the payment of that sum, which was evidenced by their bond, they executed a deed of trust on a house and lot situated in the city of Radford, and pledged their shares of stock as collateral security. During the eight years the loan was to continue, the borrowers undertook to pay monthly \$10.41 as interest and \$10.41 as premium thereon. If they failed to make such payment, and such default continued for three months, it was provided that the principal sum, together with all unpaid interest and premiums, should immediately become due and payable. By the terms of their contract of subscription to the stock of the association, they were required to pay 65 cents on each share of stock every month for 96 months, and in default of such payment they were liable to certain fines. Tinsley and Noel paid the dues upon their stock, and the interest and premiums on the loan, until November 1, 1896, when all payments ceased. In March, 1897, the appellee, Tinsley, who had become the owner of the house and lot upon which the deed of trust was given, instituted this suit, charging, among other things, that the loan was usurious, and stating the amounts paid thereon, and praying for an account to ascertain the balance, if any, due from him.

In May following, the appellant filed its answer, in which, among other things, it denied the usury charged; stated that it then elected to declare the loan to be due, because of the appellee's failure to make payments thereon according to the contract of borrowing; and claimed that the balance due, after giving all proper credits, was \$1,587.71.

The commissioner of the court, to whom the account was referred, reported that the contract was not usurious, and that the balance due to the association from the appellee was \$802.51, including \$56.25, insurance premium, paid by the building association.

From the decree confirming that report this appeal was allowed.

The only error assigned by the appellant association is that the commissioner and the court ought to have found the balance due from the appellee to be \$1,587.71, instead of \$802.51.

The appellee, under rule 9 of the court, assigns as error the action of the court in holding that the contract of borrowing was not usurious.

We will consider the appellee's assignment of error first, inasmuch as no correct statement of account between the parties can be made until the question of usury is settled.

Under the decisions of this court in the cases of *Nickels v. Association* (appellant company) 93 Va. 880, 25 S. E. 8, and *Ware v. Investment Co.*, 95 Va. 689, 29 S. E. 744, the contract under consideration must be held to be a New York contract. It is true that there is nothing in the bond given for the money borrowed, nor in the deed of trust executed to secure its payment, to show where the contract was to be performed. It is also true that the appellee was a resident of, and received the money in, this state, and that the property embraced in the deed of trust is situated in the city of Radford. These facts would, if nothing else appeared, be sufficient to make it a domestic contract; but article 16 of the by-laws of the appellant association provides and requires that all remittances for admission, monthly and quarterly installments, fines, penalties, interest, and premiums, and all other payments, shall be made to the secretary of the association, at its principal office, in Geneva, in the state of New York. As a member of the association, the appellee must, as was held in the cases referred to above, be considered as having contracted with reference to that by-law, which made it a contract to be performed in the state of New York. The fact that some of the payments provided for were made to an agent of the association located in this state, for the convenience of one or both of the parties, does not make that a Virginia contract which by its express terms was made a New York contract. *Ware v. Investment Co.*, supra.

Treating it as a contract to be performed in the state of New York, the hustings court did not err in holding that it was not usuri-

ous. *Association v. Ashworth*, 91 Va. 706, 22 S. E. 521, and cases cited above.

We will now consider the appellant's assignment of error.

The amount to which the appellee was entitled as a credit on his indebtedness to the association on account of his certificates of stock must be determined by the terms of his contract. Being, as we have seen, a New York contract, and to be construed and governed by the laws of that state, we cannot do better than quote from the opinion of the supreme court of that state in the case of *O'Malley v. Association* (this appellant) reported in 92 Hun, 572, 36 N. Y. Supp. 1016, where a contract of subscription similar to the one involved in this case was construed. In that case the shareholder had subscribed for five shares of stock of Class A, and had in all respects complied with the rules and regulations of the association. At the expiration of five years from the date of his certificate (the time when, according to its face, it was payable), he presented it to the association, and demanded the sum of \$500, its face or par value. The association declined to pay that sum, for the alleged reason that the shares had not earned that amount, but stated that the amount that they had earned was \$371, which it offered to pay upon the surrender of the certificate. This the shareholder declined, and brought suit. The trial court construed the certificate to be an absolute, unconditional promise to pay \$500 (the par value of the certificate) at the expiration of five years from its date, and gave judgment for that sum. From that judgment the association appealed. The appellate court, in passing upon the correctness of that judgment, said:

"The main question presented by the appeal, as stated, is whether the plaintiff is entitled to recover the face value of the certificate, or whether his recovery should be limited to the amount the shares had earned.

"If the language of the certificate alone is considered, there can be but little doubt that the decision of the trial court was right.

"In construing this contract the defendant's articles of association and by-laws must be considered as part of the contract, and be given their proper effect. *Gibbs v. Bank*, 83 Hun, 92, 31 N. Y. Supp. 406; *In re Com'rs of Washington Park*, 52 N. Y. 181. It is reasonably certain that, if the construction contended for by the plaintiff is to prevail, it will thwart the scheme and purpose of the association, and probably bankrupt it. The plan of the organization contemplates that holders of certificates shall be entitled to share equally in its earnings. It is a mutual association. It cannot with propriety be claimed that, under the defendant's articles of association and by-laws, it was contemplated that there should be any distinction in the time of the maturity of the shares of stock.

"The officers of the defendant association,

however, assumed to issue to the plaintiff a certificate which, upon its face, states that the association at the end of five years will pay the holder thereof the sum of \$100 a share.

"Plaintiff's payments were \$13 a year on each share of stock, amounting upon his five shares to \$65 a year, and in five years to the sum of \$325. Interest computed at 6 per cent. per annum on the payments from the time they were respectively made until the end of five years amounts to between \$45 and \$46, which, added to the payments, make \$371, the amount which the defendant claimed the shares had earned, and which it offered to pay. If the plaintiff is entitled to recover the \$500, his investment earned from 22 to 23 per cent. per annum,—an amount of interest which, if paid upon all the certificates issued by the defendant, would in all probability bankrupt the association; a result which, it would seem, must have been apparent to the parties when the transaction took place.

"The plaintiff was presumably aware of the general plan of the association, for it was stated in his certificate that the articles of association and the by-laws were to form a part of the contract; and, as stated, the general plan of the association contemplated that all the shareholders should be entitled to a pro rata share of its earnings. He must have been aware that it was not at all probable that the earnings of the association would be sufficient to pay the rate of interest which his construction of the contract calls for. It was not possible to know at the time the certificate was issued to the plaintiff when it would mature by the accumulation of dividends, for that necessarily depended upon the earnings of the association, and they could not be determined in advance.

"The dues, fees, and penalties paid by the shareholders, with the interest and premiums paid by the borrowing members, make up and constitute the income of the association, and provide the fund from which the dividends upon the stock are paid. *People v. Preston*, 140 N. Y. 549, 35 N. E. 979. The dividends can only be paid out of the earnings. Section 7 of chapter 122 of the Laws of 1851, as amended by chapter 564, Laws 1875. If the five-year clause be construed as an estimated time for the maturity of the certificate, then the certificate conforms to the general scheme of the organization and to the statutes.

"The authority to issue a certificate with a fixed period of maturity is not expressly given, either by the statute, or by the articles of association or by-laws of the association. We are of opinion that the defendant did not possess the power or authority to issue a certificate specifying a fixed maturity period, and that the clause in the certificate in question should be construed as an estimated period of maturity. The amount actually earned by the certificate at the time it was presented by the plaintiff for payment was only \$371."

From that decision it is clear that even if the appellee in this case had complied with all the rules and regulations of the association, and fully kept his contract during the entire 96 months in which it was estimated that his certificate of stock would mature, and had then demanded payment, he would only have been entitled to receive what his stock had earned, unless it had then matured. The fact that he was also a borrowing member cannot render his stock more valuable. Where he refuses or fails to comply with the terms of his contract of subscription or of borrowing, and, before the maturity of his stock, asks to have its value credited upon his indebtedness to the association (to which the association assents), he is only entitled to be credited with a sum equal to the value of, or the amount standing to the credit of, his certificates on the books of the association. That value, as shown by the evidence, was \$1,107.95, and was arrived at by adding together all monthly installments paid on each certificate of stock on the monthly installments to the loan fund prior to January, 1896, and all dividends declared thereon prior to that time. From this sum was deducted 23 per cent. for losses of the association, as directed by the shareholders at their annual meeting in January, 1896. To the sum remaining after this deduction was made there were added the monthly installments paid on the certificates of stock to the loan fund after January, 1896. The sum of \$1,107.95, under the evidence in the case, must therefore be considered the amount which the appellee is entitled to have credited upon his indebtedness to the association.

At that time the indebtedness of the appellee amounted to the sum of \$2,695.66. Deducting the value of the shares from the amount due from the appellee, and it leaves due the appellant, as of May 1, 1897, the sum of \$1,587.71, instead of \$802.51, as determined by the court.

The decree complained of must therefore be reversed, and the cause remanded to the hustings court, with direction to enter such decree as is proper, and in accordance with the views expressed in this opinion.

CARDWELL, J., absent.

(96 Va. 352)

LIBERTY SAV. BANK v. OTTERVIEW
LAND CO. et al.

(Supreme Court of Appeals of Virginia. Sept.
15, 1898.)

CORPORATIONS—SUBSCRIPTIONS—ENFORCEMENT—
LIMITATIONS.

Under Code, § 2920, prohibiting action on a verbal contract after three years from accruing of right of action, an action on a verbal stock subscription is barred in three years from the entering of the decree calling on stockholders to pay the balance due on their shares, and authorizing the receiver to collect the same.

Appeal from circuit court of city of Bedford.

Bill by the Liberty Savings Bank against the Otterview Land Company and others. There was a decree for defendants, and complainant appeals. Affirmed.

J. Singleton Diggs, S. Griffin, and F. W. Whitaker, for appellant. Smith, Moncure & Gordon, S. S. P. Patteson, Jos. T. Johnson Campbell & Tucker, and H. M. Heuser, for appellees.

HARRISON, J. The object of this suit is to wind up the affairs of an insolvent land company, and apply its assets to the payment of debts. The amended and supplemental bill brings the stockholders before the court, and asks for a decree against them for the balance due upon the shares of stock held by each. The appellees each answer under oath, and deny that they made any contract in writing to take stock in the company, or authorized any one to make such a contract for them, and plead the statute of limitations applicable to verbal contracts as a bar to any recovery against them.

The only question necessary to be decided is whether or not this defense is sufficient to defeat the claim asserted against the appellees.

The several pleas and answers put the burden upon appellant to prove that appellees had bound themselves by a contract in writing to take the stock. There is no evidence that any one of those sought to be held liable ever made such a contract. Their names appear on the books of the company, and the evidence tends to prove that appellees are the owners of the stock charged to them. It is not, however, a question of ownership, but whether the contract to become owner was verbal or written. No original lists are produced. The names on the books are not in the handwriting of appellees, and the evidence all tends to show that the several subscriptions appearing on the books were based upon verbal contracts, and that appellees made no contract in writing to take the stock, or to become the owners thereof.

The defense is based upon the provisions of the statute limiting the period within which suits shall be brought upon verbal contracts. Section 2920 of the Code provides that no action shall be brought upon a verbal contract unless within three years from the time the right of action accrues. In the case at bar the right of action accrued June 10, 1893, when the decree was entered calling upon the stockholders to pay the balance due upon the several shares of stock held by each, and authorizing the receiver to collect the same by suit or otherwise. The amended and supplemental bill making the stockholders parties, and asking for a decree against them, was not filed until March 31, 1897, more than three years after the right of action accrued. There being no evidence of a written contract

to take the stock in question, and the suit to enforce payment having been instituted more than three years after the right accrued, the right to recover is barred, under the express terms of the statute relied on by the appellees.

The circuit court having so held, its decree must be affirmed.

CARDWELL, J., absent.

(94 Va. 231)

MATNEY v. RATLIFF et al.

(Supreme Court of Appeals of Virginia. July 7, 1898.)

PUBLIC LANDS—FORFEITURE—TAXES—SPECIFIC PERFORMANCE—CLOUD ON TITLE—EQUITY PLEADING—WAIVER—APPEAL.

1. Under the statutes making it the duty of landowners to enter their lands on the books of the commissioner of revenue for taxation, a grant by the commonwealth in 1795 of a tract of land which was never so entered for taxation, and on which no taxes were ever paid, is forfeited.

2. A forfeiture of a grant of land by the commonwealth, under the statute, for failure to enter it for taxation, need not be evidenced by any record.

3. Where, on the facts shown, the law is clear that a prior grant is forfeited, it constitutes no cloud on the title acquired under a subsequent grant; and hence one who contracts to purchase such title will be compelled to do so.

4. A statement in the answer that defendant reserves "all just exceptions to the many deficiencies by demurrer to a bill exhibited," etc., is not sufficient to attack the bill as on demurrer.

5. Where a defendant omitted to demur to a bill which was defective because certain allegations of title and authority were omitted, and answered, supplying the deficiencies, he cannot, on appeal, complain that the bill is insufficient in law.

Appeal from circuit court, Buchanan county.

Bill by M. S. Ratliff and another against William Matney. There was a decree for complainants, and defendant appeals. Affirmed.

R. Walter Dobson and S. W. Williams, for appellant. Finney & Stinson, for appellees.

BUCHANAN, J. The bill in this case was filed by the appellees for the purpose of having a contract for the sale of a tract of land specifically executed. They allege that, as administrators of John M. Ratliff, they sold to the appellant in May, 1892, a parcel of land, containing 643 acres; that they executed a bond to him for title, by which they bound themselves to make, or cause to be made, to him, a deed with covenants of general warranty, when the purchase money was fully paid; that the appellant executed to them for the unpaid purchase money his two bonds, which, subject to certain credits, are still due and unpaid; and that the appellant refuses to pay them. They also file with it, as an escrow, a deed, executed, as they allege, "by

the proper parties," conveying the land to the appellant, with covenants of general warranty, and ask to have the land subjected to the payment of their debt; and if the proceeds arising from its sale are not sufficient to satisfy it, they pray that certain other property which they have attached may be subjected to the payment of the residue.

The appellant filed his answer, in which he admitted that he made the purchase as alleged in the bill, and averred that the appellees, "who were the administrators of John M. Ratliff, deceased, together with the remaining surviving heirs at law of the said John M. Ratliff, deceased, made, signed, and executed a title bond" to him, and filed a copy of it as an exhibit with his answer. He also averred that, when he entered into the contract for the purchase of the land, the parties to the title bond represented to him that they had a fee-simple title to the land, and were in a condition to comply with the terms and conditions of the bond for title, and that, after paying about the sum of \$800 on the purchase price of the land, he ascertained that they (complainants) were not in the possession of the land, and could not make such a deed as they had undertaken and obligated themselves to do, for the reason that on the 15th day of June, 1795, the commonwealth had granted to John Johnson 22,134 acres of land, which covered and included all the tract of land which appellant had purchased. He filed with his answer, as an exhibit, a deed from Johnson, the grantee, conveying the land embraced in the grant to John McClanahan and John Woods. He averred further that the Johnson grant was prior to that under which the appellees claimed. He further averred that the lands purchased by him were wild and uncultivated; that neither the appellees, himself, nor any other person, had ever been in possession of the same, and that there is nothing in the record to show that the title to the Johnson grant had ever been forfeited or escheated to the commonwealth, but that it was in fact now vested in the grantees of Johnson; and that his (appellant's) vendors could not make good title to it.

The court directed a special commissioner to report upon the status and condition of the title of the appellees,—whether they could convey such title as they had agreed to convey,—and to inquire specially into the title of Johnson, or those who claim under him, and whether or not that title had been forfeited to the commonwealth when the grant under which the appellees claimed was issued, and how long they and those under whom they claim had been in adverse possession of any part of the land claimed by them.

The commissioner reported that the Johnson grant for 22,134 acres was issued on the 30th day of June, 1795; that he conveyed the same land to John McClanahan and William Woods on the 14th day of April, 1796; that

McClanahan and Woods conveyed it on the same day to Nicholas Clapper; and that the land is now claimed by his heirs, but that he was unable to learn their names, or where they resided.

He further reported that the 22,134 acres had never been entered upon the commissioner's books for taxation in Buchanan or in Tazewell county; that neither Johnson nor those claiming under him had ever paid any taxes upon the land, or been in possession of it.

He also reported that the land in controversy had been granted by the commonwealth to S. W. White on the 1st day of January, 1859, and was included within, and covered by, the Johnson grant; that White had caused the land in controversy to be entered upon the commissioner's books for taxation, and that he and those claiming under him had kept the taxes on it paid; that White had departed this life, and that his heirs had sold and conveyed the land to M. S. Ratliff and John M. Ratliff (now deceased) on the 16th day of April, 1889; that neither the appellees nor those under whom they claim, had been in possession of the land prior to the sale to the appellant, in 1892, since which time he had been in possession of and cultivating a part of it. He reported that, if the title to the Johnson grant had been forfeited to the commonwealth, it was for his failure to put it upon the commissioner's books for taxation, but that he was unable to say whether or not the appellees could convey a good title to the land; that he had reported the facts, and would leave that question to be determined by the court.

Upon the hearing of the cause the court was of opinion that the contract should be specifically executed, and so decreed.

From that decree this appeal was taken.

The only error assigned in the petition for appeal is that the court, in decreeing a specific execution of the contract, required the appellant to accept a title upon which there was a cloud, by reason of the prior grant to Johnson.

It is well settled that a court of equity will not decree the specific execution of a contract, on the application of the vendor, if there be any reasonable doubt as to his ability to make such title as he contracted to make. 2 Minor, Inst. (4th Ed.) 803, and cases cited; *Clark v. Hutzler*, 96 Va. —, 30 S. E. 469; *Pom. Spec. Perf.* § 204.

Does the Johnson grant, under the facts of this case, cast such a doubt upon the title of the vendors?

That grant was issued more than 100 years ago. The land has never been placed upon the books of the commissioner of the revenue for the purpose of taxation, and no taxes have ever been paid upon it by Johnson, or those claiming under him. That being the case, under the decisions of this court construing the provisions of our statutes enacted from time to time, making it the duty of the

owners of land to have their lands entered upon the books of the commissioner of the revenue for the purposes of taxation, it is clear that the Johnson title was forfeited to the commonwealth. *Staats v. Board*, 10 Grat. 400; *Wild's Lessee v. Serpell*, Id. 405; *Hale v. Branscum*, Id. 418; *Levasser v. Washburn*, 11 Grat. 572.

The fact that there is nothing of record to establish such forfeiture does not make it the less complete. For the same cases above cited decide that the forfeiture becomes absolute and complete by the failure to enter the lands upon the books of the commissioner of the revenue, and to pay the taxes, etc., in the manner prescribed by the act of February 27, 1835, and that no judgment or decree, inquest of office, or other matter of record, is necessary to consummate and perfect the forfeiture.

Where, upon a given state of facts, the law is settled that a title is absolutely forfeited to the commonwealth, it cannot be said, when those facts are shown to exist, that it is a cloud upon the title of a subsequent grantee of the commonwealth for the same land.

We are of opinion, therefore, that the Johnson grant did not create a cloud upon the title of the vendors in this case, and that the circuit court did not err in so holding.

In his brief, but not in his petition for appeal, the appellant insists that the court erred in overruling his demurrer to the bill. There is nothing in the record to show that a demurrer was filed. The only reference to a demurrer in the case is a statement in the appellant's answer that he reserves "all just exceptions to the many deficiencies by demurrer to a bill exhibited," etc. Under the most liberal construction of pleadings, that statement could not be regarded as alleging that the bill was insufficient in law.

It is also assigned as error in the brief that the suit was brought by the personal representatives of John M. Ratliff, deceased, without alleging in their bill their authority to sell their decedent's lands, and without making his heirs parties to the suit.

The bill is defective in both these respects, and, if it had been demurred to, the court would doubtless have sustained the demurrer, and required it to be amended before granting the relief prayed for. The appellant, however, made no objection to these defects, and filed his answer, in which he states that he made his contract of purchase with the personal representatives of John M. Ratliff, deceased, and that they, with the other heirs at law of the decedent, signed and executed a bond to him for title.

There is filed with the bill, as an escrow, a deed conveying the land to the appellant, signed and acknowledged by all the parties who signed the title bond, in which it is recited (as is admitted in the answer of the appellant) that they are the heirs of John M. Ratliff, deceased.

It thus appears from the record that the

heirs of John M. Ratliff authorized his personal representatives to sell the land, that they were parties to the contract of sale, and that they have made a deed conveying the land to the appellant, with covenants of general warranty, ready to be delivered to him when the purchase money shall have been fully paid. Nothing could be gained by requiring the bill to be amended so as to show the authority of the personal representatives to make the sale, and to make the heirs of their decedent parties to the suit, so as to extract title from them, since the record shows by what authority the sale was made, and that the title of the heirs has been conveyed by a deed on file in the cause, ready to be delivered upon the payment of the residue of the purchase price.

Upon the whole case, we are of opinion that the decree complained of should be affirmed.

(96 Va. 345)

**NEW SOUTH BUILDING & LOAN ASS'N
v. REED et al.**

(Supreme Court of Appeals of Virginia. Sept. 15, 1898.)

**JUDGMENTS—MORTGAGES—PRIORITY—FRAUDULENT
CONVEYANCES—CONSIDERATION—SUBSEQUENT
CREDITORS—HUSBAND AND WIFE.**

1. Under Code, § 8567, providing that a judgment is a lien as of the first day of the term at which it was rendered, a judgment rendered after the recordation of a deed of trust, but at a term which commenced prior to such recordation, is prior to the deed.

2. Where a debtor, at the time of purchasing lands taken in the name of his wife, had ample property to pay his debts, and there is no evidence that the conveyance was intended to prejudice subsequent creditors, it is valid as to them, under Code, § 2459, providing that voluntary conveyances shall not on that account merely be void as to subsequent creditors.

3. A husband cannot divert his estate to the payment of purchase money due from his wife on her separate estate, or to the cost of improving it, when by so doing he divests himself of means to pay debts already contracted.

4. A contention by a wife, in a contest with her husband's creditors, that sums expended by the husband in paying the balance of purchase money on her separate estate, and in improving it, were from her separate estate, because of proceeds of her estate passing into his hands some several years previous, will not prevail, where there is no evidence that the transaction had been intended as a loan, or that husband and wife had intended to occupy the relation of debtor and creditor in respect thereto.

Appeal from hustings court of Roanoke.

Bill by the New South Building & Loan Association against D. V. Reed and others to determine the priority of certain liens. From a decree in favor of defendants, complainant appeals. Reversed in part.

C. A. McHugh and John M. Hart, for appellant. Scott & Staples, Watts, Robertson & Robertson, and Lockett & Cosby, for appellees.

HARRISON, J. The court is of opinion that the two judgments asserted in the original bill in this cause, one in favor of the

Enterprise Carriage Manufacturing Company, and the other in favor of the Ohio Spiral Spring Buggy Company, constitute liens upon the real estate of D. V. Reed prior in dignity to the deed of trust upon said real estate in favor of the appellant building association dated and recorded April 17, 1893. Both of these judgments were rendered at the April term, 1893, of the circuit court for the city of Roanoke, which term began April 10, 1893. The judgments were rendered after the recordation of the deed of trust, but they operate as a lien upon the real estate of the judgment debtor from the first day of the term of the court at which they were rendered. This, we have seen, was before the deed of trust was recorded, and hence judgments rendered at that term have priority over the deed of trust recorded during the term. Code, § 3567; *Hockman v. Hockman*, 93 Va. 455, 25 S. E. 534.

The court is further of opinion that the appellant building association is not entitled to be subrogated to the liens existing upon the real estate of D. V. Reed at the time its loan was made, and upon which said loan was secured. This claim for subrogation is for affirmative relief. It was never made in the court below, but is suggested for the first time in the closing brief of counsel for appellant filed a few days before the case was called for argument in this court. The cause was not conducted in the court below with reference to the contention now made as a means of relief, and, even if it was proper to allow parties to be surprised by a new case made here for the first time, the evidence furnishes no basis for the relief asked.

The court is further of opinion that the deed of April 15, 1891, from George A. Baker and wife, conveying to Mrs. M. O. Reed a certain lot of land in the city of Roanoke on the corner of Mountain street and Franklin road, was not made at the instance of D. V. Reed, the husband of the grantee, with intent to hinder, delay, and defraud his creditors. The evidence shows that, at the time of this conveyance, D. V. Reed had ample property to pay his debts, and that its execution in no way prejudiced any creditor of D. V. Reed whose debt existed at the time it was made. Nor is there any evidence or circumstance tending to show that the deed in question was intended to prejudice the rights of subsequent creditors of D. V. Reed. The deed was merely voluntary, and the appellant, whose debts were created after it was made and recorded, cannot subject the property thereby conveyed upon the ground that it was executed in fraud of its rights. Code, § 2459; *Rose v. Brown*, 11 W. Va. 122; *Bank v. Wilson*, 25 W. Va. 242.

The court is further of opinion that D. V. Reed, having created the debts due to the appellant, could not thereafter lawfully divert his estate to the payment of purchase money due from his wife on her separate real estate, or to the cost of improving said real

estate, leaving his own debts unpaid and without the means of payment. It is well settled that improvements put upon the wife's separate realty by the husband, in fraud of creditors, can be followed by the creditors on the premises where they are put, and the realty can, in favor of the creditors, be charged with the value of such improvements. It would be contrary to the plainest principles of right and justice to permit an insolvent husband to divert his means, and invest it in improving his wife's separate estate, which is not liable to his debts, and thus defeat the demands of his creditors. *Rose v. Brown*, 11 W. Va. 122; *Bank v. Wilson*, 25 W. Va. 242; *Burt v. Timmons*, 29 W. Va. 441, 2 S. E. 780.

The contention on behalf of Mrs. Reed, that the balance of purchase money on her lot, and the cost of improving the same, was paid by D. V. Reed with separate estate in his hands belonging to her, is not sustained by the evidence. It appears that about the year 1888 the proceeds of certain real estate in West Virginia belonging to Mrs. Reed, amounting to about \$1,200, passed into the hands of D. V. Reed without anything to show that it was intended as a loan, or that the husband and wife intended to occupy the relation of debtor or creditor in respect thereto. Under such circumstances, the wife cannot prevail against the creditors of the husband. *Spence v. Repass*, 94 Va. 716, 27 S. E. 583.

Admitting, however, that D. V. Reed was under obligation to account to his wife for this fund, as debtor to her separate estate, it is shown that all obligation on this account was more than discharged by the conveyance to Mrs. Reed, and the subsequent improvement, of certain real estate, in the city of Roanoke, not in controversy in this case, and by the payment for her, prior to the creation of the debts due appellant, of a large part of the purchase money for the lot in question.

The court is further of opinion that the record does not show, with sufficient clearness to form the basis of a decree, what amount was paid by D. V. Reed, after the creation of the debts due to appellant, in discharge of unsatisfied purchase money due on the house and lot in question belonging to Mrs. Reed, or what sum was paid by him, after that date, in discharge of the outstanding cost of making improvements upon said lot. The cause ought to have been recommitted to a commissioner, and these facts ascertained and reported to the court, and, when correctly determined, a decree entered charging the property in question with the amount thus shown to have been diverted by D. V. Reed from the just claims of his creditors.

The lower court having held that there was no charge upon the house and lot belonging to Mrs. Reed, situated on the corner of Mountain street and Franklin road, in the city of Roanoke, in favor of appellant, its decree

must in this respect be reversed and set aside, and in all other respects affirmed, and the cause remanded to the hustings court for the city of Roanoke for further proceedings to be had in accordance with the views expressed in this opinion.

CARDWELL, J., absent.

(96 Va. 397)

FADELY'S ADM'R v. WILLIAMS' ADM'R.
(Supreme Court of Appeals of Virginia. Sept. 29, 1898.)

LIMITATIONS—COMPUTATION OF TIME—ADMINISTRATION—PARTIES—JUDGMENTS—SCIRE FACIAS.

1. In computing time under the statute of limitations, a period of one year from the qualification of the personal representatives of a person for whose benefit an action is brought in the name of another (Acts 1887-88, pp. 345, 346) cannot be excluded, since such person is not a party on the record.

2. Code, § 3577, prescribes the time within which execution may be issued and scire facias brought on a judgment, and then provides that "in computing time under this section there shall, as to writs of *scire facias*, be omitted from such computation the time elapsed between the first day of January, 1869, and the 29th day of March, 1871." *Held*, that the quoted clause does not apply to writs of *scire facias*.

Error to circuit court, Shenandoah county.

Scire facias by Fadel's administrator against Williams' administrator to revive a judgment. From a judgment reviving the judgment, defendant brings error. Reversed.

M. L. Walton and R. T. Barton, for plaintiff in error. John J. Williams, for defendant in error.

BUCHANAN, J. This is a proceeding to revive a judgment by scire facias. The defense relied on is the statute of limitation. The period which elapsed between the return day of the execution (on which there was a return by the sheriff showing that it had not been satisfied) and the suing out of the scire facias was 29 years, 10 months, and 13 days. From this is to be deducted the time during which the statute of limitations did not run, as is provided in section 2919 of the Code, as amended by act of assembly approved February 29, 1888 (Acts 1887-88, pp. 345, 346). But in ascertaining that time the period of one year from the qualification of the personal representatives of the beneficial plaintiff in the judgment cannot be included, as counsel for defendants in error insist. It is usual, when an action is brought in the name of one person for the benefit of another, to state that fact in the body of the declaration, or to indorse it thereon, or on the writ. It is useful and convenient to do so, to give notice to the defendant of the rights of the beneficial plaintiff, and to enable the court to protect him by its orders; but this is not necessary. The statement is no material part of the pleadings. The cause of action is complete without it, for he is not a party on the record. *Clark*.

sons v. Doddridge, 14 Grat. 42, 45, 46; Hayes v. Association, 76 Va. 225; 4 Minor, Inst. (3d Ed.) 970, 971. And, not being a party on the record, he does not come within the provisions of the act of February 29, 1888.

The judgment sought to be revived was barred by the statute of limitations, unless, as is contended by counsel for the defendant in error, there be omitted, in computing time under section 3577 of the Code, the time which elapsed between the 1st day of January, 1869, and the 29th day of March, 1871.

Section 3577 is as follows: "On a judgment, execution may be issued within a year, and a scire facias or an action may be brought within ten years after the date of the judgment; and where execution issues within the year, other executions may be issued, or a scire facias or an action may be brought within ten years from the return day of an execution on which there is no return by an officer, or within twenty years from the return day of an execution on which there is such return; except that where the scire facias or action is against the personal representative of a decedent, it shall be brought within five years from the qualification of such representative; and in computing time under this section, there shall, as to writs of fieri facias, be omitted from such computation the time elapsed between the first day of January, eighteen hundred and sixty-nine, and the twenty-ninth day of March, eighteen hundred and seventy-one. Any return by an officer on an execution showing that the same has not been satisfied, shall be a sufficient return within the meaning of this section."

It is conceded that a scire facias is not within the letter of that provision of the section which excludes from computation the time between January 1, 1869, and March 29, 1871; but it is insisted that it is within the intent of the legislature, and that the court should give effect to that intent. A careful examination of that section of the Code, and of its history, will show, we think, that the legislature had no such intent.

Section 12, c. 186, of the Codes of 1849 and of 1860, was in these words: "On a judgment, execution may be issued within a year, and a scire facias or action may be brought within ten years after the date of the judgment, and where execution issues within the year, other executions may be issued, or a scire facias or action may be brought within ten years from the return day of an execution on which there is no return by an officer, or within twenty years from the return day of an execution on which there is such return; except that where the scire facias or action is against the personal representative of a decedent, it shall be brought within five years from the qualification of such representative."

On November 5, 1870, an act was passed which provided, among other things, that in computing time under that section there should be omitted, as to writs of fieri facias, the time which had elapsed between the 1st

day of January, 1869, and the 18th day of February, 1870. Acts 1869-70, p. 569.

By an act approved March 29, 1871, the section itself was amended and re-enacted so as to provide that in computing time under it there should be omitted, as to writs of fieri facias, the time which had elapsed between the 1st day of January, 1869, and the date of the amendment. Acts 1870-71, p. 341.

That act, with an immaterial omission, and an addition which does not affect the question now under consideration, is found in the Code of 1887, as section 3577.

If these several legislatures, or the revisers (who did their work so admirably), had intended that in computing time under that section the same period should be omitted from computation as to writs of scire facias or actions on judgments as was to be omitted as to writs of fieri facias, they would have used some language to indicate such intent. Not only is there nothing in either of those acts, or in section 3577 of the Code, to show that it was so intended, but each shows that there was no such intention. If there had been, it was only necessary to provide generally that in computing time under that section the period named should be excluded. Such a provision would have been as broad as the statute, and would have applied alike to writs of fieri facias, writs of scire facias, and actions on judgments. This was not done, but, on the contrary, the legislature, in passing the acts of November 5, 1870, and March 29, 1871, and in adopting the Code of 1887, expressly limited the time which was to be excluded from computation to writs of fieri facias.

We are of opinion, therefore, that the provision in question only applies to writs of fieri facias, that the judgment sought to be revived was barred by the statute of limitations when the scire facias was sued out, and that the circuit court erred in not so holding. Its judgment must be reversed and set aside, and this court will enter such judgment as the circuit court ought to have entered.

(96 Va. 323)

McCLANAHAN et al. v. HOCKMAN et al.
(Supreme Court of Appeals of Virginia. Sept. 22, 1898.)

APPEAL—FORMER DECISION—EQUITY PLEADING—ADMISSIONS—PARTITION—NOTICE—REPORT.

1. A decision on a former appeal is binding on a party thereto, though in the meantime other persons have been joined as necessary parties.

2. Where one, in his petition to be made a party to a partition suit on the ground of being an heir, admitted that complainants and defendants were heirs, he cannot avoid the admission by calling in his answer for proof of heirship.

3. Commissioners in partition need not give notice. The parties interested have their day in court when the report comes before the court for approval or rejection.

4. A report of commissioners in partition is not defective for failure to place a money valuation on all or a portion of the lands.

5. Conclusions presented by commissioners in partition in their report are presumed to be correct, in the absence of evidence to the contrary.

Appeal from circuit court, Shenandoah county.

Supplemental bill, after a decision by the appellate court, by one Hockman and others against one McClanahan and others for partition of the lands in question. From a decree confirming the report of commissioners as to the partition therein, certain defendants appeal. Affirmed.

M. L. Walton and Wm. R. Alexander, for appellants. John E. Roller, for appellees.

KEITH, J. The present appeal is the sequel to two cases of Hockman v. McClanahan, decided in this court at a former term, and reported in 87 Va. 33, 12 S. E. 230. This court decided in those cases that certain deeds executed by Rebecca McClanahan, conveying her undivided interest in two tracts of land, were null and void, for reasons set forth in the opinion of the court. The effect of that decision was to vest in the heirs at law of Rebecca McClanahan one undivided half in each of the two tracts of land which were the subjects of litigation. When the decrees of this court were certified to the circuit court of Shenandoah county, the two causes, which had theretofore proceeded separately, were brought on to be heard together, and the plaintiffs filed an amended and supplemental bill to bring before the court the heirs of Rebecca McClanahan on the side of her mother, Christena, who, before her marriage, was Christena Miley. The object of the suit was to have the two tracts of land partitioned among those entitled.

At a subsequent day Thomas McClanahan, Samuel McClanahan, and Harrison Crabill presented their petition, in which they stated that they were parties to the original bill, and were interested in the matter therein involved; that they were not made parties to the amended and supplemental bills; and prayed that they might be admitted as defendants. This petition further averred that said Thomas McClanahan "is one of the heirs at law of Rebecca McClanahan, and as such entitled to share as a co-parcener with complainants and defendants, who are heirs at law of Rebecca McClanahan, in any real estate of which said Rebecca McClanahan died seised and possessed." Five commissioners were appointed to make partition, any three of whom were authorized to act, and on the 26th day of March, 1896, having been first duly sworn, Bauserman, Cooley, and Hite went upon the real estate, and after a careful examination, and taking into consideration the quality and quantity of the land, reported that, in their opinion, the two tracts of land were not susceptible of partition separately without great injury to the interests involved. They therefore divided the two tracts of land into two parts, and determined by lot that parcel No. 1 should be given to the heirs of Rebecca McClanahan, and lot

No. 2 to Thomas McClanahan and those claiming under him. This report was presented to the court, and a decree confirming it was entered on the 11th of September, 1896, and to that decree an appeal was allowed by one of the judges of this court.

The decrees rendered in this court in these causes ended all matters therein adjudicated, are final and irreversible, and cannot be called in question on a second appeal in the cause. This rule of decision is too firmly established in this court to be now shaken.

Appellants, while admitting the force of the rule, have endeavored to show that it has no application to this case, because the maternal heirs of Rebecca McClanahan were not parties to the former appeal. The controversy was between Thomas McClanahan and the heirs of his wife, Rebecca. The decision of this court was a final adjudication of that controversy, and by it the title to one-half of each of the two tracts of land in litigation was vested in the heirs of Rebecca. Thomas McClanahan was, of course, a party to each of those suits, and he cannot now reopen those decrees because certain persons, whose rights were affected by those decrees and who make no complaint of the result, were not parties before the court.

Nor do we think his contention well founded with respect to the proceedings leading up to the partition in this case and the decree by which that partition was confirmed. Thomas McClanahan cannot now be heard to dispute the heirship of the parties named in the supplemental bill and answer as the heirs at law upon the part of the mother, Rebecca McClanahan. He admits that they are heirs at law in the petition, in response to which he was made a party defendant to the amended bill, and cannot avoid the consequences of that admission by calling in his answer for proof of the fact thus admitted.

Nor is an exception which he makes to the report of partition, in which he alleges that certain persons therein named, who have not been made parties, were interested in the subject-matter as tenants by the curtesy inchoate or consummate, well taken, because the record does not disclose the existence of the conditions essential to that estate in the parties named. It is not necessary, under our statute of partition, that the commissioners should give notice, though it is frequently done. The parties interested have their day in court when the report of the commissioners is made and it comes before the court for approval or rejection.

Nor is the report of the commissioners defective for failure to place a valuation in money upon the lands, or any portion of them; nor will the court presume that partition of the respective tracts could have been made separately, but, in the absence of evidence to the contrary, will presume that the conclusions reached by the commissioners, and by them reported to the court, are true, and sufficient to warrant a decree in accordance with them.

We are therefore of opinion that there is no error in the decree to the prejudice of the appellants.

The appellees, through their counsel, assert that the partition made does them injustice, claim that they are entitled to have the whole of both tracts of land sold, and ask for a reversal in their favor, and for a decree for the sale of both tracts. The commissioners found that partition in kind of each of the two tracts could not be made conveniently without great injury to the entire estate. They therefore determined to treat the two tracts as a whole, and then proceeded to divide it as equally as possible between those entitled, ascertaining by lot the share of each. As we have seen, in considering the assignments of error presented by the appellants, there is no evidence controverting the facts stated and the conclusions presented by the commissioners in their report. All the presumptions are in favor of its correctness, and it was properly approved by the circuit court.

Having reached that conclusion, the circuit court very properly, for the reasons stated in the decree, directed a sale of the share allotted to the heirs of Rebecca McClanahan.

Upon the whole case we are of opinion that there is no error in the decree complained of, and it is affirmed.

(96 Va. 318)

WARD v. SCHERER.

(Supreme Court of Appeals of Virginia. Sept. 15, 1898.)

INFANTS—CONTRACTS—RATIFICATION.

Under Code, § 2840, prohibiting an action to charge a person on a ratification, after coming of age, of any contract made by him during infancy, unless the ratification is in writing and signed, a ratification of an unspecified "open account" will not found an action on a bond for a different amount.

Error to circuit court, Roanoke county.

Action by J. J. Scherer against Augusta J. Ward. There was a judgment for plaintiff, and defendant brings error. Reversed.

Phlegar & Johnson, for plaintiff in error.

CARDWELL, J. This is a writ of error to a judgment of the circuit court of Roanoke county against the plaintiff in error upon a bond executed by her to the defendant in error before the former's marriage and during infancy. The action was by motion under the statute, and to the plea of infancy offered by the defendant in the court below the plaintiff replied that the "defendant has, since she has become twenty-one years of age, ratified and acknowledged in writing the promises to pay the debt in the papers in this motion set forth," to wit, by four writings signed by her, and made parts of the replication.

Objection was made to the filing of the replication, but the objection was overruled, and the replication was filed. The defendant then demurred to the replication, in which

demurrer the plaintiff joined, and the demurrer was overruled, and judgment rendered against the defendant for the amount of the bond, \$503.82, with interest thereon from its date, June 8, 1896, till paid.

The case may as well be disposed of here on the demurrer to the replication to the plea of infancy, without considering the exception to the ruling of the court below in permitting the replication to be filed.

The writings relied on as "a ratification or acknowledgment by the defendant in writing of the promise to pay the debt sued on" are four letters written by her after she attained the age of 21 years.

The first was written in reply to a notice that the Salem National Bank held "an open account" against her for \$505.35, which is not the amount of the bond sued on, and, after declaring that her former guardian was liable for the account, she says, "I would fain pay the amount if I could."

The second letter was to the plaintiff, in which the defendant expressed concern about an open account which she supposed had been settled by her former guardian, and after saying, "I * * * will cancel the account if it remains unpaid," she uses the expression, "I know it is an open account and has run out, but will pay you every cent."

The third letter expresses doubt as to the honesty of the account, and the promise "to settle satisfactory" is conditioned on the account being honest, and the ability of the writer to obtain the "wherewithal."

The last refers to two accounts between the parties, and the promise then made is to pay Fannie's first, and "then the other"; but this is qualified by the preceding clause, "provided I find all the truth rests on your side."

Whatever might have been the effect if this action had been brought on the open account referred to in the letters, there is certainly no reference in either of them to the bond sued on, and nothing to show that the bond is for the account about which she was speaking in her correspondence. Every expression contained in these letters that might by any possibility be construed as a ratification or promise to pay the debt sued on is either coupled with a condition, or falls short of such a ratification of a promise previously made as would justify the judgment of the court below upon the demurrer to the replication.

No particular form of words is required to make a confirmation of a debt contracted by a person when an infant, after he attains his majority, but they must import an unequivocal recognition and confirmation of the previous engagement, though they need not amount to a direct promise to pay. Section 2840 of the Code provides that no action shall be maintained whereby to charge any person upon any promise, made after full age, to pay any debt contracted during infancy, or upon any ratification, after full age, of any promise or simple contract made during infancy, unless such promise or ratification

shall be made by some writing, signed by the party to be charged therewith. This statute follows almost in exact terms 9 Geo. IV. c. 14, § 5, and the decisions construing that statute have held that any written instrument, signed by the parties, which, in the case of adults, would have amounted to an adoption of the act of a party acting as an agent, will, in the case of an infant who has attained his majority, amount to a ratification. The memorandum or writing, to be sufficient, must recognize the debt as a debt binding upon the party who signs it. It must, either in terms or on a fair construction of the instrument, refer to the contract which is to be ratified, and treat it as a subsisting contract. *Smith, Cont. (5th Ed.) 323; 1 Chit. Cont. (11th Ed.) 221; 1 Minor, Inst. 421; 3 Minor, Inst. 176.* See, also, 18 Am. St. Rep. 701, 708, 713, and authorities there cited.

The last letter made a part of the replication to the plea of infancy in this case, referring, as it does, to two accounts, renders it all the more difficult to ascertain with any degree of accuracy to what account the writer referred in the other three letters, but by no construction that we can give to either of these letters, or to them when read together, can they be held to amount to a ratification of the contract evidenced by the bond sued on.

We are therefore of opinion that the judgment of the court below is erroneous, and should be reversed, and judgment rendered by this court for the plaintiff in error, with costs.

(96 Va. 403)

HOME LIFE INS. CO. v. SIBERT.

(Supreme Court of Appeals of Virginia. Sept. 29, 1898.)

INSURANCE—WARRANTIES—EVIDENCE—TRIAL—INSTRUCTIONS.

1. Where a charge was given in lieu of refused instructions, which was sufficient, except as to matters in respect to which the refused instructions did not remedy it, the refusal of the instructions was not error.

2. The party asking an erroneous instruction cannot complain of a charge to the same effect, though the instruction itself was refused.

3. On an issue of the truth of a statement in an insurance contract, that insured had never been treated for the alcohol habit, testimony of physicians that they had treated him therefor is not contradicted by testimony that he was a temperate man.

Error to circuit court, Shenandoah county.

Action by Mary C. Sibert against the Home Life Insurance Company. There was a judgment for plaintiff, and defendant brings error. Reversed.

Barton & Boyd and Tavenor & Bauserman, for plaintiff in error. Walton & Walton, for defendant in error.

HARRISON, J. It is not necessary to incumber this opinion with comment in detail upon the 24 bills of exception taken in the court below. In the main, they were not re-

lied on in the argument here, and are not well taken; and the action of the court must be regarded as affirmed, in respect to the questions thereby raised, except in the particulars hereinafter mentioned.

Bills of exception Nos. 21 and 23 relate to the refusal of the court to give seven instructions asked for by the defendant, and giving in lieu thereof four instructions of its own. The instructions given were sufficient, except in one particular, and in that particular they are not remedied by the instructions refused; hence there was no error in refusing the instructions asked for by the defendant.

Instruction No. 2 given by the court lays down the proposition that: "To constitute an answer not full or complete, F. E. Sibert must have suppressed some fact which the question reasonably called for, and which fact was material to the risk." This is not sound. The contract of insurance under consideration expressly declares that all the answers contained in the application for insurance, together with those contained in the declaration to the company's medical examiner, are warranted to be true, full, and complete, whether written by the insured or not, and are offered to the company in consideration of the contract. The answers being warranties, it was a matter of no consequence whether they were material to the risk or not. A warranty is a stipulation on the literal truth or fulfillment of which the validity of the entire contract depends. It is in the nature of a condition precedent, and must be strictly complied with, whether material or not. *Insurance Co. v. West, 76 Va. 575; Insurance Co. v. Morgan, 90 Va. 290, 18 S. E. 191.* This error, however, cannot now be availed of by the plaintiff in error, for the reason that in its sixth instruction, which was refused, the court was asked to instruct the jury to the effect now pointed out as erroneous. A party cannot invite the court to commit error by asking for an erroneous instruction, and be permitted afterwards to have the verdict set aside for the error into which the court has been thus misled. *Kimball v. Friend, 85 Va. 125, 27 S. E. 901.*

The twenty-fourth bill of exception is to the action of the court in refusing to set aside the verdict of the jury and grant a new trial upon the ground that it was contrary to the law and the evidence. It is difficult to perceive how the jury could have reached the conclusion they did upon the evidence in this case. The sole issue in the case was whether or not the answers contained in the application for insurance and in the declaration to the medical examiner were true, full, and complete. If true, the plaintiff was entitled to recover. If not true, the verdict should have been for the defendant. Among other questions in the declarations to the company's medical examiner, the insured was asked who his family physician was, and when and for what

his services had been sought. He answered that Dr. D. L. Shaver was his family physician, and that his services had been sought for nothing. Dr. Shaver testifies that prior to September 14, 1895, the date of the policy, he was consulted by the insured in regard to his health, who stated that he had been, and was still, drinking too much, and was asked by the insured if he could not do something to help him. The testimony of this witness shows that these conversations were numerous, beginning as far back as three years before the date of the policy, and continuing from time to time until the insured died, in January, 1896,—four months after the policy was taken out. This witness further testifies that in November, 1894, he treated the insured for stomach derangements, neuralgia, and disease resulting from drink; that he found him in bad condition from excessive use of alcoholic liquor, and told him that a continuation of the habit for two years would end his life. Witness further says that insured spoke to him about treating him for drink four, six, or more times within the twelve months immediately preceding the date of the policy. The further question was asked: "Have you ever had or been subject to neuralgia?" The answer to this question was, "No." The evidence of the family physician was that he had treated insured for neuralgia prior to the application for the policy. The further question was asked: "What other physician have you consulted?" The answer to this question was, "None." The evidence shows that in June, 1895, and in August, 1895, about one month before the policy was applied for, the insured consulted Dr. Graves, and asked if he could relieve him from alcoholism; saying that he was annoyed all the time with neuralgia caused by drink. The further question was asked: "Have you ever had special treatment for the alcohol habit?" The answer to this question was, "No." The evidence of the family physician and Dr. Graves both show that they had each at different times prior to the date of the policy treated the insured for the alcohol habit, and the evidence of Dr. Campbell shows that about the time the policy was taken out, or shortly thereafter, the insured applied to him for the "Keeley Cure" treatment.

Other instances might be given of untrue answers to the questions asked, but it is unnecessary to multiply them; for, if any one of said answers is shown to have been untrue, there can be no recovery, under the terms of the warranty entered into by the insured.

Recognizing and giving full force to the law requiring that the case shall be heard by this court as upon a demurrer to the evidence, we are of opinion that the motion to set aside the verdict should have prevailed.

There is no evidence in the record in conflict with that which shows the answers to

be untrue. There is much evidence offered by the defendant in error tending to show that the insured was a temperate man, and, if that were the issue, the evidence might be regarded as conflicting. The issue, however, was not whether the insured was a sober man, but whether he had fulfilled the warranty that his answers should be true, full, and complete. Upon this issue the evidence was clear and uncontradicted that the answers made were not true.

For these reasons the judgment of the circuit court must be reversed, the verdict of the jury set aside, and the cause remanded for a new trial.

(96 Va. 383.)

CITY OF CHARLOTTESVILLE v. MAURY et al.

(Supreme Court of Appeals of Virginia. Sept. 22, 1898.)

EMINENT DOMAIN—PROPERTY SUBJECT—WATER RIGHTS.

Code, § 1079, providing that, on payment of the award in condemnation proceedings, the land condemned shall vest in petitioner in fee, and Charlottesville City Charter, § 38 (Acts 1891-92, p. 1013), authorizing the condemnation of lands for a city water plant, do not authorize the condemnation of a riparian water right without condemnation of any of the abutting lands.

Error to circuit court, Albemarle county.

Proceedings by the city of Charlottesville to condemn a water right of S. P. and E. S. Maury. There was a judgment of condemnation, and the proceedings were taken to the circuit court by defendants on writ of error, where the judgment of condemnation was reversed, and petitioner brings error. Affirmed.

Geo. Perkins, for plaintiff in error. D. Harmon, for defendants in error.

BUCHANAN, J. The defendants are the owners of a small parcel of land lying on both sides of Reservoir creek, in the county of Albemarle, below the point where the city of Charlottesville proposes to divert that stream for the purpose of increasing its water supply. That creek, and two others which flow into the mill pond of the defendants, supply the power with which they operate their gristmill located on the land.

These proceedings were instituted by the city council in the county court of Albemarle county for the purpose, among others, of condemning for its purposes the rights of the defendants in Reservoir creek, and orders were entered therein, which, if valid, resulted in their condemnation. Those orders, upon a writ of error to the circuit court, were reversed upon the ground that the county court was without jurisdiction, under the charter of the city, to condemn or appropriate the property rights of the defendants in the water of Reservoir creek alone, without condemning the land through which it flow

ed, or some part of it. To that judgment of the circuit court this writ of error was awarded.

The authority relied on by the city for condemning the defendants' rights in the creek is found in section 38 of its charter (Acts 1891-92, p. 1013). By that section the city is authorized to erect suitable dams and reservoirs, and to lay suitable pipes, to furnish the city with an adequate supply of water, and also to establish and construct a sewerage system for the city, and, "for such purposes, to acquire either by purchase or condemnation, according to the provisions of the general law for the condemnation of lands by incorporated cities, such lands and so much thereof as may be necessary for the aforesaid purposes."

The general law in accordance with which the lands were to be condemned, so far as applicable to this case, is found in chapter 46 of the Code, and provides, among other things, that, if the council of a city cannot agree on the terms of purchase with those entitled to lands wanted for its purposes, they can have commissioners appointed to ascertain and report what will be a just compensation for such part of the land as is taken, and the damage to the residue of the tract beyond the peculiar benefits to such residue from the work to be constructed. Upon the confirmation of their report, it is provided that the sum so ascertained may be paid to the parties entitled thereto or into court, and that upon such payment the title to that part of the land for which such compensation is allowed shall be absolutely vested in the city (or other corporation authorized to condemn lands) in fee simple, except in the case of a turnpike company, where a sufficient right of way only for the purposes of such company shall be vested. Code, § 1079.

It is well settled, where the legislature has defined the interest or estate which shall be taken under condemnation proceedings, that no less interest or estate than that specified can be taken. *Lewis, Em. Dom. § 278; Rand. Em. Dom. § 203.*

This question was directly presented and decided by this court in the case of *Roanoke City v. Berkowitz*, 80 Va. 616. In that case the city of Roanoke instituted proceedings to condemn lands in order that it might, for sanitary purposes, drain a portion of its territory and straighten the course of a small stream. The commissioners reported that, if the city was required to condemn the fee in the lands of Berkowitz, his damages would be \$1,000, but, if it was only required to condemn the use of his land, his damages would only be \$200. The court (Judge Lewis delivering the opinion) held that nothing less than the fee could be taken, and in commenting upon section 11 of chapter 56 of the Code of 1873, which is the same as section 1079 of the Code of 1887, said: "It is difficult to see how language could be plainer or

less liable to misconstruction. The requirement is imperative that the fee shall be vested except in the single case of a turnpike company, where an easement only is acquired; and the exception proves the universality of the rule which is intended to be prescribed."

There is nothing in the charter which authorizes an easement in the land, or any other interest less than the fee, to be condemned. On the contrary, it provides that the condemnation must be in accordance with the provision of the general law which requires the fee to be taken and paid for.

It may be true, as counsel for the city earnestly contend, that it is a great hardship upon the city to be compelled to condemn and pay for property which it does not need, in order to get what is necessary for its purposes. This is an argument more properly addressed to the legislature than to the courts. While all private property is held subject to the right of eminent domain, that power lies dormant in the state until called into action by the lawmaking power; and then it can only be exercised in the manner and upon the conditions and terms prescribed by the legislature. If the right to exercise that power is conferred upon a corporation by its charter or a special statute, it must be exercised in accordance with the general law upon the subject, unless a contrary intention clearly appears, for it will not be presumed that the legislature intended to change that policy (which policy is shown by its general law) further than is expressly provided or necessarily implied in the special legislation.

There is no better settled rule of law than this, that statutes which encroach on the personal or property rights of the individual are to be strictly construed; and this is especially the case where it is claimed that the statute delegates to a corporation, whether municipal or private, the right of eminent domain,—one of the highest powers of sovereignty pertaining to the state itself, and interfering seriously, and oftentimes vexatiously, with the ordinary rights of property. *Cooley, Const. Lim. 660; Alexandria & F. R. Co. v. Alexandria & W. R. Co., 75 Va. 780; Lewis, Em. Dom. §§ 253, 254.*

We are of opinion that there is no error in the judgment of the circuit court, and that it must be affirmed.

(86 Va. 312)

GISH'S EX'R v. JAMISON.

(Supreme Court of Appeals of Virginia. Sept. 15, 1896.)

SPECIFIC PERFORMANCE—LAND CONTRACTS—TIME OF PAYMENT OF PRICE—LACHES.

1. Where a vendor sued to rescind the contract after the property had almost doubled the contract price in value, which suit was dismissed by the court, and he made no offer to give possession or make a deed, and made no demand for performance until four years after the sale, and three years after the last of the purchase

money was due, and when the property had fallen to one-third of the contract price, performance will not be enforced.

2. Where the cash payment on a land contract was to be made as soon as a third person made a certain payment to the purchaser, which he and the vendor expected would be within a few days, the cash payment was payable within a reasonable time, from the close of which period the court would compute time on a question of the vendor's laches in suing for specific performance.

Appeal from hustings court of Roanoke.

Bill of J. A. Jamison against the executor of the will of S. H. Gish, deceased. There was a decree for complainant, and defendant appeals. Reversed.

Hansbrough & Hall, for appellant. L. H. Cocke and Lockett & Cosby, for appellee.

RIELY, J. On April 12, 1890, J. A. Jamison and S. H. Gish entered into a contract in writing whereby Jamison sold to Gish a certain house and lot, the residence of the former, in the city of Roanoke, for the sum of \$16,000, paid and to be paid as follows: \$10 cash in hand, \$7,990 on delivery of the deed to the property, and the residue, \$8,000, with interest, in one year from date of the contract. The contract concluded with this clause: "The cash payment to be made as soon as the Fairmont Land Co. makes their cash payment to the said Samuel H. Gish."

The Fairmont Land Company, though chartered, was never organized. By it was meant W. P. Moomaw and his associates, who, on March 31, 1890, 12 days previously, had purchased from S. H. Gish and wife 60 acres of land within the corporate limits of Roanoke city for the price of \$80,000, of which sum \$15,000 was to be paid when a deed should be made to the land, conveying to the purchasers a valid title in fee simple. Gish and wife tendered to Moomaw and his associates a deed of conveyance, executed and acknowledged, pursuant to the contract of sale. They refused to accept the deed and pay the purchase money, or any part of it, upon the alleged ground that Gish and wife could not convey a perfect fee-simple title. Upon their refusal, Gish and wife, in June, 1890, brought suit in the hustings court of the city of Roanoke against Moomaw and his associates to compel them specifically to perform their contract. The court, at the hearing, dismissed the bill, but, on appeal to this court, its decree, on September 22, 1892, was reversed, and the vendors adjudged to be entitled to have specific performance of the contract. A rehearing having been granted, the court, on April 13, 1893, adhered to its former decision. *Gish v. Moomaw*, 89 Va. 345, 376, 15 S. E. 868, and 17 S. E. 324. In pursuance thereof, the hustings court, at its November term, 1893, entered a decree against Moomaw and his associates for the purchase price of the land, which, however, has proved unavailing. Executions were issued upon the decree, but were returned "No effects," and no part of the purchase money has been paid.

After Moomaw and his associates refused to accept the land from Gish and wife, and the latter had instituted suit to compel performance of the contract, Jamison brought suit to rescind the sale of his house and lot to Gish. This suit, at the hearing, was dismissed by the court. Jamison not only acquiesced in its dismissal, but, so far as the record discloses, thereafter made no demand upon Gish that he perform the contract, nor took any action to compel its performance until the institution of this suit, on October 31, 1894, more than four years after the sale, and upward of three years after the last of the purchase money was due and payable.

Every application for the specific performance of a contract is addressed to the sound judicial discretion of the court, governed by established principles. These principles require, among other things, that the party seeking the performance must show himself to have been ready, prompt, willing, and eager to perform the stipulation of the contract on his part. *Bowles v. Woodson*, 6 Grat. 78; *Ford v. Euker*, 86 Va. 75, 9 S. E. 500; *Dunsmore v. Lyle*, 87 Va. 391, 12 S. E. 610; *Powell v. Berry*, 91 Va. 568, 22 S. E. 365; and *Darling v. Cumming's Ex'r*, 92 Va. 521, 23 S. E. 880. It is also well settled that the court will not decree specific performance where he has been guilty of such delay or conduct as to justify the presumption of an abandonment of the contract, or where to do so would work a hardship on either party, not only because of unfairness in the terms of the contract, but also where the applicant has been in default, and the hardship is caused by subsequent events, or is the result even of collateral circumstances. The party seeking performance must not have remained quiet or held himself aloof, so as to enforce or abandon the contract as events might prove advantageous. 2 Minor, Inst. (3d Ed.) 898; Pom. Cont. §§ 177, 185, 408; *Willard v. Tayloe*, 8 Wall. 557, 566; *Booten v. Scheffer*, 21 Grat. 474, 497; and *Anthony v. Leftwich*, 3 Rand. 238. In *Darling v. Cumming's Ex'r*, supra, Judge Harrison used the following language: "The rule may be laid down as general, applying to either the vendor or vendee, that where there has been a change of circumstances or relations which renders the execution of the contract a hardship to the defendant, and this change grows out of, or is accompanied by, an unexcused delay on the part of the plaintiff, the change and delay together will constitute a sufficient ground for denying a specific performance, when sought by one thus in default."

Applying the foregoing principles to the case before us, the complainant was not entitled to have specific performance of the contract, and the hustings court erred in decreeing its execution. From the time of the sale until the institution of this suit, he gave no evidence of a willingness or readiness to comply with his part of the contract, nor manifested any desire to have it performed

by his vendee. He was in possession of the property at the time of the sale, and has ever since remained in possession. It does not appear that he at any time offered to give possession, or that he tendered or offered to make a deed to the property, upon the delivery whereof he was entitled to exact the cash payment. The only disposition manifested by him with respect to the contract previous to the institution of this suit was to abandon it by bringing a suit to rescind it; and this he did at a time when the property had risen in value from \$16,000, the price at which he sold it to Gish, to \$24,000. Failing in his suit to rescind, he thereafter remained quiet, and made no demand for the performance of the contract, nor took any steps to compel its execution, but, as heretofore stated, suffered to elapse more than four years after the sale, and upward of three years after the last of the purchase money was due and payable, before manifesting any disposition to perform the contract himself or to have it performed by his vendee, and then did so at a time when the property had fallen in value to about one-third of the price at which he sold it. A court of equity will not grant specific performance where there has been an absence of good faith. It will refuse relief where the party seeking it is in default, and by delay has indicated an intent to perform the contract or to abandon it, as the property should rise or fall in value. Where a vendee has been guilty of such delay in completing the contract and seeking its performance as has been the vendor in this case, a rise in the value of the land during the interval is a fact of much weight in tending to show that the vendee's delay was speculative, and for the very purpose of waiting such a turn favorable to himself, and not less so is a fall in the value of the land indicative of a speculative purpose in a vendor who has delayed completing a contract of sale and demanding its execution.

Jamison, so far as respects the cash payment, had as much right to ask specific performance of his contract with Gish when, in 1890, he brought suit to rescind it, as in 1894, when he instituted this suit to compel its specific execution. The cash payment was as much due then as it was at the institution of this suit. The sale was for cash as to one-half of the purchase price, and the subsequent and concluding clause of the contract—that it was to be made as soon as the Fairmont Land Company made their cash payment to Gish—was not intended to alter the terms of the sale, or to make the receipt by Gish of the cash payment from the Fairmont Land Company a condition precedent to the payment of that due from him to Jamison. The cash payment of the company has never been made, but at the time of the sale from Jamison to Gish it was expected by both of them that it would be made within a few days,—just as soon as Moomaw and his associates could examine and be satisfied as

to the title to Gish's property. But although not made at all, or if not made according to their expectation, that from Gish was payable within a reasonable time, and Jamison, after a reasonable delay, had the right to exact its payment.

It was conceded that Jamison knew all about the sale from Gish to Moomaw and his associates, and that he was well aware that Gish had no means of paying him except from the proceeds of that sale. Upon that source each relied for the fulfillment by Gish of their contract, but, wholly contrary to their mutual expectation, that sale has proved fruitless, and the land itself has immensely fallen in market value, as has also that sold by Jamison to Gish. In view of the delay of Jamison in seeking specific performance of his contract with Gish, and the evidence given by him previous to the institution of this suit of an abandonment of it, our conclusion is that, under the changed conditions that have taken place during the interval of delay, which conditions are in no degree attributable to any default of Gish, but were produced by circumstances over which he had no control, specific execution of the contract sought to be enforced would be harsh, oppressive, and very inequitable.

The decree of the hustings court must therefore be reversed, and the bill of the complainant be dismissed, leaving him to pursue any remedy he may have at law.

CARDWELL, J., absent.

(96 Va. 387)

TEESE v. KYLE et al.

(Supreme Court of Appeals of Virginia. Sept. 22, 1898.)

WILLS—CONSTRUCTION—INTERESTS CREATED.

Testator gave his wife "all my interest in the estate," and then devised specific property to her. By subsequent clauses, specific property was given to other legatees without restriction. *Held*, that the widow had no interest in the property given to the other legatees.

Appeal from circuit court, Amherst county.

Suit between Margaret P. Teese and Margaret Kyle and others to obtain a construction of the last will and testament of David Teese, deceased. From the decree, the former appeals. Affirmed.

Caskle & Coleman, for appellant. Lee & Howard, for appellees.

HARRISON, J. The court being of opinion that there is no error in the decree appealed from, to the prejudice of appellant, the jurisdiction of this court, which is denied by the appellees, may be conceded, for, whether that question be decided for or against appellant, the result is the same.

This suit was brought for a construction of the following testamentary paper:

"This is the last will and testament of Rev. David Teese, of Elon, Amherst Co., Virginia.

"(1) All my interest in the estate I bequeath to my beloved wife, M. P. Teese; also, fifty shares of New York Central & Hd. River Railroad stock now owned by me; also, all monies in deposit in the Natl. Exchange Bank of Lynchburg standing to my credit or in her name.

"If surviving my wife, I leave this bequest to her sister Virginia B. Pascoe.

"(2) I give & bequeath to my sister Margaret Kyle, Harrisville, Butler Co., Penn., fifty shares of Pennsylvania Railway stock standing in my name, to her and her heirs and assigns forever.

"(3) I give and bequeath to my sister Rebecca A. Henderson, of West Middlesex, Mercer Co., Pennsylvania, and to her heirs and assigns forever, fifty shares of Pennsylvania Railroad stock now standing in my name in that company.

"All other property of mine not thus disposed of I bequeath to my wife, and constitute her the sole executrix of my last will and testament, and request no security be required of her as said executrix.

"The foregoing will and testament is signed by me, and acknowledged as such, this 3rd day of March, in the year 1893, and in the presence of these witnesses.

"David Teese. [Seal.]

"Witnesses:

"Wm. Murselman, Elon, Va.

"J. J. Jones, " " "

The lower court held that appellant took an absolute estate in all the property embraced in the first clause; that the bequest therein to Virginia B. Pascoe was intended to take effect only in the event that Margaret P. Teese, the appellant, should die in the lifetime of her husband, and the said Virginia B. Pascoe should survive both the testator and his wife.

Of this decree, Virginia B. Pascoe does not complain.

Upon the issue between appellant and the appellees, the lower court held that Margaret Kyle and Rebecca Henderson each took absolutely and presently the 50 shares of Pennsylvania Railway stock bequeathed to them, respectively, in the second and third clauses of the will, and that said bequests were not affected or qualified in any manner by any provision in any other clause of the will.

From this decree the widow, Margaret P. Teese, has appealed.

Her contention is "that the first clause of the will gave her the stock therein mentioned and the money in bank absolutely, and, during her natural life, all of the interest or profits arising from the entire estate of the testator, with remainder for life, if then living, to her sister Virginia B. Pascoe, and that the bequests to the testator's two sisters were subject to this provision in favor of herself and sister." It is insisted that the circuit court gave no significance to the opening words used in the first clause, "All my interest in the estate I bequeath to my beloved

wife, M. P. Teese," but wholly disregarded that expression, and construed the will as if those words had not occurred therein.

What estate the testator referred to when he used the language quoted, "All my interest in the estate," does not clearly appear. He was most likely referring to some estate in which he thought he might have some interest; perhaps, the landed estate belonging to his wife and her sister, upon which, the petition for appeal admits, he had lived during his married life.

The testator is conceded to have been an intelligent minister of the gospel, and he would hardly have employed the language quoted for the purpose of carving out a life interest in his entire estate for his wife. Nor did he intend by it to give his wife the fee simple in the entire estate, for then the subsequent provisions of the will would have been meaningless. While there may be doubt and room for conjecture as to what estate the testator referred to when using the words quoted from the first clause of the will, there can be no doubt of the property referred to or the meaning of the language used in framing the second and third clauses. These two bequests are expressed in clear, positive, and unambiguous terms, and give to each of the sisters named 50 shares of Pennsylvania Railroad stock standing in his name, without any limitation or restriction whatsoever upon the present and absolute right to its use and enjoyment.

The object of courts in construing wills is to arrive at the true intent of the testator, but that intent is to be gathered from the language used. "Conjecture," it has been said, "cannot be permitted to usurp the place of judicial conclusion, nor supply what the testator has failed sufficiently to indicate." The intention must be collected from the words of the will, for the object of construction is not to ascertain the presumed or supposed, but the expressed, intention of the testator: that is, the meaning which the words of the will, correctly interpreted, convey. *Hatcher v. Hatcher*, 80 Va. 171; *Waring v. Boshers*, 91 Va. 286, 21 S. E. 464. In the case last cited, the president of the court, quoting from high authority, says: "A clearly expressed intention in one portion of the will is not to yield to a doubtful construction in any other portion of the instrument."

In *Gaskins v. Hunton*, 92 Va. 528, 23 S. E. 885, Judge Buchanan, speaking for the court, and citing numerous authorities in support of the proposition, says: "It is a settled rule of construction, both in deeds and in wills, that if an estate is conveyed, or an interest given, or a benefit bestowed, in one part of the instrument, by clear, unambiguous, and explicit words, such estate, interest, or benefit is not diminished or destroyed by words in another part of the instrument, unless the terms which diminish or destroy the estate before given be as clear and decisive as the terms by which it was created."

In the light of these well-settled principles, the clear and unambiguous bequests to appellees cannot be taken away or diminished by the language relied on in the first clause of the will, which clearly was not intended as a bequest of the entire estate to appellant, nor as giving her a life estate in the whole; for the words are not such as are commonly used for creating a life estate, and cannot be made to refer to such an estate without supplying words not used by the testator. At most, that language only raises a doubt as to the estate referred to by it, and does not affect the clear rights of appellees under the clauses providing for them.

There is no error in the decree appealed from, and it is affirmed.

(96 Va. 372)

ALLEGHANY IRON CO. v. TEAFORD
et al.

(Supreme Court of Appeals of Virginia. Sept. 22, 1898.)

SALES—DETERMINATION OF QUALITY—BREACH BY BUYER—DAMAGES—DOUBLE RECOVERY—REDUCTION—TRIAL—ARGUMENT.

1. Where the purchaser unreasonably delayed receiving the goods, and induced the seller to hold himself ready to make delivery, he was liable for damages sustained by the seller, regardless of his bona fides in causing the delay.

2. A contract to sell ore provided that if, in the opinion of the buyer's foreman, any ore delivered was unfit to wash, the seller was to be notified, and he and the foreman were to determine the disposition to be made thereof. *Held*, that the foreman was not the sole judge of the fitness of the ore, and an improper rejection thereof was a breach of contract.

3. Where the purchaser was unable to receive the goods, and by representing himself as ready to receive them in a few days induced the seller to hold himself ready to make delivery, and then broke the contract, the seller could recover both the profits which he would have realized on completion of the sale and damages sustained by being induced to hold himself ready for delivery, such recovery not being a double recovery.

4. Where a contract for the sale of crude ore, which provided for delivery at the mines, was broken by the purchaser, and the seller then sold ore from the same mine to another, the latter sale being of ore cleaned and ready for market, the profits realized on the second sale could not be offset against the damages for loss of profits on the first contract.

5. It is proper to stop counsel from arguing an unsound legal proposition to the jury.

Error to circuit court, Botetourt county.

Two actions in assumpsit by R. H. Teaford and another against the Alleghany Iron Company to recover for ore delivered to defendant and for breach of a contract to purchase ore. The two actions were consolidated, and there was a judgment for plaintiffs. Defendant brings error. Affirmed.

Beverley T. Crump and Benj. Haden, for plaintiff in error. Jas. W. Marshall and Geo. K. Anderson, for defendants in error.

RIELY, J. This is a writ of error to a judgment rendered in two actions of assump-

sit, which, being between the same parties and growing out of the same matter, were consolidated by the court.

On December 10, 1895, a contract was entered into between the Alleghany Iron Company and R. H. Teaford, by which it agreed, among other things, to take from him 10,000 tons of iron ore from a certain mine, at \$1.10 per ton. The ore was to be delivered at the mine in a crude state, on board of the cars of the company, and thence hauled to its washer and washed, the hauling and washing to be at its expense. J. H. Hannah acquired from Teaford an interest in the contract, and became jointly interested with him in its performance. They commenced to mine and deliver the ore in January, and continued to do so up to the 17th day of February, when the severity of the weather caused the pump connected with the washer to freeze and break, thereby preventing the washing of the ore and stopping the plaintiffs from delivering it. The company did not resume operations until the 1st of June, when the plaintiffs again commenced to deliver ore under the contract, but the company rejected it in such quantity that they claimed the rejection to be improper and a breach of the contract.

One of the suits was for the amount due for ore delivered in the month of June, and the other was for damages for breach of the contract.

The contract was in the form of a letter from the general manager of the company to Teaford, and accepted by him. It contained, among other provisions, the following:

"Should your superintendent from any cause ship us a car of material that, according to the judgment of our washer foreman, is unfit to wash, this car is to be side-tracked until your superintendent can go and look at it, and the two are to decide what is best to be done about this car; that is, whether it shall be dumped and thrown away, or washed, to arrive at its true value in comparison with the other cars."

On the trial the plaintiffs introduced testimony to prove the damages resulting to them from the delay of the company in resuming operations, thereby preventing them from delivering any ore between the 17th of February and the 1st of June. The defendant objected to the testimony, but the court overruled its objection and admitted the testimony. The admission of this evidence is the subject of the first bill of exceptions, and constitutes the first assignment of error.

The general manager of the company informed the plaintiffs of the injury to the pump, and assured them that a new one would be procured in five or six days, and the work proceed. Time went on, but the place of the broken pump was not supplied, nor the work resumed. Assurance was again and again given, when complaint of

the delay was made, that the pump would be soon procured, whereby the plaintiffs were kept in a state of expectation and comparative idleness, waiting for the resumption of operations. After a delay of more than three months, extending from the 17th of February to the last of May, a second-hand pump belonging to the president of the defendant company, which had been used by him in a coal shaft, was brought, and work resumed, but this was not done until the president had purchased a tract of land in the vicinity containing iron ore, and the company had built a railroad to it of several miles, and gotten ready to mine and manufacture ore from it. Evidence had been introduced tending to prove that the long delay in procuring another pump and resuming work was unnecessary and unreasonable. Under these circumstances, evidence was admissible to show that the plaintiffs had suffered loss from the delay, and the court did not err in overruling the objection of the defendant.

The next assignment of error relates to the admission of testimony to prove that the ore in the cars which were side-tracked in June by order of the washer foreman was such as should have been received, and that it was improperly rejected. The propriety of admitting the testimony is very clear. The washer foreman and the superintendent had been unable to agree as to the ore. No provision had been made in the contract, in case of disagreement between the washer foreman and the superintendent, with respect to ore in cars that should be side-tracked by order of the washer foreman on account of its unfitness, in his judgment, to be washed. In the absence of any such provision, the propriety of the rejection of the ore had to be settled in some other way. The company declined to arbitrate the matter, and there was no other way of settling it than by a resort to the tribunals of the land established for the adjudication of the rights of parties and the settlement of controversies. The jury could not decide the question of fact in issue except upon evidence as to the character of the ore. Clearly, evidence for this purpose was pertinent and admissible. The case is wholly unlike that of *Condon v. Railroad Co.*, 14 Grat. 302, relied upon by the plaintiff in error, and plainly distinguishable from it. In that case the contract made the engineer of the railroad company the sole arbiter of all questions of law or fact arising under the contract. By its express terms his decision was to be "obligatory and conclusive between the parties, without further recourse of appeal." But in this case the washer foreman was not the sole judge or final arbiter of any dispute as to the ore. He had merely the power to have side-tracked any car containing material which he regarded as unfit to be washed, but its subsequent and final disposition was to be determined by the concurrent judgment of him-

self and the superintendent. He alone could not decide against its acceptance. If they differed as to the ore in any car which had been side-tracked, the contract not providing for such a contingency, the result was the same, with respect to that particular ore, as if no provision had been made in the contract for deciding a dispute as to any ore rejected by the company. In such case, if the parties could not agree upon some other mode of settling the dispute, resort must necessarily be had to the courts, and the matter be there determined upon evidence as to the character of the rejected ore.

After the plaintiffs had concluded their testimony and rested their case, the counsel of the defendant moved the court to strike out all the testimony of the plaintiffs tending to show loss during the cessation of the work from the 17th of February to the 1st of June, and also all testimony tending to show the judgment of other parties than the washer foreman as to the character of the ore rejected by him, and to exclude all of the said evidence from the consideration of the jury. The court rightly overruled the motion. The evidence was, as we have seen, properly admitted by the court, and, being so admitted, the jury were entitled to consider it.

Upon the conclusion of all the testimony, the defendant offered ten instructions, which it asked to be given to the jury. The court refused to give the instructions, or any of them, and gave instead three instructions for the plaintiffs and two for the defendant. The refusal of the court to give the ten instructions asked for by the defendant, and the giving of instructions 1, 2, and 3 for the plaintiffs, constitute the next assignment of error. The court committed no error with respect to the instructions refused or given.

By instruction 1 the defendant asked the court to instruct the jury to disregard all evidence tending to prove loss resulting to the plaintiffs from the failure of the company to receive ore from them during the cessation of operations from the 17th of February to June 1st; and by instructions 7, 8, and 9, which embodied the same principle with more or less variation, it was asked to instruct the jury that the washer foreman was the sole judge of the fitness of the material in the cars, which were side-tracked by his order, to be washed. The impropriety of these instructions has already been shown in disposing of the exceptions to the admissibility of the evidence as to the loss resulting from the said delay, and of the evidence as to the character of the ore rejected by the washer foreman.

Instruction No. 2 given by the court for the defendant covers substantially the same ground as instruction 6 asked for by it, and the rejection of the latter instruction gives no cause for complaint.

Instructions 3 and 4 asked for by the defendant propounded the doctrine that no recovery could be had for damages resulting

from the failure of the company to receive ore during the cessation of its operations from February to June, unless such failure was purposely caused by the company with the intention to deceive and defraud the plaintiffs. The principle enunciated by these instructions is not correct. It was not necessary to a recovery of damages for loss sustained in consequence of the protracted delay to receive ore that the delay should be the result of deception and fraud. Actual fraud is not an essential ingredient of the breach of a contract. If the failure to receive the ore was unnecessarily and unreasonably protracted, or the delay could have been avoided by due diligence, the plaintiffs were justly entitled to recover damages for any loss they could show that they had suffered in consequence of the delay.

Instruction No. 2 embodied the proposition that the plaintiffs could not recover damages for loss resulting from delay to receive the ore from February to June, and also for the profits that would have been realized if they had been allowed to deliver the whole amount of ore contracted for, upon the ground that such damages would be obnoxious to the objection of a double recovery. Instruction No. 5 propounded substantially the same proposition. We were cited to no authority to sustain it, and, in our opinion, it is not in accordance with the law. Such a recovery would not be double. The object of the law in awarding damages is to make amends or reparation. It aims to put the party injured in the same position, so far as money can do it, as he would have been in if the contract had been performed. He is entitled to recover all damages resulting directly from its violation. There may be several elements of damage. It may, as in this case, consist of the expense incurred in taking care of unemployed stock and paying the wages of idle employes that were necessary to the performance of the contract, while he was unnecessarily and unreasonably prevented from doing the work contracted for, and may also consist of profits which would have been realized if the party had been allowed to complete the contract. Otherwise, a contract from which a profit was reasonably certain might result, without his fault, in an absolute loss to the party who should have realized the profit. One might enter into an agreement to do certain work at a stipulated time, which required for its performance teams and hands, and, though ready to begin the work at the appointed time, be prevented by the other party from doing so, through one pretext or another, until the daily expenses of his equipment of idle teams and hands exceeded the entire profit to be expected from the performance of the work, and then finally not be allowed to do the work at all. Is it possible that, in an action for a breach of the contract, he could recover only the profits that he could show that he would have made from the performance of the work if he had

been allowed to do it, and nothing for the loss resulting from the delay induced by the misconduct of the other party to the contract? If so, instead of gains or profits, he would have to suffer an actual pecuniary loss, without fault on his part, but caused solely by the misconduct of the other party. Such a result would directly conflict with the very object of the law in awarding damages for the violation of a contract, which is to place the party injured pecuniarily in the same condition that he would have been in if the contract had been kept and performed.

It is not clear what was the proposition intended to be enunciated by the tenth instruction. How were the jury to consider the ore sold and delivered to the Low-Moore Iron Company? This is not plainly set forth. If its object was to require the jury to apply, in reduction of the profits that the plaintiffs would have realized from the fulfillment of their contract with the Alleghany Iron Company, any profit they had made on the ore sold and delivered to the Low-Moore Company, there was, in the first place, no evidence of the amount or that any profit was made; and, secondly, if that was the object of the instruction, it was manifestly erroneous. It appeared in evidence that several months after the rupture of the contract, and the cessation of dealings under it between the parties, Teaford made a contract with the Low-Moore Iron Company to furnish it with ore from the same mines from which he had contracted to supply the plaintiff in error. This contract was of a different nature and upon different terms. It was not for the delivery of ore in a crude state at the mines, as was the case under the contract with the Alleghany Iron Company, but the ore was to be washed and made ready for market or for use in the furnace. This contract required other equipment and much additional expense to fulfill it. A washer had to be built, and a track constructed to haul the ore, after being washed, to the Chesapeake & Ohio Railway. This contract could not affect the amount of profits the plaintiffs were entitled to recover from the Alleghany Iron Company for its failure to take the residue of the ore it had contracted for. They were to be ascertained as of the time when, as well as the place where, the ore should have been accepted, and were to be measured by the difference between the cost of the ore to the plaintiffs delivered on board the cars of the company and the price it had agreed to pay for it.

And, the court having properly refused to give the instruction, it did not err in stopping the counsel of the defendant, on motion of counsel for plaintiffs, from arguing to the jury that the ore sold and delivered to the Low-Moore Iron Company, or some part of it, should be deducted from the total amount of ore mentioned in the contract with the Alleghany Iron Company, in considering the profits that might have been earned by

the plaintiffs, and in stating to the jury that the subsequent sale and delivery of ore to the Low-Moore Company could not affect the question of profits arising from a breach of the contract by the defendant, if they should find that there had been such breach.

The petition points out no error in the three instructions given by the court for the plaintiffs. None is perceived, and their consideration may be dismissed without further comment.

This brings us to the last assignment of error, which was the refusal of the court to set aside the verdict and award a new trial. The grounds upon which this motion was based were the rulings of the court upon the trial, which have been already disposed of contrary to the contention of the plaintiff in error, and need not be again discussed, and the additional grounds that the verdict was contrary to the evidence and also excessive. These may be considered together.

The jury did not render a verdict for a lump sum, but itemized the several elements of damage. They allowed the sum of \$720 for the ore delivered in the month of June, the sum of \$200 for damages between February 17th and June 1st, and \$2,181 for profit on the ore that was not allowed to be delivered.

The defendant admitted that it owed the sum of \$564.97 for the ore it received in June. This, however, was only for the ore it accepted, and did not include anything for the ore it rejected. The plaintiffs claimed that the ore accepted and the ore rejected aggregated 807⁸⁴⁸/₁₂₄₀ tons, which, at \$1.10 per ton, amounted to \$868.10. To this must be added the sum of \$52.25 for lump ore, which was conceded to be due, thus making the whole amount \$720.35. The testimony showed that the ore rejected was such as should have been received, and was sufficient to sustain the claim of the plaintiffs as to the quantity.

The plaintiffs in their testimony fixed their damages resulting from the cessation of operations from February 17th to June 1st at \$600, and gave the reasons for their estimate. The jury allowed the sum of \$200. Upon a review of the testimony, we are of opinion, without going into particulars, that it sustained the amount allowed by the jury. The plaintiffs made frequent complaints of the delay, which, upon the evidence, was unnecessary, and were assured that a new pump would be speedily procured, and were kept in constant expectation that operations would be resumed. They had to feed and take care of several head of horses. They also had to keep their mining force partially organized, so as to be ready to deliver ore as soon as the company resumed operations, and suffered loss in other ways from the long delay.

The jury ascertained that the profits on the 7,931 tons of ore which the plaintiffs

were not permitted to deliver was \$2,181. This was an allowance of 27½ cents profit per ton. There was evidence before the jury tending to show that the cost of the ore, and the expense of mining and putting it on the cars, including a royalty of 25 cents per ton, was only 71 cents, thus affording a profit to the plaintiffs of 39 cents per ton. They had a contract with Tollifer under which he was mining and putting the ore on the cars at the time of the breach of the contract at 50 cents per ton, which, with the royalty, made the entire cost 75 cents, thus showing a profit of 35 cents per ton, while the jury allowed only 27½ cents per ton; they probably taking into consideration and justly making a "reasonable deduction for the less time engaged, and for release from the care, trouble, risk, and responsibility attending a full execution of the contract."

We are of opinion the verdict was not contrary to the evidence nor excessive. The judgment of the circuit court must be affirmed.

(96 Va. 235)

REUSENS v. LAWSON et al.

(Supreme Court of Appeals of Virginia. Sept. 15, 1898.)

BOUNDARIES — SUFFICIENCY OF EVIDENCE — TRIAL — INSTRUCTIONS.

1. Plaintiff, claiming title under a grant, the boundaries of which were disputed, introduced evidence that a certain poplar stump belonged to a poplar tree named as the beginning point. There was evidence that it corresponded to the calls of another ancient survey adjoining, which referred to the tree as the beginning point of the original grant, embracing both tracts, but it described the tree as on the north bank of a certain river instead of on the east bank. Another survey had a call for the same tree, 640 poles from a certain branch, but the stump was much further away. The description of the original grant called for certain trees which, by beginning at the stump, were not found, and for certain others of a kind which did not grow where the courses were run out as claimed by plaintiff. The survey as claimed also crossed a mountain, beyond which there was evidence that one of the ancient owners did not claim, and on the nearer side of the mountain trees of the kind named abounded. The surveyor who had surveyed the original grant had only four years previously surveyed an adjoining grant, through which this one, as now claimed, would have run, but he made no mention or note of that fact. There were discrepancies also in the courses and distances. *Held* not to warrant a reversal of a finding that such stump was not the true point of beginning.

2. An instruction which correctly states the law should, on request, be given, if there is any material evidence to which it is applicable.

Appeal from circuit court, Carroll county.

Ejectment by G. Reusens against J. C. Lawson and others. There was a judgment for defendants, and plaintiff appeals. Affirmed.

A. A. Phlegar, for appellant. S. A. Anderson, for appellees.

RIELY, J. This is an action of ejectment to recover 206 acres of land, which the plain-

tiff asserts is a part of a large grant to Gen. Henry Lee, as assignee of John Miller, and within the survey for Miller upon which the grant was founded.

The case is before us for the second time. It was here before mainly upon matters of law. 91 Va. 226, 21 S. E. 347. It is now before us chiefly upon questions of fact.

The defense was twofold: First, that the land was not within the Miller survey; and, second, that, if covered by it, the defendants, and those through whom they claim, were purchasers for value, and had held adverse possession under color and claim of title beyond the statutory period of limitation.

Upon the plaintiff devolved the burden to prove, by satisfactory evidence, his title to the land, and to establish his right to recover possession thereof from the defendants.

One of the principal difficulties encountered by the plaintiff in making out his title was in establishing satisfactorily the beginning corner of the Miller survey. Unless this corner was established, he could not locate correctly or satisfactorily the Miller survey, and prove that the land in controversy is within its boundaries.

It is not proposed to go into minute discussion of the evidence, but merely to advert to some of its principal features.

The original survey for Miller and the grant to Lee describe the land embraced therein as follows: "Beginning at a poplar and persimmon on the north side of Big Dan river; thence new lines N., 23 degrees E., 1,280 poles, to a chestnut tree; N., 40 degrees E., 500 poles, to a black walnut tree; N., 40 degrees E., 1,600 poles, to a black walnut tree and hickory near a path; S., 45 degrees E., 1,300 poles, down the Mayo river, to Magruder's corner white oak; thence his line N., 20 degrees W., 36 poles, to a white oak," etc.

The plaintiff claimed as the beginning corner of the Miller survey the point at A, on Big Dan river, on the map made by Surveyor Branscome.

No witness introduced on the trial ever saw the poplar and persimmon which are described as the beginning corner, and there was no direct testimony to fix their particular location on the river. The plaintiff claimed to fix the point at A as the beginning corner by reference to the deed from Henry O. Middleton, a grantee of the larger and northern part of the Miller survey to Stephen Goings, for 238 acres of the Lee grant. This deed was made in 1831, 36 years after the Miller survey. It describes the land conveyed to Goings as a part of the large survey of Russell (Miller), in Patrick county, on the Blue Ridge mountain, and as beginning at a large poplar on the north side of Big Dan river, "the beginning corner of the said Russell survey." The plaintiff claimed that a poplar stump at or near the point at A on the river was the poplar referred to as the beginning corner of the Russell survey. It was a "large poplar" in 1831, when the deed

from Middleton to Goings was made, and stood near where the road crosses the river; but, so far as the record discloses, no witness introduced ever saw the tree when standing, and there was no evidence that there was any mark on it, or on the log after the tree had fallen, or on the stump, to identify the tree as the corner of a survey, or that it was a marked tree. The plaintiff contended that its identity was established by the ability to begin at it, and run the lines of the Goings land according to the courses and distances given in the deed. This, according to the testimony, was not free from doubt.

On the other hand, there was much in the evidence to cast great doubt upon the poplar stump as the beginning corner of the Russell (Miller) survey. It is not on the north, but on the east, side of the river. Surveyor Pedigo did not agree that it was the beginning corner, but commenced his survey 87 poles further down the river. The Ternan grant adjoins the Lee grant, and the McLean survey, upon which the Ternan grant was issued, was made by the same person (Surveyor Stovall) who made the Miller survey, and at the same time. Both surveys have the same beginning corner. The McLean survey and Ternan grant begin at John Miller's corner poplar on the north side of Big Dan river, and thence run down the river, "as it meanders, 640 poles, to Wm. Carter's corner beach at the mouth of Buzzard branch." The branch, like the river, is a fixed natural monument. The corner trees (poplar and persimmon) at the beginning of the Miller survey not being found, and the location of the corner being in great doubt, it ought to be reached and located by running up the river, as it meanders, 640 poles from the mouth of Buzzard branch, but the testimony shows that a line so run would stop far short of the point at A; would not, in truth, go over half the distance.

If the point at A be in fact the beginning corner of the Miller survey, and the courses and distances thereof be thence run, the result should correspond with the requirements of the calls; but, so far from this being the case, it appeared, on running from A the calls of that survey, that there was much in the result to negative the claim that the point at A was the beginning of that survey.

The first call is N., 23 deg. E., 1,280 poles, to a chestnut tree. Being run from the point at A, no corner was found at B, the end of the call. Chestnut timber was found there, but no marked chestnut tree. The next call is N., 40 deg. E., 500 poles, to a black walnut tree. No walnut tree or corner was found at the end of the line. The next call is N., 40 deg. E., 1,600 poles, to a black walnut tree and hickory, near a path. The distance of this call, if run out, would have gone down the Blue Ridge, and on the north side of Bull Mountain, and away from Mayo river and the requirement of the next call. The plaintiff did not run out the distance, but stopped at

Witt's Spur path, at the point at D, 516 poles short of the call. No evidence of any corner was found at the path at D, and, though the call was for a walnut tree, none was found, and the testimony was that at D the soil is not adapted to the growth of walnut timber, and that none was ever known to grow there. The fourth call is S., 45 deg. E., 1,300 poles, down Mayo river, to Magruder's corner white oak. The Magruder survey calls for several white oak corners in this vicinity, and to reach the "fallen white oak," which the plaintiff contended was the one referred to, the course and distance had to be changed. Instead of running S., 45 deg. E., 1,300 poles, the line had to be run S., 35 deg. E., 1,543 poles, in order to reach the "fallen white oak." Whether this white oak was the one referred to, or the one further south, marked "White Oak Stump" on the map, the evidence was contradictory, there being testimony before the jury that Middleton, in looking up the boundaries of the land, claimed the "white oak stump" as the Magruder white oak referred to in the Miller survey.

In addition to the discrepancies between the calls of the survey and the courses and distances which were run by Surveyor Branscome by direction of the plaintiff, there was much in the evidence to throw doubt upon his right to the parcel of land in dispute.

Starting at the point at A, which was contended for by the plaintiff as the beginning corner of the Miller survey, and running the very first call, the line, before going half the distance of the call, crosses the mountain, and passes directly through the tract of 235 acres of B. Magruder. The Miller survey was made in 1795. The survey of the Magruder tract had been made by the same surveyor only four years before, and the patent for it duly issued. It is not reasonable that, with the Magruder survey fresh in his memory, he would have run through the Magruder land, and included an unknown and indefinite portion of it within the Miller survey, without some mention of the fact; or at all probable that the line would have been so run, and no reference be made in the calls to the lines of the Magruder survey.

The Miller survey, as run by Surveyor Branscome, in accordance with the contention of the plaintiff, includes much land beyond the mountain, but it was in evidence that Middleton, and, after him, Purvis, his grantee, were both in the county in the lifetime of Surveyor Stovall, and while he was still the county surveyor, looking up the corners and boundaries of the land, and that neither of them ever contended that any of the land lay north of or beyond the Blue Ridge, but, on the contrary, only claimed to the brow of the mountain upon its southern side. This testimony tended to explain why, in starting at the point A, claimed by the plaintiff as the beginning corner, and running the calls of the survey, no walnut timber was found at D, as called for, and to prove the incorrectness of the starting point; it being shown that there is no walnut

timber on the top or on the north side of the mountain, and that none ever grew there, but that it abounds on the south side of the mountain.

The fourth call from the walnut tree and hickory near a path at the end of the third line is "down the Mayo river to Magruder's corner white oak," and shows that the walnut tree and hickory were in close proximity to the river, or, making allowance for the loose surveys of that day, that the river was at least in sight. The evidence, however, shows that Hylton's spring, the headwater of the Mayo river, is 300 poles south of the point at D, claimed by the plaintiff as the end of the third line, and that the mountain lies between D and the river. Bearing this in mind, and recalling the evidence that no corner or walnut tree was found at the point at D, and that no walnut timber ever grew there, but that it did grow on the south side of the mountain, and also that Branscome had to change the course of the fourth call, and protract the distance 243 poles, in order to reach the "fallen white oak," claimed by the plaintiff as the end of the fourth line, and the inference is both reasonable and strong that the point at D is much too far north to be the corner of the Miller survey at the "black walnut tree and hickory near a path," even if Witt's Spur path, of all the old paths shown to have existed, be the one referred to.

There was no evidence that the points at A, B, C, D, and E on Branscome's map were ever claimed by Middleton or Purvis as corners, when looking up the corners and locating the boundaries of the Miller survey in the lifetime of the surveyor who made it, which points, if correct, would include the parcel of land in dispute; but there was evidence before the jury tending to prove that Purvis, who at one time spent four months in endeavoring to establish the boundaries of his land, never claimed it.

The facts which have been adverted to, and others that might be mentioned, tended to prove that the location of the Miller survey, as contended for by the plaintiff, was too high up, and that it lies lower down and further south.

Without further reference to the evidence and its many discrepancies, it is sufficient to say that we have carefully gone over it all, and studied it in connection with the maps and surveys filed with the record, and are unable to say, after mature consideration, that the jury were not warranted in finding a verdict for the defendants, and that the circuit court erred in refusing to set aside the verdict as contrary to the evidence. Whether the land sued for lies within the boundaries of the Miller survey, and is covered by it, was, upon all the evidence, left in such doubt and uncertainty as that the jury could reasonably find that it was not. The jurors were, under the law, the judges of the weight and effect to be given to the evidence. Under our judicial system, they

are the triors of the facts. The court before which the case was tried saw the witnesses and heard them testify. It was satisfied with the verdict, or, at least, did not feel justified in disturbing it. Its sanction of the verdict gives additional weight to it. This court will not, under these circumstances, set aside the verdict of a jury, except where the jury has plainly decided against the evidence or without evidence, although the judges of this court, upon the evidence as it is presented to them in the record, if they had been on the jury, might have rendered a different verdict. We cannot, under repeated decisions of this court, set aside the verdict of a jury merely in a doubtful case. We can only do so where the verdict is a plain deviation, upon the evidence, from right and justice, or where there is a palpable insufficiency of evidence to sustain it. This is the established practice of this court, as settled by a long line of decisions. *Kimball v. Friend*, 95 Va. 125, 27 S. E. 901; *Railway Co. v. Bryant*, 95 Va. 212, 28 S. E. 183; *Michie v. Cochran*, 93 Va. 641, 25 S. E. 884; *Read's Case*, 22 Gratt. 924; *Valden's Case*, 12 Gratt. 717; *Brugh v. Shanks*, 5 Leigh, 598.

It was said in *Hill's Case*, 2 Gratt. 594, which was approved in *Read's Case*, 22 Gratt. 944, that, "where the jury and the judge who tried the cause concur in the weight and influence to be given to the evidence, it would be an abuse of the appellate powers of this court, remote as it is from the scene of the transaction, having the evidence only on paper, divested of many elements which enter into every jury trial, and which, from their nature, cannot be presented on paper, to set aside a verdict and judgment because the judges of this court, from the evidence written down, would not have concurred in the verdict. Although we have, contrary to the rule of the English courts, decided that it is within the appellate powers of this court to set aside a verdict because it was not authorized by the evidence, yet it is only in a case where the jury have plainly decided against the evidence, or without evidence, that this appellate power will be exercised."

And a similar statement of the powers and practice of this court with respect to new trials was made by Judge Christian in *Blosser v. Harshbarger*, 21 Gratt. 214.

Having reached the conclusion that the verdict of the jury was warranted by the evidence, and that we are not authorized, in view of the long and well-settled practice of this court, to interfere with the verdict by setting it aside and awarding a new trial, even if we were so disposed, it becomes unnecessary to consider the defense of adversary possession.

The only other matter left for determination relates to the propriety of instructions numbered 5, 6, and 7, which were given for the defendants. In this the court below committed no error.

As to instructions 5 and 7, there being evi-

dence before the jury upon which to predicate them, it was the duty of the court to give them upon the request of the defendants. Where there is evidence tending to make out the supposed case, of however little weight the evidence may appear to the court to be entitled, or however inadequate, in its opinion, to make out the case supposed, it is safest and best for the court not to refuse to give an instruction asked for, if it propound the law correctly. *Michie v. Cochran*, 93 Va. 641, 25 S. E. 884; *Hopkins v. Richardson*, 9 Gratt. 485; *Kimball v. Friend*, 95 Va. 125, 27 S. E. 901.

As to instruction No. 6, it is in accordance with the views of this court as laid down on the former appeal; and, considered in connection with instruction No. 13 given for the plaintiff and explained by it, instruction 6 could not have possibly prejudiced the plaintiff.

The case was submitted to the jury with correct instructions upon the different phases of the evidence, which was in great part obscure, uncertain, and conflicting. Upon the consideration of the whole evidence and under the instructions, a verdict was fairly rendered by the jury in favor of the defendants; the trial court approved the finding; and this court, bearing in mind the principles which control the exercise of its appellate powers in such cases, cannot disturb the verdict.

The judgment of the circuit court must be affirmed.

CARDWELL, J., absent.

(104 Ga. 831)

CENTRAL OF GEORGIA RY. CO. v. STATE.

(Supreme Court of Georgia. July 27, 1898.)

RAILROADS—OFFICE—VENUE—STATUTES—ENACTMENT—FORM—SUBJECT—TITLE—CODES.

1. If a railroad company of this state refuses to comply with an order passed by the railroad commissioners requiring it to erect a depot building in a given town or city through which the line of its road passes, such refusal, in contemplation of law, is at the company's principal office or place of business; and consequently the superior court of the county in which that office is located, and it alone, has jurisdiction of an action by the state against the company for the recovery of the penalty incurred by the company in refusing to yield obedience to such order.

2. The intention of the act of December 16, 1895, adopting the present Code, and making the same of force as the Code of Georgia, is to enact into one statute law all the provisions embraced in that Code.

3. This act is not unconstitutional because it did not incorporate in its body the various sections of the Code, nor because these sections were not read three times, and on three separate days, in each house of the general assembly, before the passage of the act.

4. The act in question does not, within the meaning of article 3, § 7, par. 8, Const. Ga., refer to more than one subject-matter, nor does it contain matter different from what is expressed in the title thereof.

5. The effect of this act is to make as part of the law of the state all new matter embodied in the Code of 1895 which could be constitutionally enacted by the legislature. It follows, therefore, that an act, though unconstitutional as originally passed, on account of containing matter different from what was expressed in its title, if otherwise constitutional, became valid law by its incorporation in the present Code, upon the passage of the act first above mentioned.

(Syllabus by the Court.)

Error from superior court, Monroe county; M. W. Beck, Judge.

Action by the state against the Central of Georgia Railway Company for the recovery of a penalty incurred by the company in refusing to yield obedience to an order of the railroad commissioners requiring it to erect a depot building. There was a judgment for plaintiff, and defendant brings error. Reversed.

Lawton & Cunningham, Hall & Boynton, and Dessan, Bartlett & Ellis, for plaintiff in error. J. M. Terrell, Atty. Gen., for the State.

LEWIS, J. 1. The latter part of section 2189 of the Civil Code gives the railroad commissioners power to require the location of such depots, and the establishment of such freight buildings, as the condition of the road, the safety of freight, and the public comfort and convenience require. This provision is contained in the act of October 29, 1889 (Acts 1889, p. 132). Under section 2196 of the Civil Code a penalty is prescribed against any railroad company doing business in this state for a violation of the rules and regulations fixed by the railroad commissioners. This section is a codification of section 9 of the act of October 14, 1879 (Acts 1878-79, p. 129). It appears from the record that on January 28, 1896, the railroad commissioners of this state passed an order requiring the Central of Georgia Railway Company to erect a suitable depot building at Forsyth, in Monroe county. The company refused to comply with this order, and suit was instituted by the state, through the attorney general, in Monroe superior court, to recover the penalty provided for in the above section 2196 of the Civil Code. Unless the right to sue elsewhere is specially given by statute, suits against a railroad company of this state should be brought in the county of its principal place of business. The legislature, by special provision, in the act upon which this suit is based, has undertaken to fix the venue of such actions. Section 2196 of the Civil Code declares: "An action for the recovery of such penalty shall be in any county in the state, where such violation has occurred or wrong has been perpetrated, and shall be in the name of the state of Georgia." It is contended by counsel for the state that the superior court of Monroe county has jurisdiction of the petition, as it appears that the violation of the rule of the railroad commissioners and the perpetration of the wrong set forth occurred in that coun-

ty. It is not alleged either that this county was the principal place of business of the defendant company, or that the company had any agent or employe in that county charged either with the duty or power of erecting a depot. The wrong done in this case was a failure on the part of the company, through its principal officer, to obey the order of the railroad commissioners. It involved simply an omission of a duty. No agent in Monroe county was charged with this duty, or had anything whatever to do with its performance, so far as the record shows. No disregard, therefore, of the mandates of the railroad commissioners occurred in that county. The wrong was perpetrated by the company through its principal officer, who failed or refused to obey the order in question. The violation, therefore, occurred in the county where the company's principal office is located, and there the wrong was perpetrated. In *Coles v. Railroad Co.*, 82 Ga. 149, 9 S. E. 127, it appears that the gist of the action was the refusal of the company to issue a through bill of lading over its own line to the line connecting its road with Brunswick, the latter extending from Albany to Brunswick. The suit was brought in Dougherty county. According to the allegations in the declaration, the refusal did not occur in that county, but in other counties. It was held by this court that the suit ought to have been brought either in those other counties, or in Chatham county, the residence of the defendant. It further appeared in that case that before the freight arrived in Albany plaintiffs notified defendant's agent that it was coming, and requested that it be transferred in the same cars from the defendant's road to the Brunswick & Western Railroad, and that, after the cotton arrived at Albany, the same request was made, and the defendant refused to comply with the request. Notwithstanding the issuing of the bill of lading involved work to be done by the company in Dougherty county, to wit, a transfer of the freight from one road to another there, yet this court held that this did not give Dougherty superior court jurisdiction. So, in the case we are now considering, although the work contemplated by the order of the commissioners was to be performed in Monroe county, yet the gist of the action was a refusal to obey the order, and hence the action should have been brought where such refusal took place. In refusing to perform a duty enjoined upon railroad companies by statutes, and which can only be performed by its general officers, they are presumed to act at the principal place of business of the company. We think, therefore, that the court erred in not sustaining the first ground of the demurrer to the petition.

2. It is contended by counsel for plaintiff in error that there is no law in this state which confers upon the railroad commissioners the power and authority to require a railroad company to erect depot buildings; that the act which undertakes to confer this

power, to wit, the act approved October 29, 1889, amendatory of the act of 1879, is unconstitutional, because it contains matter different from what is expressed in the title thereof; and that the act approved August 31, 1891, which undertook to remove the defect in the title in the act of 1879, is itself unconstitutional, because its title does not indicate the matter contained in the body of the act. On the other hand, it is contended by counsel for the state that, the act of 1889 being codified as section 2189 of the new Code, the act of 1895 adopting and making of force that Code cured all those defects, if any, which had existed in the act of 1889. Counsel for plaintiff in error insists, however, that by the adopting act of 1895 the legislature never intended to make anything in the Code law which was not the law before its adoption; and that, even if such was its intention, it did not have the power, under the constitution, to enact in this way new statutes, or any changes or modifications in the existing laws of the state. We will not pause to consider or pass upon the questions raised in reference to the constitutionality of the acts of 1889 and 1891 as originally passed by the legislature, but we will pass over these to consider the more important question as to what validity or force the adopting act of the legislature gave to the provisions in the present Code of 1895. Upon this issue was fought the great legal battle between counsel for the contending parties in this case; and the view we take of this question, which can scarcely be measured in its importance and interest to the profession and the people generally, renders it unnecessary to consider the other constitutional questions touching defects in the titles of the original acts. It is insisted that by the act approved December 19, 1893, providing for the appointment of three commissioners to codify the laws of Georgia, these commissioners were simply empowered to codify and arrange in systematic and condensed form the laws then in force in the state, and had no authority whatever to embody in the Code any new law, or any provision which modified any existing law of the state. No one would hardly pretend that any new matter in the Code derives force or efficacy by virtue of the act of the commissioners alone. Even if the legislature had attempted to confer upon the commissioners the power to make changes in the law, and to embody in the Code such new matter as they saw proper, such an act of the legislature, in so far as its purpose was to thus create new legislation for the state, would have been an absolute nullity. Enacting and changing laws for a state devolves by the constitution upon the legislative branch of its government, and that branch cannot delegate the power to another. A consideration, therefore, of the duties and powers imposed upon the code commissioners, can throw no light up-

on what construction should be given an act of the legislature adopting their work. If the codifiers introduced any new matter in the Code, it, of course, amounted to nothing unless it afterwards was enacted into statute by legislative sanction. Where such matter is not inherently unconstitutional,—that is, where it embraces nothing that is not a proper subject-matter of legislative enactment,—there can be no question but that the legislature has the power to enact it into law or not, as it sees proper. When the work of the commissioners was completed, it was laid before the legislature. It had the power to reject that work or to accept it, and in its acceptance it had the power simply to provide for the pay of the commissioners, and the publication of their work for the use of the public; and, if nothing more was done, there would have been a want of legislative sanction to any new matter embodied in the Code, and hence such new matter would never have had any validity. The vital question, then, in this case, is not what the commissioners had the power to do, but what the legislature intended to do with their work. That intention can only be gathered from what the legislature itself has deliberately declared when it finally passed upon the work reported to it by the commissioners. This final action of the legislature is embodied in what is known as the "Adopting Act" of the Code, approved December 16, 1895. Section 1 of that act declares: "That the code of laws prepared under its authority by John L. Hopkins, Clifford Anderson, and Joseph R. Lamar, and revised, fully examined and identified by the certificate of its joint committee, and recommended and reported for adoption, and with the acts passed by the general assembly of 1895 added thereto by the codifiers, be, and the same is, hereby adopted and made of force as the Code of Georgia." This portion of the body of the act is covered by these words in the title, "An act to approve, adopt, and make of force the code of laws prepared under the direction and by authority of the general assembly," etc. A legislative body should always be presumed to mean something by the passage of an act. If, as contended by plaintiff in error, the legislature by this act intended to adopt such provisions in this Code as were law anyway, without any further legislative sanction whatever, then the act in question is absolutely meaningless. It would give no more force or effect to the Code of 1895 than such a work would have carried with it emanating from a private source, and without any legislative warrant or authority whatever. The code of laws designated and identified in the act was adopted and made of force as the Code of Georgia. Not a part of the Code was then made of force, but the entire Code, as compiled by the commissioners. It would be difficult to conceive how lan-

guage could more clearly or forcibly express the real intent of the legislature in this matter than the words used in the title and the body of this act. If it means anything, it means a purpose of the legislature to adopt and make of force a code of laws, and hence to breathe into every provision in that code the vitality of a legislative enactment. Any other construction would ascribe to the legislature the folly of declaring, in effect, "We adopt as law in this code everything which would be law anyway without further sanction." It would be just as reasonable for that body to reenact verbatim et literatim a statute which it recognized and knew to be already of force. Had such been the legislative will, that body would, doubtless, have pursued the same course with reference to the Code of 1895 that its predecessors followed in regard to the Codes of 1868, 1873, and 1882. The Code of 1868, known as "Irwin's Code," and also the Code of 1873, were both the work of private enterprise, their compilation not even having been previously authorized by any act of the legislature. The Code of 1882 was compiled in pursuance of an act of the legislature, but neither this edition nor the other two named received the sanction of an adopting act. After each of these works was completed, it was, by resolution of the general assembly, submitted, the first to a committee of three, and the last two to the attorney general of the state, and each received favorable reports. This was a completion of the work, and all the legislature afterwards did was to order a publication of a given number of volumes, and make appropriation therefor. When, however, the Code of 1895 was reported by the commissioners, and was examined, approved, and favorably reported by a joint committee of both houses of the legislature, that body went a step further, and passed the "Adopting Act" of 1895. Instead of treating the work as it did the three preceding editions, it pursued the same course followed by the legislature when it passed the act of December 19, 1860, adopting and making of force what has ever since been known as the "Code of 1863." There is a remarkable similarity between the words used in the title and body of that act and those employed in the act of December 19, 1895. The title of the former was, "An act to approve, adopt and make of force, in the state of Georgia, a revised code of laws, prepared under the direction and by authority of the general assembly thereof; and for other purposes therewith connected." The title to the latter was, "An act to approve, adopt and make of force the code of laws prepared under the direction and by authority of the general assembly, to provide for the printing and publication of the same, and for making indices thereto, and for other purposes." In the body of the former act it was declared that the code designated "is

hereby adopted as the Code of Georgia; to be of force and take effect on the first of January, 1862." By a subsequent act of the legislature this time was extended to January 1, 1863. In the body of the act of 1895 it was declared that the code mentioned "be, and the same is, hereby adopted and made of force as the Code of Georgia." In the light of the numerous decisions of this court, some of which are hereinafter referred to, there can be no question as to what was the intent of such language in the act of 1860; the legislative purpose being to enact into law every provision contained in the Code, including such new matter as was introduced, as well as such changes and modifications as were clearly made in existing laws. The power conferred upon the first code commissioners by the act of December 9, 1858, was no greater than that conferred by the act of December 19, 1893, providing for the present Code. In the former act it was provided that the commissioners should "prepare for the people of Georgia a code, which should, as near as practicable, embrace, in a condensed form, the laws of Georgia, whether derived from the common law, the constitutions, the statutes of the state, the decisions of the supreme court, or the statutes of England of force in this state." In the act of 1893 power was conferred upon the commissioners "to codify and arrange in systematic and condensed form the laws now in force in Georgia, from whatever source derived." The commissioners had no more authority to make changes in the law in one instance than they had in the other. It therefore follows that the effect of an adopting act cannot be measured by the powers with which the codifiers were clothed in the original act of the legislature, which was the first step towards providing a code. Even if the position taken by counsel for plaintiff in error be correct, that it was the constitution of 1865 that first gave the Code of 1863 vitality and force as a legislative enactment, this will not help them out of the difficulty of their position. That constitution, so far as it bears upon the subject, simply declares of force in this state "all laws declared of force by an act of the general assembly of this state, assented to December 19, A. D. Eighteen Hundred and Sixty, entitled 'An act to approve, adopt, and make of force in this state of Georgia, a revised code of laws,' etc. The constitution itself, therefore, refers only to such provisions in the code as were declared to be of force by the adopting act of 1860. This necessarily carries us back to the terms of that act, and involves the question as to what laws it intended to declare of force. There is quite a difference between a code of laws for a state and a compilation in revised form of its statutes. The code is broader in its scope, and more comprehensive in its purposes. Its general object is to em-

body as near as practicable all the law of a state, from whatever source derived. When properly adopted by the lawmaking power of a state, it has the same effect as one general act of the legislature containing all the provisions embraced in the volume that is thus adopted. It is more than evidentiary of the law. It is the law itself. In 6 Am. & Eng. Enc. Law (2d Ed.) p. 173, it is declared: "The word [code] is used frequently in the United States to signify a concise, comprehensive, systematic re-enactment of the law, deduced from both its principal sources,—the pre-existing statutes and the adjudications of courts,—as distinguished from compilations of statute law only." We quote the following from Black on Interpretation of Laws (page 363): "Although a code or revision may be made up of many provisions drawn from various sources, though it may include the whole or parts of many previous laws and reject many others in whole or in part, though it may change or modify the existing law, or though it may add to the body of law previously in force many new provisions, yet it is to be considered as one homogenous whole, established 'uno flatu.' All its various parts or sections are to be considered and interpreted as if they were parts of a single statute. And hence, according to a well-known rule, the various provisions, if apparently conflicting, must, if possible, be brought into harmony and agreement. In order to bring about this harmony and agreement, the court which is called upon to interpret the code will look through the entire work, and gather such assistance as may be afforded by a complete survey of it." Whenever the legislature, therefore, employs such words as "adopting a code," no other legitimate or reasonable construction can be given the language itself than an intention to enact and make of force as a statute every provision in the entire work which it has under consideration. Such being the intention, then, of the legislature by the adopting act of 1895, it remains to be considered whether or not this purpose has been legally and constitutionally declared.

3. The present constitution of this state (article 3, § 7, par. 7; Civ. Code, § 5770) declares that "every bill, before it shall pass, shall be read three times, and on three separate days, in each house, unless in cases of actual invasion or insurrection." One attack made upon the adopting act is that it does not contain in its body any of the various provisions of the law which it seeks to declare of force, and that under the constitutional provision above cited it was necessary that these provisions should have been embodied in the act, and should have been read three times before their passage. If this contention be correct, then a large body of our laws, many of which have been enforced for a century, are unconstitutional and void. The act of 1782 revived the colonial statutes by mere reference, and without embodying them

in the act itself. The act of 1784 adopted the common law of England. These laws were passed under a constitution which required bills to be read three times in the house and twice in the council; and the common law not only was not so read, but very few, if any, of the legislators knew of all its provisions. The Code of 1863 (section 1, par. 6) went further than the original adopting act of 1784, and made parts of the civil and canon law of force in this state. By virtue of section 3945 of the present Code, "equity jurisprudence embraces the same matters of jurisdiction and modes of remedy in Georgia as was allowed and practiced in England." This was simply an adoption of such jurisdiction and modes by mere reference. The New York percentage table for calculating reinsurance, the American experience or actuaries' table of mortality, and Stern's Calendar are thus adopted by acts codified in sections 2045, 2049, and 5169 of the Civil Code. Similar instances might be multiplied to such an extent as to show that a tremendous breach, if not a total wreckage, of our system of laws, would be accomplished if the judicial construction contended for in this case were placed upon the constitutional provision above quoted. By the act of February 25, 1875 (Acts 1875, p. 162), a charter was granted to the town of Douglasville simply by adopting by reference sections 774 to 797 of the Code of 1873. In *Ayeridge v. Commissioners*, 60 Ga. 404, these sections were declared to be unconstitutional, yet this court held, in *Town of Douglasville v. Johns*, 62 Ga. 423, that the above act of 1875, incorporating these unconstitutional provisions by reference, was valid. On page 427, Justice Jackson, delivering the opinion, says: "The legislature might have taken them from an English book, or from a newspaper, and ingrafted them on the charter. When it did so, it became law to this town and all its citizens." In *Association v. Richards*, 21 Ga. 592, it was held that an act of the legislature incorporating a company by its constitution and by-laws, without embodying the same in the act, was constitutional and valid. On page 613, Lumpkin, J., delivering the opinion, said: "Suppose the legislature were to adopt the Bible as a part of the law of the land. Would the act be void, unless the whole of the Old and New Testament were embodied in the statute? Suppose it were to declare that the Levitical degrees as set forth in the Old Testament should fix the relationship within which marriage might or might not be contracted; or suppose it were to say that Mr. Greenleaf's treatise on Evidence should be the guide of the courts in settling the rules of testimony. It is needless to multiply illustrations. The position is untenable and impracticable. Our legislature has by one sweeping act declared the whole of the ordinances of one of our cities valid and of binding force. These ordinances fill a volume of some five hundred pages, and yet it is probable that not one of them was read,

certainly not one of them is inserted in the amendatory act. * * * Set aside this charter, and you eviscerate the digests and statute books of the state. Nay, more; you annul unquestionably the adopting act of 1784; and with it go the common and statute law of England, heretofore of force in this state." This point as to the constitutionality of an act thus adopting a code was practically made and decided by the supreme court of Alabama in *Dew v. Cunningham*, 28 Ala. 466, and also by the supreme court of Florida in *Mathis v. State*, 12 South. 681 et seq. *Mabry, J.*, who delivered the opinion in the last case, on page 686, after citing the case of *Dew v. Cunningham*, *supra*, says: "In this case it was contended that the Code of Statutory Laws, then recently adopted by the legislature, was not in force, because at the time of its adoption it was not read upon three several days in each house of the general assembly, and that it had not the style required by the legislature. The constitution then in force in that state provided that 'no bill shall have the force of law until, on three several days, it be read in each house, and free discussion had thereon,' and the style of all laws shall be, 'Be it enacted by the senate and house of representatives of the state of Alabama, in general assembly convened.' The Code was held in this case to have been constitutionally enacted, although not embodied in the bill adopting it. *Walker, J.*, said in his opinion: 'We do not understand this to mean that everything which is to become a law by the adoption of the bill must be read on three several days. Such a construction is not warranted by the language of the constitution. Our legislative annals afford many instances of the adoption, by one comprehensive enactment, of large masses of law, which were never read on three several days in both branches of the legislature.' " See, also, *Ex parte Thomas*, 113 Ala. 4, 21 South. 369 et seq.

4. It is further contended by counsel for plaintiff in error that the adopting act of 1896, if given the construction we have placed upon it, is violative of article 3, § 7, par. 8, Const. (Civ. Code, § 5771), which declares that "no law or ordinance shall pass which refers to more than one subject-matter, or contains matter different from what is expressed in the title thereof." This presents the only question in the case which, to our minds, is at all difficult of solution. An act adopting a code necessarily, in one sense, refers to a great many subjects, and enacts into statute provisions not germane one to another. We have, however, after much reflection, thought, and research, reached the conclusion that the position of the able counsel of plaintiff in error is founded upon a misconception of the real meaning and purpose of the provision in the constitution above quoted. This constitutional restriction 'prohibiting the passage of any law containing matter different from what is expressed in its title originated in

this state, and grew out of a memorable event in its history. The act of January 17, 1795, known as the "Yazoo Act," had for its purpose, as its title declared, "payment of the late state troops," and "protection and support of its frontier settlements." The body of the act made a large grant of land to a private company of speculators, and when the fraud was discovered it gave rise to a long and bitter controversy between the leaders of different parties and factions in the state. *Mayor, etc., of City of Savannah v. State*, 4 Ga. 38; *Howell v. State*, 71 Ga. 227. The manifest purpose, then, of this provision in the constitution, was to prevent a repetition of such fraud. Its object, therefore, was not to prevent comprehensive, but surreptitious, legislation. The other provision—that no bill shall contain more than one subject-matter—does not appear in the constitution of 1795, but has since become a part of our constitutional law. Its object was not so much to prevent surreptitious legislation as to inhibit the passage of what is often termed "omnibus" or "log-rolling" bills. A bill may contain more than one subject, and yet, if its title clearly indicates all its subjects, it will not be apt to mislead the legislature as to its intent and scope, and cannot, therefore, be considered surreptitious legislation. Experience, however, taught that it was often the case that many matters were embraced in the same bill adverse in their nature, and having no necessary connection, with the view of combining in their favor the advocates of all, and thus secure the passage of several measures, no one of which could succeed upon its own merits. It was to prevent this dangerous practice that our organic law declares that a bill should contain but one subject-matter. An act, however, adopting a code, or a system of laws, obviously does not fall within any of the classes of mischiefs which this restriction in the constitution was intended to remedy. No one need be misled by a title to an act which declares that its purpose is to adopt a certain code or system of laws; nor is there anything in such an act to occasion any alarm that it would pass contrary to the wishes of the people by virtue of improper combinations among members of the legislature. What the constitution looks to is unity of purpose. It does not mean by one subject-matter only such subjects as are so simple that they cannot be subdivided into topics; but it matters not how many subdivisions there may thus exist in a statute, or how many different topics it may embrace, yet if they all can be included under one general, comprehensive subject, which can be clearly indicated by a comprehensive title, such matter can be constitutionally embodied in a single act of the legislature. On the other hand, should the legislature embody in one act two or more different subjects, however simple they may be, which have no relation or connection whatever one with the other, the constitution is

violated. The following very apt illustration has been suggested to this court: "You can, in one act, charter Greater New York, with its millions, and embrace therein an endless variety of legislation concerning police, streets, wharves, courts, jails, mayor, council, tax collecting, tax assessing, legislative and executive functions; but you cannot, in the same act, charter two small villages like High Shoals and Belton." See *King v. Banks*, 61 Ga. 20. The Code of 1863 was not the first code that ever went into effect in Georgia. In *Lamar's Digest*, on page 1098, we find a resolution of the legislature, approved December 16, 1811, appointing a joint committee on the Criminal Code, "with power to add to and enlarge the extent of articles embraced by the Code now reported, and further to recommend such alterations in that Code as they may deem necessary." On page 540 of this work begins the Penal Code of 1811, adopted by an act with the title, "To ameliorate the Criminal Code, and conform the same to the penitentiary system." On page 564 begins the Penal Code of 1816, adopted by an act with the title, "To reform the Penal Code of this state, and to adapt the same to the penitentiary system." That Code embraces 46 pages of that large volume. On page 611 of the same book begins the Penal Code of 1817, adopted under the title of an act "To amend the Penal Code of this state," embracing 44 pages of that volume. These Penal Codes treat of the various criminal offenses against the laws of the state, define them, provide for their punishment, etc. Offenders have been deprived of life and liberty under these penal laws. For years were they enforced by the courts as they stood in the Penal Codes, and we are not aware of any case where it was even suggested that there was anything in the body of the act different from what was expressed in the comprehensive titles above quoted.

Under the repeated rulings of this court in numerous cases the Code of 1863 has been given vitality and force by virtue of the adopting act of 1860. In *Shumate v. Williams*, 34 Ga. 249, it was declared that "the Code, begun in 1859, finished and adopted in 1860," etc., and it was further recognized in the same case that it introduced numerous changes in the old law. In *Bass v. Ware*, 34 Ga. 387, it was declared that the Code went into effect January 1, 1863. In *Bryan v. Doolittle*, 38 Ga. 258, it was said: "That Code, however, did not take effect until the 1st day of January, 1863." In *Railroad Co. v. Oaks*, 52 Ga. 414, it was stated: "The Code was adopted as the law of the state, upon the matters included in it, by the legislature, on the 19th of December, 1860, to take effect on the 1st of January, 1862, which date was afterwards changed to 1st January, 1863, when it became the law of the state." In *Kennedy v. McCordel*, 88 Ga. 454, 14 S. E. 710, it was decided that, after the Code went into effect on January 1, 1863, it repealed the old law, which

allowed the clerk of an inferior court to be the official attesting witness to a deed. In *Banks v. Sloat*, 69 Ga. 333, it is said, "Decree was rendered in February, 1862, nearly a year before the Code took effect." In *Lewis v. Turner*, 40 Ga. 418, it was declared that "the Code was adopted in 1860, and went into effect 1st January, 1863." From the facts in that case it will be seen that, in order to make the Western & Atlantic Railroad liable in the pending suit, it was necessary that the action should have been brought after the adoption of the Code. The suit was brought in 1861. The court held that this was within the time prescribed by the statute, as the Code was adopted by the legislative act of 1860. If, as contended by counsel for plaintiff in error in this case, the Code did not go into effect until the adoption of the constitution of 1865, that decision was manifestly wrong. If the first Code went into effect on January 1, 1863, it was necessarily by virtue of the legislative act of 1860, and not by virtue of the constitution of 1865, which did not go into effect until November 7th of that year. It is passing strange, if the contention of plaintiff in error be correct, that it never occurred to this court, in the consideration of all the cases we have cited, as well as many others of like import, that the Code of 1863 did not go into effect on the 1st day of January of that year, but on November 7, 1865. Apart from these decisions, we think the learned counsel have entirely misconceived the purpose of the constitution of 1865 in its allusions to and treatment of the Code. Article 5, § 5, of that constitution simply declares what laws of general operation were then of force in this state. They were: First, as the supreme law, the constitution of the United States; second, as next in authority thereto, the constitution of the state; third, in subordination to the foregoing, all laws declared of force by the act of the general assembly of December 16, 1861, and December 13, 1862, adopting the Code, and making it of force from and after January 1, 1863, and also acts of the general assembly passed since the date last written. It cannot, of course, be claimed that this section in the state constitution made the constitution of the United States the supreme law of the land. It was not the intention of the constitutional convention to enact statutes, but simply to recognize such as were then in existence. The purpose of such a recognition becomes patent when we reflect upon the political condition of this country at the time. The state had just emerged from the Civil War. It was passing through the period of reconstruction. Its laws to which reference was made in the constitution were mainly adopted during the period of secession, when the state was a member of the Southern Confederacy. Apprehension, doubt, and anxiety existed in the minds of many as to what effect this changed condition of affairs would have upon legislation enacted through that stormy period. To quiet

these doubts and allay these fears, the people, in convention assembled, declared in the constitution of their state what laws they recognized as being still valid and of binding effect. As was stated by this court in *Smith v. Ordinary*, 44 Ga. 504: "That portion of the constitution of 1868 which confirms and makes valid the acts of the legislature of 1865 and 1866 was only intended to quiet doubt, and was not necessary to give them validity." The question, however, we are now discussing has never before been directly made in this court. But, even if we regard these decisions, declaring, in effect, that the Code became of force by virtue of an act of the legislature, as mere obiter, they still deserve some weight, even as authority. If they did not correctly announce the law, then the frequent repetition by different members of the same court of an erroneous dictum on the same subject is certainly without a parallel in the history of any judiciary. In our research upon this subject we have been unable to find any authority in this state or elsewhere tending to hold, or even suggesting, that an act of the legislature adopting a system of laws is obnoxious to a constitutional provision prohibiting the passage of any bill containing more than one subject-matter. The contrary view is supported by abundant authorities, some of which we will now cite: Cooley, in his excellent work on *Constitutional Limitations* (5th Ed.) 144, 174, declares: "The generality of a title is, therefore, no objection to it, so long as it is not made a cover to legislation incongruous in itself, and which by no fair intendment can be considered as having a necessary or proper connection. The legislature must determine for itself how broad and comprehensive shall be the object of a statute, and how much particularity shall be employed in the title in defining it." The constitution of the state of Minnesota provides that "no law shall embrace more than one subject, which shall be expressed in the title." In *Johnson v. Harrison*, 47 Minn. 575, 50 N. W. 923, it was decided that an act entitled "An act to establish a probate code," was not obnoxious to this constitutional provision. It appears that the act establishing this code in Minnesota embraced 21 subchapters, containing 326 sections. The legislature adopted in the form of one act a complete system of statutory law relating to those matters over which probate courts have jurisdiction, namely, estates of deceased persons and of persons under guardianship. In *Ex parte Thomas*, 113 Ala. 4, 21 South. 369, 370, it is declared: "A code or body or system of law adopted or enacted by a single act of the general assembly, though it may contain inconsistent or repugnant provisions, or one section or part may be modified, and, to the extent of the modification, controlled, by another, is not within the letter or spirit of the mandate of the constitution. It is not within the legislative evil it is designed to remove, nor can it be supposed that it was within the contemplation of the

framers of the constitution. Though, for convenience, the Code is published in two volumes, the one pertaining entirely to that which may be termed 'civil,' and the other to that which may be termed 'criminal,' legislation, it was adopted by a single act, entitled 'An act to adopt a code of laws for the state of Alabama.'" It is true, the constitution of Alabama authorizes the adoption of a code by the legislature, but the constitution of Alabama nevertheless required that the subject should be described in the title, and Brickell, C. J., in that case quoted the following from Walker, C. J., in *Ex parte Pollard*, 40 Ala. 98: "The constitution requires that only one subject should be embraced, and that it should be described in the title. 'Subject' is a very indefinite word. A phrase may state the subject in a very general or indefinite manner, or with minute particularity. The subject of laws with such titles as the following, 'To adopt a penal code,' 'To adopt the common law of England in part,' 'To adopt a code of laws,' 'To ratify the by-laws of a corporation,' would be expressed in a very general way, and very little knowledge of the specific provisions of the laws could be gleaned from the title; yet it would nevertheless be true that the subject was described in the title." See *Bales v. State*, 63 Ala. 30-34; *Dew v. Cunningham*, 28 Ala. 466; *Hoover v. State*, 59 Ala. 57. The constitution of the state of Washington provides that "no bill shall embrace more than one subject, and that shall be expressed in the title." Article 2, § 19. In the case of *Marston v. Humes*, 3 Wash. 267, 28 Pac. 520, it was held that the Code of 1881 of that state was a valid and binding body of laws, arranged and consequently sectionized under authority of the legislature of 1881 from laws revised and reenacted by that body, and ratified by subsequent legislatures by constant reference thereto as the Code of 1881. On page 276, 3 Wash., and page 523, 28 Pac., the court says: "If the legislature can thus, by a name sufficiently comprehensive, embrace all the subjects properly relating to civil procedure, it must follow that by adopting a subject sufficiently general it can embrace in one act all the statute law of the state. In other words, the legislature may adopt just as comprehensive a title as it sees fit, and if such title, when taken by itself, relates to a unified subject or object, it is good, however much such unified subject is capable of division." There is a like restriction in the constitution of West Virginia against the passage of laws containing more than one subject, and containing matter different from what is expressed in the title. In *State v. Mines*, 38 W. Va. 139, 18 S. E. 475, it was said: "It cannot be doubted that, under the title of the act passed in 1868 establishing a code of laws, it was valid to insert" in that code a named section. The present constitution of Texas allows only one subject-matter in an act. Its Revised Statutes were adopted by an act entitled "An

act to adopt and establish the Revised Civil Statutes of the State of Texas." In *McLane v. Paschal*, 28 S. W. 711, the court of civil appeals of Texas decided that this act, passed in 1879, was a legal and constitutional enactment. In *Van Horn v. State*, 46 Neb. 62, 64 N. W. 365, it was declared: "The object * * * of the constitution providing that 'no bill shall contain more than one subject, and the same shall be clearly expressed in its title,' is to prevent surreptitious legislation. If a bill has but one general object, no matter how broad that object may be, and contains no matter not germane thereto, and the title fairly expresses the subject of the bill, it does not violate this provision of the constitution." On page 74 of the same case (page 368, 64 N. W.) the court says: "We conceive the rule to be that the constitutional provision does not restrict the legislature in the scope of legislation. It does not prohibit comprehensive acts, and, no matter how wide the field of legislation, the subject is single so long as the act has but a single main purpose and object. Thus we would have no doubt of the power of the legislature by a single act to provide a new and complete code of civil procedure," etc. Other authorities might be cited with like import, but these are quite sufficient to show the trend of judicial decision upon the subject. Our conclusion, therefore, is, both upon reason and authority, that the act of December 16, 1895, contains but one subject, which is clearly embraced in the title of the act. That subject is the adoption of a code of laws for Georgia. Though comprehensive, and of vast extent in its range, it nevertheless preserves the constitutional principle of unity. While all the various sections of the Code are not germane, one to the other, when considered separately, yet, taken together, they are directly connected with, and relate to, this great subject, and constitute one system of laws for the state.

5. It is further contended by plaintiff in error that the embodiment in the Code of an unconstitutional law is an error which the legislature did not intend to sanction by its act adopting the Code. If the infirmity of the act relates to matter upon which the constitution prohibits any legislation at all, of course the act would be void, it matters not where found, nor how often adopted. Where, however, the defect is not inherent in the subject-matter itself, but relates simply to its manner of passage under a defective title, it is, of course, permissible for the legislature to re-enact the measure under a proper title. If the act of 1889 in question, empowering railroad commissioners to require railroad companies to erect depots, was unconstitutional as originally passed, because its title did not indicate what was in its body, it simply amounted to no law, and was just as if there had never been any attempt to legislate upon the subject. Such matter afterwards embraced in the Code duly adopted is like any other new matter contained therein, and

has force and effect from the time of the adoption of the Code. The changes made in the Code of 1863 are, perhaps, much more numerous than was at first supposed. Many of these modify previous statutes by omitting a portion of their provisions, others alter the statutes by adding more thereto, while others contain entirely new matter emanating from the brains of the codifiers, and not found either in the common or statute law. Yet all these alterations and additions have been treated by this court in its numerous decisions relating thereto as valid law. See *Railroad Co. v. Johnson*, 38 Ga. 433; *Phillips v. Solomon*, 42 Ga. 196; *Gardner v. Moore*, 51 Ga. 269; *Miller v. Railroad Co.*, 55 Ga. 144; *Railroad v. Kirkpatrick*, 35 Ga. 144; *Railroad Co. v. Ivey*, 73 Ga. 499, 500, 506; *Watson v. Swann*, 83 Ga. 200, 9 S. E. 612; *Verdery v. Dotterer*, 69 Ga. 197, 198; *Adams v. Barlow*, Id. 302-308; *Banks v. Sloat*, Id. 333; *Freeman v. Cherry*, 46 Ga. 18; *Ewing v. Shropshire*, 80 Ga. 380, 7 S. E. 554; *Ellis v. Darden*, 86 Ga. 370, 371, 12 S. E. 652; *McVicker v. Conkle*, 96 Ga. 593, 594, 24 S. E. 23. In *Huff v. Markham*, 70 Ga. 235, it was held that an act, though unconstitutional on account of containing matter in its body different from what was expressed in its title, became valid law after it was incorporated in Irwin's Code as the statute law of the state, and after that body of law had been recognized both by the constitution of 1868 and 1877. In *Bales v. State*, 63 Ala. 34, it was decided that a code "may embrace statutes not originally enacted in the forms prescribed by the constitution, and, if that be true, they are valid, not from the day of their original enactment, but from the day the code became operative."

We have not overlooked, in the consideration of this case, those decisions and dicta of this court to the effect that it was not intended to adopt as law every inaccuracy and error that may have crept into the Code. On this point our attention has been specially called to the following cases: *City of Atlanta v. Gate City Gaslight Co.*, 71 Ga. 106; *McDaniel v. Campbell*, 78 Ga. 188; *Jamerson v. State*, 80 Ga. 111, 5 S. E. 131; *Hardeman v. McManus*, 82 Ga. 20, 8 S. E. 733. All these cases relate to the effect of the adoption or recognition by the constitution of 1868 of Irwin's Code. As before seen, this code was never adopted by an act of the legislature, but what force it had as a code of laws grew out of its recognition by the constitution of 1868. Every one of the cases above cited relate to an omission or error in Irwin's Code touching a provision in some act of the general assembly passed in 1866. But the constitution of 1868 no more adopted or recognized that code as law than it did every act of the general assembly passed since 1861. Hence Justice Jackson, in *McDaniel v. Campbell*, 78 Ga. 189, 190, above cited, says: "But it is argued that the Code of 1868 uses 'or' instead of 'and,' and that the constitution of

1868 makes that code law. The answer is that it makes acts passed since 1861 also law. So that the act of 1866 has the imprimatur of the constitution of 1868 as fully as Irwin's Code has. The codifier had no right to alter the act of 1866, and the constitution of 1868 does not ratify such alteration, but, by making that code valid, it makes it only so far as it consists with acts passed since 1861, which are also made valid." But, in any view we take of these decisions on the subject of palpable errors and inadvertent mistakes made by the codifiers, they do not bear upon the particular act in question now being considered. As above seen, if the act involved in this case authorizing the railroad commissioners to compel the erection of depots by railroad companies was never law before it was incorporated in the Code, on account of a constitutional defect in its title, then it is entirely new matter in the Code, purposely put there, and does not get there by inadvertence or mistake. It has always been held that, where new matter is embraced in the Code, it becomes the law of the state the moment the Code goes into effect.

We have treated the constitutional questions involved in this case at considerable length, on account of their vast importance and interest to the public generally. Laws should be made as certain as practicable, and should be so published, if possible, as to enable every citizen readily to find where they are, and what they declare. This great need in all civilized governments has never been so successfully met by any system as one which undertakes to codify in a systematic, condensed, yet clear and comprehensive form, the laws of a state. Georgia perhaps had, when her Code of 1863 went into effect, the most perfect system of codified laws then existing in any country on the globe. Mr. Cobb deserves the chief credit for this great work of systematizing and condensing the statute and common law of Georgia in one volume. While the changes in the law made by this codification were probably more numerous than was at first supposed, yet these changes generally, instead of marring the symmetry or detracting from the splendor of our system of laws, add to its luster and its excellence. In the main they still exist. Their wisdom has been indorsed by two generations. Executives have honored them by their observance in the execution of the laws. Legislatures have respected them by refusing to repeal or modify their provisions. Courts have recognized them by repeatedly enforcing them in the administration of justice. They have been handed down from Code to Code, and still live in the present Code, a monument to the legal learning and ability of their author, and to the genius of his masterly intellect. Yet these changes were never vitalized into life and power until the legislature, in its wisdom, adopted them as a part of the statute law of the state. What changes have occurred in the new Code of 1895 have

likewise been thus adopted, and they should receive at the hands of the judiciary the same respect and consideration as any other act of the legislative department of the state. We think the court did right in overruling all the grounds of the demurrer except the first, and we reverse the judgment for not sustaining the demurrer on the ground, alone, that Monroe superior court did not have jurisdiction of this cause of action. Judgment reversed. All the justices concurring.

NOTE. Knowing that the Honorable Jos. R. Lamar was one of the codifiers of the Code of 1895, and had doubtless given some of the matters involved in this case consideration, we requested of him his views touching the constitutional questions raised. To this he generously responded by furnishing us with an able and thorough brief, which has been of great assistance to us in this work.

(102 Ga. 523)

IRVINE v. WISE.

(Supreme Court of Georgia. July 28, 1897.)

DISTRESS LEVY—COUNTER AFFIDAVIT—SUFFICIENCY—AMENDMENT.

1. A counter affidavit interposed to the levy of a distress warrant need not, in any event, state that the levying officer retained possession of the property.

2. Were it otherwise, the affidavit would be amendable so as to make it allege that such was the fact, and the right to amend would not be lost because, some time after accepting the counter affidavit and suspending further proceedings under the levy, the officer permitted the defendant to give a forthcoming bond, and surrendered to him the possession of the property.

3. Whether a levying officer's acceptance of a forthcoming bond, and allowing the defendant to take possession of the property, at the time he files his counter affidavit, should be treated as being the same, in effect, as if the officer had retained personal custody of the property, and therefore as dispensing with the necessity of giving a bond for the eventual condemnation money, or whether, under such circumstances, the failure to give the latter bond would be cause for dismissing the counter affidavit, is not now decided, the present record not distinctly presenting this question for adjudication.

(Syllabus by the Court.)

Error from superior court, Bibb county; W. H. Felton, Jr., Judge.

Action between E. D. Irvine, agent, and J. C. Wise. From the judgment Irvine brings error. Reversed.

H. F. Strohecker, for plaintiff in error. Anderson & Jones, for defendant in error.

PER CURIAM. Judgment reversed.

(105 Ga. 595)

LAFFITTE v. STATE.

(Supreme Court of Georgia. Oct. 12, 1898.)

CRIMINAL LAW—APPEAL—NEW TRIAL—EVIDENCE.

1. Points made in a record, but not argued in this court by brief or otherwise, will be regarded as having been abandoned.

2. There being positive evidence to show the guilt of the accused, the verdict against him was warranted.

3. The superior court has, on certiorari, no power to grant a new trial in an inferior judiciary on the ground of alleged newly-discovered evidence.

(Syllabus by the Court.)

Error from superior court, Screven county; R. L. Gamble, Judge.

Charles Laffitte, convicted of misdemeanor, brought certiorari, and from a judgment of the superior court brings error. Affirmed.

J. W. Overstreet, for plaintiff in error. B. T. Rawlings, Sol. Gen., for the State.

LUMPKIN, P. J. The main purpose for which arguments are had before this tribunal is to call its attention to the points insisted upon and the authorities relied on in support of the positions taken by counsel. Our thirteenth rule declares that briefs must "be confined to a statement of the points insisted upon and a citation of authorities." Civ. Code, § 5612. This court is certainly not called upon to deal with or decide any question to which no allusion is made by the counsel who brings here a case for review. It has been frequently held that points presented in a record, but not argued in this court, orally or by brief, will not be considered. See *Parker v. Lanier*, 82 Ga. 219, 8 S. E. 57; *Brown v. State*, 82 Ga. 224, 7 S. E. 915; *Davis v. Jackson*, 86 Ga. 138, 12 S. E. 299; *Railway Co. v. Wideman*, 99 Ga. 245, 25 S. E. 400; *Moss v. Lovett*, 99 Ga. 321, 25 S. E. 649; *Thompson v. Waterman*, 100 Ga. 586, 28 S. E. 286. In the case last cited, Mr. Justice Cobb remarked, "Where counsel argue their cases in this court by brief alone, if points presented in the record are not insisted on in the brief this court will consider them as abandoned."

The plaintiff in error was, in the county court of Screven county, convicted of a misdemeanor, upon an indictment which had been transferred to that court from the superior court. In his petition for certiorari he alleged that the county judge erred in overruling a demurrer to the indictment, and the answer to the certiorari verifies this allegation. We shall not, however, pass upon the question thus made, because it was not argued in this court. Counsel for the plaintiff in error appeared by brief alone, and in his brief discussed two, only, of the questions presented in his petition for certiorari, viz. that the verdict was contrary to the evidence, and that the accused should have been awarded a new trial on the ground of newly-discovered evidence. We accordingly treat the point upon the sufficiency of the indictment as having been abandoned. It need only be added that an examination of the evidence in the record discloses that there was positive testimony showing the guilt of the accused. The verdict against him was therefore warranted. And, as to the point relating to alleged newly-discovered evidence, we refer to the case of *Almand v. Maxwell*, 100 Ga. 818, 27 S. E. 176, holding that "the

superior courts have no power, by writ of certiorari, to award new trials in inferior judicatories upon the ground of alleged newly-discovered evidence." That, it is true, was a civil case, but the principle is applicable to criminal cases as well. Judgment affirmed. All the justices concurring.

(105 Ga. 588)

SHARPE v. STATE.

(Supreme Court of Georgia. Oct. 12, 1898.)

ARSON—POSSESSION OF STOLEN GOODS—INSTRUCTIONS.

1. When, in the trial of a criminal case, the state relies upon the possession of stolen goods by the accused as a circumstance tending to show guilt, the time which elapsed between the commission of the offense charged and such possession is a material matter for consideration by the jury; and, in charging upon this subject, reference to the element of recency should never be omitted by the presiding judge.

2. Though failure to do so does not necessarily amount to reversible error, when it affirmatively appears that the possession in question was in fact a recent one, such failure is cause for a new trial, when recency of possession is not shown, and the evidence, at best, makes a weak case against the accused.

(Syllabus by the Court.)

Error from superior court, Bulloch county; R. L. Gamble, Judge.

Julia Sharpe was convicted of arson, and brings error. Reversed.

Strange & Lee, for plaintiff in error. B. T. Rawlings, Sol. Gen., for the State.

LUMPKIN, P. J. It frequently happens, upon the investigation of a criminal charge, that the possession of stolen goods by the accused is a circumstance tending to show criminality. Instances of this kind often occur in prosecutions for larceny, burglary, and arson, sometimes in cases of homicide, and also in trials for other offenses. Whenever evidence of such possession is offered, the time which elapsed between the commission of the offense and the possession by the accused of the stolen goods is a material matter for consideration by the jury, to which the judge, by appropriate instructions, should call their attention. See *Tarver v. State*, 95 Ga. 222, 21 S. E. 381. In *Young v. State*, 95 Ga. 456, 20 S. E. 270, this court held that, in charging the jury upon the law relating to the possession of stolen goods by one accused of theft, the court should use the word "recent." It was, however, in the case last cited, further held that the omission to do so would not be cause for a new trial where it affirmatively appeared that the possession in question was in fact a recent one. This, we think, was correct, for the reason that in that case there was no controversy as to the recency of the possession. In the case at bar the accused was charged with the crime of arson, and the state relied in a large measure upon evidence tending to show that she was in possession of a stol-

en article which was under, but not in, the house at the time the alleged arson was committed. The evidence did not, however, affirmatively show what length of time had elapsed between the arson and the possession by the accused of the article in question, and, as a whole, made a weak and doubtful case against her. In charging upon the law relating to the possession of stolen property as a circumstance tending to show guilt, the court nowhere used the word "recent," or made any reference to the element of recency relatively to such possession. We think, in a case of this character, it was essential to a fair trial that the law upon this subject should be fully and accurately stated to the jury, and that the omission to do so is good cause for a new trial. Judgment reversed. All the justices concurring.

(105 Ga. 829)

BRISCOE v. STATE.

(Supreme Court of Georgia. Oct. 12, 1898.)

CRIMINAL LAW—APPEAL—REVIEW.

Under the facts of the present case, there was no error in failing to charge the jury on the subject of unlawful shooting at another, nor in ruling out the testimony sought to be introduced by the accused. The evidence was amply sufficient to sustain the verdict.

(Syllabus by the Court.)

Error from superior court, Warren county; S. Reese, Judge.

Moses Briscoe was convicted of crime, and brings error. Affirmed.

E. P. Davis, for plaintiff in error. R. H. Lewis, Sol. Gen., for the State.

PER CURIAM. Judgment affirmed.

(105 Ga. 832)

THREATT v. STATE.

(Supreme Court of Georgia. Oct. 12, 1898.)

CRIMINAL LAW—APPEAL.

The verdict was sustained by the evidence. There was no error in the charges or rulings of the court complained of, and the judge did not err in refusing to grant a new trial.

(Syllabus by the Court.)

Error from superior court, Bibb county; W. H. Felton, Jr., Judge.

Lila Threatt was convicted of crime, and brings error. Affirmed.

John R. Cooper, for plaintiff in error. Rolland Ellis and Robert Hodges, Sol. Gen., for the State.

PER CURIAM. Judgment affirmed.

(105 Ga. 830)

COLBERT v. STATE.

(Supreme Court of Georgia. Oct. 12, 1898.)

CRIMINAL LAW—APPEAL—REVIEW.

There was no error in the charge of the court complained of when considered in connection with the entire charge. The evidence was

sufficient to sustain the verdict, and the court did not err in overruling the motion for a new trial.

(Syllabus by the Court.)

Error from superior court, Stewart county; Z. A. Littlejohn, Judge.

Frank Colbert was convicted of crime, and brings error. Affirmed.

J. B. Hudson, for plaintiff in error. F. A. Hooper, Sol. Gen., and C. R. Crisp, for the State.

PER CURIAM. Judgment affirmed.

(105 Ga. 832)

STUDSTILL v. STATE.

(Supreme Court of Georgia. Oct. 13, 1898.)

UNLAWFULLY SHOOTING AT ANOTHER—HARMLESS ERROR.

Neither malice nor deliberation is essential to the unlawfulness of shooting at another. The sworn testimony, both for the state and the accused, showing that the defendant shot at the prosecutor while he was running in order to escape, the evidence demanded the verdict of guilty, regardless of previous provocation that had been given by the prosecutor to the defendant. A new trial will not be granted on account of errors or slight inaccuracies in the charge of the court, it appearing that such errors could not have legally affected the result. *Hadley v. State*, 58 Ga. 309 (4); *Strong v. State*, 95 Ga. 499, 22 S. E. 290.

(Syllabus by the Court.)

Error from superior court, Dodge county; C. O. Smith, Judge.

Oliver Studstill was convicted of shooting at another, and brings error. Affirmed.

Roberts & Milner, for plaintiff in error. Tom Eason, Sol. Gen., for the State.

PER CURIAM. Judgment affirmed.

(105 Ga. 832)

LONG v. STATE.

(Supreme Court of Georgia. Oct. 12, 1898.)

CRIMINAL LAW—APPEAL—REVIEW.

There was sufficient evidence to sustain the verdict. The charge complained of was not erroneous for any reason assigned, and there was no error in overruling the motion for a new trial.

(Syllabus by the Court.)

Error from superior court, Miller county; H. O. Sheffield, Judge.

Seymour Long was convicted of crime, and brings error. Affirmed.

W. D. Sheffield and Eric Gambrell, for plaintiff in error. John R. Irwin, Sol. Gen., and W. M. Harper, for the State.

PER CURIAM. Judgment affirmed.

(105 Ga. 831)

SMITH v. STATE.

(Supreme Court of Georgia. Oct. 12, 1898.)

CERTIORARI IN CRIMINAL CASE.

The refusal to order the issuance of the writ of certiorari in a criminal case tried in the county court was error, when the petition,

which purported to specify all the evidence introduced upon the trial, contained no proof of the venue, and assigned as error that the conviction of the petitioner was contrary to law and the evidence.

(Syllabus by the Court.)

Error from superior court, Irwin county; C. O. Smith, Judge.

G. W. Smith was convicted of crime. From an order refusing a writ of certiorari to the county court, he brings error. Reversed.

Jay & Henderson, for plaintiff in error. Tom Eason, Sol. Gen., and W. T. Way, for the State.

PER CURIAM. Judgment reversed.

(105 Ga. 636)

HUNLEY v. STATE (three cases).

(Supreme Court of Georgia. Oct. 13, 1898.)

CRIMINAL LAW—INDICTMENT FOR MISDEMEANOR—DEMAND FOR TRIAL.

To entitle a person charged with a misdemeanor to an absolute discharge, on failure to try such person for such offense after a demand for trial has been made, it is essential that the demand be made in the court where the case is pending. If, after an indictment by a grand jury for such offense has been returned to a superior court, and the case, so originating, has, by order of the superior court, been legally transferred to a city court having jurisdiction to try the defendant for the offense charged, a demand for trial is made in the superior court, such demand is unavailing, and will not entitle the defendant to be discharged in the city court because of the failure of the superior court to try said case in accordance with the terms of the demand.

(Syllabus by the Court.)

Error from city court of Columbus; J. L. Willis, Judge.

Anna Hunley was convicted on three indictments for larceny, and brings error. Affirmed.

Blandford & Grimes, for plaintiff in error. E. J. Wynn, for the State.

LITTLE, J. The grand jury of Muscogee county returned as true three bills of indictment against Anna Hunley, charging her in each bill with the offense of larceny from the house. Two of these bills were found at the regular November term, 1897, and the other at the February adjourned term, 1898, and were pending in the superior court of Muscogee county at the May term, 1898. It appears from the record that on the 3d day of June, 1898, during said May term, the superior court, Judge Butt presiding, passed orders, apparently regular, transferring each of said cases to the city court of Columbus for trial, and by his order, entered in each of the cases, directed the sheriff to notify all witnesses and the attorneys for the defendant that said cases had been transferred and were pending in the city court of Columbus. During said May term, and on the 7th day of June of said term, the defendant present-

ed her demand for trial in each of said cases to the superior court. These demands were in legal and proper form, and, by special permission of the court, were allowed, and placed upon the minutes of the superior court. Neither of the cases was tried in the superior court at the May term, and the first term of the city court of Columbus after the demands made in the superior court was the July term, 1898. At the July term, 1898, of the city court, neither of the cases was tried, and the plaintiff in error, by her counsel, moved the court to discharge the defendant, and to pass an order for such discharge, as an absolute acquittal of the offenses with which she stood charged in the said bills of indictment. The judge of the city court of Columbus refused the orders asked for, and the cases were continued. To this ruling, refusing said orders, the plaintiff in error excepted, and assigns error on such refusal in each of the cases. The three cases involve the same point of law, and by direction were argued together here, and are each herein adjudicated.

Counsel for plaintiff in error contends that, in refusing to discharge the prisoner under the demands for trial, the court committed error, and cites us to Pen. Code, § 958, and to the rulings made in the following adjudicated cases. *Brown v. State*, 85 Ga. 713, 11 S. E. 831; *Silvey v. State*, 84 Ga. 44, 10 S. E. 591; *Durham v. State*, 9 Ga. 306; *Adams v. State*, 65 Ga. 516; *Kerese v. State*, 10 Ga. 95; *Denny v. State*, 6 Ga. 491. We recognize as sound the principle of law contended for by counsel, and the binding force of these authorities, and are not disposed in any way to detract from the effect of the provision enacted and the principle ruled. As was said by this court in *Case of Kerese*, supra, this statute is not open to construction; and, if the demand is made as provided, there is but one single condition precedent to trial or discharge, and that is that a jury at the term when it is made, and also at the term when the discharge is made, be impaneled and qualified to try the prisoner. The court must try, or the prisoner must be discharged. The contention of counsel, as a principle of law, is fully supported by the authorities which he cites. The difficulty in the cases at bar does not arise from the correctness of the legal proposition, but it is whether, under the conceded facts, the plaintiff in error was entitled to a discharge, as having properly made demands for trial. The provision of the Code, supra, is that a person against whom a true bill of indictment is found, for an offense not affecting his life, may demand a trial at the term when the indictment is found, or at the next succeeding term thereafter, or at any subsequent term by special permission of the court. The demands were not made at the term when the bills of indictment were found and when the cases were unquestionably pending in the superior court. By sec-

tion 778 of the Penal Code it is provided: "The judge of the superior court may send down from the superior court of that county all presentments and bills of indictment for misdemeanors, to the city court for trial, the order transmitting to be entered on the minutes of both courts." The city court of Columbus has jurisdiction to try criminal cases below the grade of a felony when jurisdiction is not specifically vested in the superior court. The bills of indictment charge the plaintiff with offenses which are misdemeanors under the statute, and which come within the jurisdiction of the city court. The effect of the orders transferring the cases, passed on June 3d, was to send down these cases to the city court for trial, and, to all intents and purposes, they were so sent down when the orders were granted. It matters not whether on that day the papers had actually been transferred from the superior to the city court. For all jurisdictional purposes, after the passing of these orders, and while they were in force, the cases were not pending in the superior court of Muscogee county, but were pending in the city court of Columbus; and had the latter court convened, on the 4th day of June, 1898, it would have been perfectly competent, under those orders, for that court to have entertained jurisdiction of the cases. If it be said that the orders were in fieri during the further session of the May term of the superior court, the reply is that, assuming that the superior court could have revoked the orders of transfer, it did not do so; and whether it could or not, not having revoked them, they were in full force and effect from their date. In effect, the orders transferring the cases were judgments of the court; and while it is true, as a proposition of law, that until adjournment a judgment rendered at that term may be modified or stricken, it is equally true that until modified or stricken it has full force and effect from the date of its rendition. It appears that on the 7th day of June plaintiff in error submitted to the judge of the superior court her demands for trial in the cases which had theretofore been transferred, and it is equally true that the superior court granted the orders, and had them placed upon the minutes of the superior court. To give effect to both sections of the Penal Code to which we have adverted,—that is, that cases charging misdemeanors may be transferred from the superior court to the city court and the provision securing to a defendant the right of a demand for trial,—it must be held that the terms of the court to which the case has been transferred are to be regarded as the terms of the court covered by the statute, and that a demand for trial, in order to be effective, must be made to the court in which the case is pending at the time of the demand. On the 7th of June, when the demands for trial were made in the superior court, the cases were pending for trial in the city court of Columbus, and

to render the demands available so as to operate as acquittals, under the provision of the statute, they would have to have been made in the city court. The order of the judge of the superior court granting special permission for the demands to be filed and entered on the minutes of his court was nugatory, and accomplished nothing, so long as the orders transferring the cases remained in force. Inasmuch, therefore, as, when the demands for trial were made and allowed in the superior court, the cases were not pending in that court, but had, before that day, been legally transferred to the city court, the effect of the demands was not to entitle the plaintiff in error to a discharge in the cases because she was not tried in the superior court under the demands made. The judgment in each of the three cases is affirmed. All the justices concurring.

(105 Ga. 406)

GENTLE v. ATLAS SAVINGS & LOAN ASS'N.

(Supreme Court of Georgia. July 21, 1898.)

JUDGMENT — RES JUDICATA — FAILURE TO INTRODUCE DEFENSE.

While a city court has not the jurisdiction to reform written instruments or grant affirmative equitable relief, a party sued in that court may set up equitable defenses which, if proven, will prevent a recovery by the plaintiff, or reduce the amount of his verdict. Where, however, a defendant has been sued in a city court, and a judgment has been rendered against him by default, he cannot, by an equitable petition, go behind this judgment, on the ground that, as his defense to the action at law was wholly or partially of an equitable nature, he was not bound to appear and plead at all. On the contrary, he is, in such a case, concluded by the judgment as rendered.

(Syllabus by the Court.)

Error from superior court, Fulton county; J. H. Lumpkin, Judge.

Action by L. C. Gentle against the Atlas Savings & Loan Association. Judgment for defendant, and plaintiff brings error. Affirmed.

Burton Smith and O. B. Reynolds, for plaintiff in error. Reed & Hartsfield, for defendant in error.

LITTLE, J. An analysis of the petition filed in this case will show that the real cause for which the petitioner seeks to enjoin the execution which was issued on the judgment rendered in the city court is that the contract on which it was founded was usurious, and that the debt which the petitioner owed to the defendant in error had not been properly credited with certain payments which it was claimed had been made. It is true that the petitioner sets out the fact that he was fraudulently induced by the defendant to sign a paper by which, having assumed the debt of Thompson, he undertook to make payments on said debt, as Thompson had obligated himself to do. The fraudulent inducements set out were that the defendant false-

ly, fraudulently, and intentionally stated that the obligation was a mere formality, and did not change or affect the real agreement executed on the 16th of March, 1894, which acknowledged the receipt of five dollars on the part of the association as part payment for the Thompson place, on Mitchell street, in the city of Atlanta. No other reason is given why these defenses were not set up in the city court of Atlanta when the suit was pending against the petitioner than that the defenses which he had to that action were equitable. The petitioner prays that the defendant be decreed to accept the sum which he tenders, and cancel the deed, which he alleges to be a cloud on his title, and that the contract made between the parties be reformed. He also prays that the defendant be enjoined from further proceeding with the suit in the city court or undertaking to enforce the same. As will be seen, the defendant obtained a judgment in the city court of Atlanta against the plaintiff for the amount of a debt claimed to be due. So far as the record shows, the plaintiff in error was duly served, and had his day in court. He filed no answer and interposed no plea to the defendant's demand, but, after the rendition of the judgment in the city court, he seeks by this petition to enjoin the execution issued on the judgment rendered from proceeding against the property, the title to which was in the defendant in error, to secure the payment of the indebtedness. We know of no reason why the plaintiff could not have appeared in the city court, and substantially made the defenses to the action which he now sets up as causes why the judgment should not have been rendered against him. A party sued in such a court can avail himself of a defense which would defeat recovery. *Bank v. Carlton*, 96 Ga. 469, 23 S. E. 388. Certainly, that court has jurisdiction to determine whether the contract was or was not usurious, and it certainly had jurisdiction to ascertain, by the aid of a jury, what was the true amount of the indebtedness. For some reason satisfactory to himself, the plaintiff failed to make any of these defenses which now constitute the cause of his complaint.

It is a well-settled rule that equity will interfere to set aside a judgment of a court having jurisdiction only where the party had a good defense of which he was entirely ignorant, or where he was prevented from making it by fraud or accident, or the act of the adverse party, unmixed with fraud or negligence on his part. Civ. Code, § 3988. But equity will not enjoin the proceedings and process of a court of law, unless there is some intervening equity or other proper defense of which the party, without fault on his part, cannot avail himself at law. *Id.* § 4915. It is not intimated in the present proceeding that the petitioner was prevented from making his defense by fraud or accident, and it must be taken that his failure to file any defense was the result of his own negligence.

If it was essential to the proper defense of the defendant in the suit at law to invoke the powers of a court exercising full equitable jurisdiction, which could alone constitutionally grant relief, it was entirely within the power of the plaintiff in error to exhibit his petition in the superior court, have the proceeding at law enjoined, and the entire controversy adjusted, under the merits of his plea, in a court having full jurisdiction. *Bank v. Carlton*, 96 Ga. 469, 23 S. E. 388. Proceedings of this character are not at all infrequent, and it is a proper mode of procedure where the defenses to the suit at law are purely equitable. See the case of *English v. Thorn*, 96 Ga. 557, 23 S. E. 843. But it was the duty of the petitioner to institute this proceeding pending the suit in the city court, and before judgment had been rendered against him in that court, or, failing, to show some legal excuse therefor. *Waters v. Perkins*, 65 Ga. 32. See, also, *Field v. Price*, 52 Ga. 469, and *Grubb v. Kolb*, 55 Ga. 630. Having permitted the judgment to be rendered against him without interposing any defense, it is conclusive as to the facts which it decides, and will not be set aside, except, as before said, for fraud, accident, or mistake, or the act of the adverse party, unmixed with negligence or fault of the petitioner. Civ. Code, § 3987. In the present case the plaintiff does not bring himself within any of these grounds of equitable jurisdiction. If it be conceded that he had a good defense, which was only cognizable by a court of equity, he shows no reason why the judgment of the city court should now be set aside. It was his duty to appear and plead in that court, or make known his defenses to a court of equity. That he did not do so will be attributed to his own negligence, and equity will not relieve against a judgment that could have been prevented but for negligence. *Rogers v. Kingsbury*, 22 Ga. 60; *Vaughn v. Fuller*, 23 Ga. 366; *Simmons v. Martin*, 53 Ga. 620; *York v. Clopton*, 32 Ga. 362; *Hill v. Harris*, 42 Ga. 412; *Taylor v. Sutton*, 15 Ga. 103; *Smith v. Hornsby*, 70 Ga. 552.

The law applicable to the facts in this case cannot be held to be the same as that which applies in a case where new parties are necessary to a full adjudication of a defendant's rights, as was ruled by this court in the case of *Radcliffe v. Varner*, 56 Ga. 222. The ruling in that case is clearly distinguishable from that applicable to the facts of this. There the court ruled that the defendants could not set up their equitable defense at law because of the want of proper parties, which could not at that time be made in a court of law, but held that, in a case where the equitable defenses could be set up, the defendant would be concluded unless he did so. As a matter of law, the city court had jurisdiction to hear and determine the main facts which constituted the defense of the petitioner, according to the allegations in his

bill; and he cannot, after submitting to a judgment which determines the amount of his indebtedness, come into a court of equity, and have that judgment set aside, unless he shows that it was the result of fraud, accident, or mistake, or due to the acts of the adverse party, unmixed with negligence or fault on his part. Judgment affirmed.

(105 Ga. 606)

WILLIAMS v. STATE.

(Supreme Court of Georgia. Oct. 12, 1898.)

CHEATING AND SWINDLING—CRIMINAL LAW—VENUE—DEFENSES—COMPOUNDING FELONIES.

1. One who, for the purpose of deceiving another and obtaining a credit, makes a false and fraudulent representation to the effect that he has purchased and has become the owner of valuable property, and who in this manner defrauds the person to whom such representation is made of money, or other thing of value, is guilty of being a cheat and swindler, under section 658 of the Penal Code.

2. A settlement between such a wrongdoer and the person defrauded, made after the commission of the offense and the arrest of the former upon a warrant charging him therewith, constitutes no bar to his conviction thereof upon an indictment subsequently returned.

3. The venue was sufficiently proved, and there was ample evidence to establish the guilt of the accused.

(Syllabus by the Court.)

Error from superior court, Screven county; R. L. Gamble, Judge.

G. W. M. Williams was convicted of cheating and swindling, and he brings error. Affirmed.

Brannen & Moore and James K. Hines, for plaintiff in error. B. T. Rawlings, Sol. Gen., for the State.

LUMPKIN, P. J. An indictment against G. W. M. Williams, found by the grand jury of Screven county and transferred for trial to the county court thereof, charged that the accused "did falsely and fraudulently represent to J. C. White that he, the said Williams, had purchased the Oyler & Woodburn R. R. for the sum of twenty-seven thousand dollars, and that he had raised all of the purchase price except one hundred dollars, and was then on his way to Savannah to pay the purchase money. By these false and fraudulent representations the said G. W. M. Williams fraudulently induced the said J. C. White to lend him, the said G. W. M. Williams, the sum of one hundred dollars, which he promised to pay back within three days from the date of the loan. These representations, made as aforesaid, were all false and fraudulent, and were made by the said Williams for the purpose of defrauding the said White, and did in point of fact defraud the said White, contrary to the laws of said state, the good order, peace, and dignity thereof." At the trial the state introduced testimony substantiating all the material allegations of the indictment. It distinctly appeared that in the conversation be-

tween the accused and White, which resulted in the former's procuring the loan, he claimed to be the owner of the railroad in question. For instance, he used the expression, "I don't want to incumber my road," and other language indicating a purpose on his part to create the impression that the railroad was his property. It was further shown by the state that White was actually defrauded of \$100, and that Williams did not repay the loan as he had agreed to do. Evidence in behalf of the accused tended to show the following: After Williams had been arrested upon a warrant charging him with being a cheat and swindler, and before he was indicted, he made a settlement with White by delivering to him the promissory note of E. E. Wood & Co. for \$100, which White accepted in full satisfaction of his demand against Williams, and afterwards sold for \$90. There was a verdict of guilty in the county court, and by his petition for certiorari Williams alleged error as follows: First. That the county judge erred in charging the jury: "If you should find that the defendant made false and fraudulent representations to the prosecutor as to having purchased and being the owner of a certain railroad, when in fact he had not purchased said road and was not the owner of the same, and that such representations were made to deceive the party to whom the application was made, and he acted upon them, whereby he was defrauded, you would be authorized to find him guilty." Second. The judge erroneously charged that "a settlement of the debt by White after the warrant had been sworn out, and the defendant was under arrest or under bond, would be no bar to the prosecution." And, third, that the verdict was contrary to law and the evidence.

1. The first charge complained of was, in substance, a correct statement of the law. The main criticism made upon it in the brief of counsel for the plaintiff in error is that there was no evidence to show that the accused claimed to be the owner of the railroad. This point is sufficiently answered by referring to the foregoing summary of the evidence introduced in behalf of the state.

2. We are also of the opinion that the second charge excepted to was free from error. That a fraud was perpetrated upon White plainly appeared. As a result of this fraud, he was deprived of the possession and use of his money, and it is apparent, from the evidence as a whole, that there was a criminal intent on the part of Williams not to return the money at all. That he was subsequently forced to make restitution, which, as will have been seen, was only partial, did not relieve him of the consequences of his violation of the criminal statute, which was complete before his arrest. As well might it be said that one guilty of a larceny could escape prosecution by returning the stolen goods after being arrested for the offense.

3. As already stated, the case for the state

was fully made out. It was argued here that there was no proof of venue, but an examination of the record before us discloses that this point was not well taken. White, as a witness for the state, after detailing the conversation which had occurred between himself and Williams under a certain oak, and stating that he and Williams then went to the railroad station, where a draft for \$100 was delivered to the latter, added, "That was in the county of Screven." The word "that," as here used, may well be understood as referring, not only to what occurred at the station, but also to what took place between Williams and White under the oak, there being but one transaction under investigation. Judgment affirmed. All the justices concurring.

(105 Ga. 100)

WESTERN & A. R. CO. v. BAILEY.

(Supreme Court of Georgia. July 22, 1898.)

RAILROADS—TRESPASSERS—NEGLIGENCE—PROXIMATE CAUSE—MASTER AND SERVANT.

If an engineer, while running a train, saw a trespasser upon the track in time to stop before striking him, but nevertheless, "carelessly, negligently, recklessly, and wrongfully, allowed and permitted" the train to "run at a reckless and dangerous rate of speed without any bell or whistle being sounded, or without any other danger or alarm signal being given, or without any effort to stop said train being made," and the trespasser was thus killed, and if his body was hurled against an employé of the railroad company, who was free from fault or negligence, and in his proper place, performing his duties as a servant of the company, and he was in this manner injured, he had a cause of action against the company.

(Syllabus by the Court.)

Error from superior court, Whitfield county; A. W. Fite, Judge.

Action by A. J. Bailey against the Western & Atlantic Railroad Company. There was a judgment for plaintiff, and defendant brings error. Affirmed.

Payne & Tye and R. J. & J. McCamy, for plaintiff in error. Marchbanks & Matthews and B. Z. Herndon, for defendant in error.

LITTLE, J. It may be stated as a general rule that one who goes upon the track or premises of a railroad company, except at a public crossing or in a highway, without the invitation or license of the company, express or implied, is a trespasser. 3 Elliott, R. R. § 1252. It may be also stated as a general rule that the company owes no duty to a trespasser upon its track, except to do him no willful or wanton injury. A trespasser is a wrongdoer, and it is a general principle of jurisprudence that the courts will not aid a wrongdoer. The facts that the trespasser is a wrongdoer does not, however, justify malicious, wanton, or willful maltreatment of him; and the failure to use reasonable care to avoid injury to him after the discovery of his danger may sometimes

be sufficient evidence of wantonness or willfulness. But neither negligence nor willfulness can ordinarily be shown in this way where an adult, or person apparently able to take care of himself, is upon the track, because the railroad employes have a right to assume, in the absence of anything to the contrary, that he will get off the track, or take such other precautions as may be available to avoid injury to himself. Id. § 1253, and authorities cited. If, after discovering the danger to the trespasser, and his inability to escape, the company fails to exercise reasonable care, it will be liable, if the exercise of such care would have prevented the injury; and, although there is a clear distinction between negligence and willfulness, yet a reckless and wanton disregard of consequences, evincing a willingness to inflict injury, may amount to willfulness, although there is no direct proof of actual intention to inflict the injury complained of. Id. § 1257, and authorities cited; Railroad Co. v. Denson, 84 Ga. 782, 11 S. E. 1089. In the case of Railroad Co. v. Vaughan, 93 Ala. 209, 9 South. 468, where a trespasser was seen by the engineer upon a long trestle in time to have stopped the train, and the latter did nothing to stop or slacken the speed of the train, but went on, speculating on the chances of the trespasser's reaching the end of the trestle before the train arrived there, although it must have been apparent that the trespasser could not escape, it was held that the engineer was guilty of such recklessness as amounted to willfulness, and that the company was liable for running over and killing such trespasser while upon the trestle, regardless of his contributory negligence. The presumption that a person, apparently of full age and capacity, who is walking or standing on the track, will leave it in time to save himself from harm, will not avail when the person who is on the track appears to be intoxicated, asleep, or otherwise off his guard, etc. Pierce, R. R. p. 831, and authorities cited. A like doctrine is announced in the case of Railroad Co. v. Brinson, 70 Ga. 207. The company is at liberty to act on this presumption, and to continue to act on it, until it discovers that the person is not likely to escape the peril, and then it is bound to exert itself to avoid the calamity. Railroad Co. v. Williams, 74 Ga. 736. In the case of Railroad Co. v. Brinson, supra, it is held: "One who walks upon a railroad track, not at a road crossing, is a trespasser thereon; and while the road would be liable for a wanton or willful wrong of its agents, acting within the scope of their duty, or for gross negligence or carelessness, evincing reckless disregard of the safety of others, or where they perceive the danger of a party in time, and make no effort to avoid it, still the company is under no such obligation to a trespasser as to those who are properly and lawfully upon its premises," etc. See,

also, *Railway Co. v. Stewart*, 71 Ga. 427; *Railroad Co. v. Meigs*, 74 Ga. 857.

According to these authorities, the petition, which, under the demurrer, must be taken as true, shows that the railroad company was guilty of willful or wanton negligence in allowing the engine in charge of its servants to collide with or run against the unknown man; and, thus being negligent, this act on its part must be held the proximate and sufficient cause of the injury which the plaintiff sustained by reason of the body of the unknown man being hurled, per force of the blow inflicted by the engine, against him. The negligence of the defendant put in motion the destructive agency, and the injury sustained by the plaintiff was directly attributable thereto; and there was no intervention of a new force or power of itself sufficient to stand as the cause of the mischief, there was no new and independent force, acting in and of itself, causing the injury, and superseding the original wrong, so as to make it remote in the chain of causation; there was no interposition of a separate independent agency, over which the defendant neither had nor exercised control. *Perry v. Railroad Co.*, 66 Ga. 746; *Car Co. v. Laack*, 143 Ill. 242, 32 N. E. 285. In the case of *Railroad Co. v. Chapman*, 2 South. 738, where a plaintiff, while walking along the track of a defendant's road, observed an approaching train, and stepped down on the embankment just before the train came along, and as the train came opposite to where plaintiff was standing a cow came up on the other side of the embankment, was thrown from the track by the engine, "bounced down" and struck the plaintiff, injuring her, it was held that, if the animal was thrown from the track by the negligence of those in charge of the train, the injury could not be regarded as a purely accidental occurrence, for which no action lies, but must be deemed to have been proximately caused by the negligence. In the opinion the court said: "When the cow was thrown by the engine, it struck the ground, bounced, and fell against plaintiff. The bounce and fall of the cow was the immediate cause, but it was merely incidental, and was not an independent agency which had no connection with the act of the defendant. The direct cause was put in operation by the force of the engine, which continued until the injury; and injuries directly produced by instrumentalities thus put in operation and continued are proximate consequences of the primary act, though they may not have been contemplated or foreseen. The relation of cause and effect between the primary cause and the injury is established by the connection and succession of the intervening circumstances,"—citing *Railroad Co. v. Lockhart*, 79 Ala. 315; *Railroad Co. v. Arnold* (Ala.) 2 South. 337. The same principle was recognized and applied in the case of *Akridge v. Railroad Co.*, 90 Ga. 232, 16 S. E.

81, where the plaintiff was held entitled to recover for injuries sustained by him from being violently thrown against a tree by a horse which the railroad had negligently frightened. The court committed no error in overruling the demurrer to the petition, and the judgment must be affirmed.

(106 Ga. 833)

McMICHAEL v. STATE.

(Supreme Court of Georgia. Oct. 13, 1898.)

CRIMINAL LAW—APPEAL—REVIEW.

The evidence fully warranted the verdict, the portions of the judge's charge complained of were not objectionable for any reasons assigned, and there was no error in overruling the motion for a new trial.

(Syllabus by the Court.)

Error from superior court, Sumter county; Z. A. Littlejohn, Judge.

Jim McMichael was convicted of crime, and brings error. Affirmed.

Jack Childers and Blalock & Cobb, for plaintiff in error. F. A. Hooper, Sol. Gen., by James Taylor, for the State.

PER CURIAM. Judgment affirmed.

(106 Ga. 373)

GOULD v. BANK OF STATESBORO.

(Supreme Court of Georgia. July 19, 1898.)

PURCHASE-MONEY ATTACHMENT.

Under section 4539 of the Civil Code, any creditor holding and owning a promissory note given for the purchase of personal property may, though not the original payee of the note, and though he acquired title thereto by delivery only, sue out and maintain a purchase-money attachment against the maker, if the latter is in possession of the property for the purchase of which the note was given.

(Syllabus by the Court.)

Error from superior court, Bulloch county; R. L. Gamble, Judge.

Action by the Bank of Statesboro against Catherine Gould. Judgment for plaintiff. Defendant brings error. Affirmed.

Cason & Everitt, for plaintiff in error. Groover & Johnson, for defendant in error.

LITTLE, J. The only question made by the record in this case is whether the holder of a note given for the purchase price of personal property, other than the payee, has a right to the process of attachment against the property. No restriction seems to be made in the Code which gives the remedy by attachment to recover the purchase money. Civ. Code, § 3549. All that seems to be required is that the relation of debtor and creditor shall exist, that the debt is created by the purchase of property, that the debt shall be due, and that the debtor is in possession of the property, or some part of it. These facts concurring, the right to attach the property purchased, by the plain words of the

statute, seems to exist. We know of no law which restricts this remedy to an original payee, and no good reason why it should be so. The right to collect a note given for purchase money by attachment of the purchased property is not afforded to protect the payee alone, but to protect the collection of the purchase price as well; and it can make no difference to the maker who holds the note, nor who has the process issued. Such process would be just as effectual when issued in one name as in another; the property is simply liable by attachment for its purchase price under the terms and conditions of the Code on this subject.

Counsel for plaintiff in error cites us to the case of *Hunt v. Harbor*, 80 Ga. 746, 6 S. E. 596, as authority for the position which he takes that, when a promissory note for the purchase money of property is transferred without indorsement, the purchase money is paid. There are a number of cases in our Reports besides the one cited which seem to rule this principle, to which we will call attention in their order. It may be here said that all of the cases so ruling, so far as we have examined them, except one, which will hereafter be noticed, refer to promissory notes given for the purchase money of land, where the title was reserved in the vendor; and we can well see how, when the question turns upon the consideration of title, or the equity of the vendee, where the title was reserved in his vendor to secure payment of the notes, no lien may be declared to exist in favor of one who becomes the owner of the notes, and who is yet a stranger to the title. The liens referred to have been created by statute, and all of the adjudicated cases to which we shall presently refer are based on the statute, and the rulings made are interpretations of the statute, when applied to particular facts. Briefly summarized, the statute gives a first lien to the judgment rendered for the purchase money of land where the vendor has reserved title, and afterwards files and records a deed to the vendee for the purposes of sale. Code 1882, § 3654; Civ. Code, § 2788. To secure such lien, the vendor, or, if dead, his representative, must put the title in the vendee for the purpose of enforcing the lien. Other than this, no lien for purchase money exists by operation of law. We have said this much in order that, when the cases adjudicating the status of notes given for the purchase money of land are examined, it may be understood that the rulings are made to establish when such purchase-money notes are entitled to the lien, and that they have not been made with a view of determining what are purchase-money notes.

The first of our adjudicated cases which bears on the subject is that of *Tompkins v. Williams*, 19 Ga. 569. There, Williams, an owner of land, sold the same to Dobson, received notes of the latter for the purchase money, and made Dobson a bond for title.

Dobson sold the land to Tompkins, who paid the purchase money to Dobson, and took a bond for title from him, and an assignment of the bond from Williams to Dobson. Williams afterwards transferred the notes of Dobson, without indorsement, to Porter, and subsequently sued Tompkins for the land. The question was, could Williams maintain his action? This court held he could not, saying, through Lumpkin, J.: "He only held the legal title to secure the notes, and he had parted with the notes for value and upon terms which exonerated him from all responsibility." The court then held that Williams could not maintain the action, but intimated that Porter could compel Williams to convey title to him (Porter) in order that he might do so. The case of *McGregor v. Matthis*, 32 Ga. 417, rules the same principle, on the authority of *Tompkins v. Williams*.

In the case of *Neal v. Murphy*, 60 Ga. 388, a vendor of land received a part of the purchase money, and a negotiable note for the balance, and transferred the note for value and without indorsement. The holder, who sued the note to judgment, and levied on the land, was met by the claim of a purchaser from the vendee. This court held that the question whether the land is subject or not, without a deed having been made by the first vendor, and delivered or filed under the Code, depends on whether or not the defendant's title passed to the claimant, before the judgment was rendered, and that, on the transfer of the note without indorsement, the vendee's equity in the land became complete as against his vendor; citing 19 Ga. 569, and 32 Ga. 417, *supra*.

The next case is that of *Carhart v. Riviere*, 78 Ga. 173, 1 S. E. 222. The same principle, under a similar state of facts, was ruled as in the case of *Neal v. Murphy*, *supra*. In delivering the opinion of the court in that case, Blandford, J., says: "When the purchase-money notes have been sold by the vendor to another without guaranty or conveyance of the land to the purchaser by the vendor, the equity of the defendant is complete; that is, it is his land, and the purchaser of the notes is nothing more than an ordinary creditor, and the notes lose their character of purchase money, so as to be entitled to prepayment, under section 3586 of the Code of 1882."

The next case is that of *Hunt v. Harbor*, *supra*. There Williams made a promissory note to Mays for the purchase price of land. Mays executed his bond for title to Williams, stipulating to make title on payment of the purchase money. This note was transferred by Mays to Harbor, without any indorsement or guaranty. Subsequently Harbor sued out an attachment against Williams for balance due on the note, and, in his petition, prayed judgment against the land. Before this judgment was obtained, a prior judgment had been rendered against Williams in favor of Hunt. When the land was sold

under the judgment for purchase money, Hunt claimed the proceeds; and the question decided in that case was whether, under these facts, Harbor was entitled to be paid in preference to Hunt, because Harbor's judgment was for the purchase money. In delivering the opinion in that case, Simmons, J., said: "When Mays transferred this note without indorsement or without guarantying the payment of it, the purchase money due Mays for the land was paid. He no longer, as vendor of the land, had any claim of priority upon the land for the purchase money. Transferring the note to Harbor without indorsement or guaranty did not transfer the priority given him as vendor by our Code (section 3586) for the purchase money. When, therefore, Harbor sued the note, so transferred, to judgment, he only got an ordinary judgment, which only bound this land from its date, although the judgment itself declared it to be a first lien on the land; citing 78 Ga. 173, 1 S. E. 222, supra. It will be noted in that case that the question of the lien acquired by the levy of the attachment under the provisions of section 4539 of the Civil Code was not involved, but simply the question as to whether the lien allowed by section 2788 to vendors of land, where titles have not been made, but bond for titles given, would inure in favor of the transferee of a note given for the purchase money of the land; such transferee taking the note without indorsement or guaranty of payment by the payee, and without any conveyance of title to the land to him. It appears that in August, 1886, Harbor sued out an attachment against Williams for the balance due on the note; while it appears that the judgment in favor of Hunt against Williams was obtained in 1874, and kept alive by proper entries. It is therefore apparent that the lien contemplated by section 4539, which is allowed to attach only from the date of the levy of the attachment, was not involved; nor were Harbor's rights under that section passed upon, for, Hunt's judgment having been rendered long before the levy of the attachment, the lien thereof would necessarily take precedence over the lien acquired under that section.

The next and the only case in which personal property was involved is that of *Farrah v. Brackett*, 86 Ga. 463, 12 S. E. 686, which was a case where title to the property was reserved in the vendor to secure the purchase money. The court, in substance, ruled in that case, that the transfer (without recourse) of notes given for part of the price of a mill did not place the title to the mill in the person taking the notes, because, when the person transferring them received the money thereon, he was paid, and the title to the mill passed into the maker of the notes, of whom the purchaser of them was but an ordinary creditor; and the principle ruled in this case is exactly the same as in cases where the vendor reserved title to the land,

and subsequently transferred the purchase-money notes, without liability on his part for their payment.

None of these cases deal directly with the right of attachment, nor with the lien which is acquired thereby. The principle ruled in each is clearly distinguishable from the principle involved in the case at bar. In each of said cases the question which arose was that of the existence of title to the property, or of a lien superior to the lien for the purchase money. The lien for purchase money allowed by the Code is quite different and of much higher dignity than that to be acquired by the levy of an attachment under the section of the Code with which we are now dealing. In the one case the lien is given in order that a person selling property may receive from the purchaser the purchase price thereof before other creditors will be allowed to appropriate such property to the payment of debts due them by the purchaser. In the other case the lien is a concomitant of the remedy. It does not attach until the remedy itself has been put in process of enforcement, and has no retroactive force, and the remedy is allowed when the debt is for purchase money, etc. Manifestly, when a contract for the purchase and sale of land is made, and a bond for title given to the vendee, the vendor holds the title, unless more be stipulated as security for the payment of the balance of the purchase money due to him. Whenever the vendor is paid that balance, without himself incurring any liability, or guarantying the collecting of the notes, or putting title to the land in the transferee for the purpose of making the land subject, he has been paid in full for his land, and no lien arises by contract nor by operation of law on the land originally sold, in favor of the transferee; and inasmuch as the vendee is entitled to the property unincumbered when the purchase money is paid, according to his contract, his equity is made perfect whenever the vendor receives the amount of the purchase money under the circumstances enumerated. The transferee of the notes does not stipulate for any lien, nor does he purchase one, and the law gives him none merely because of the fact that the notes which he bought and holds were given as part of the purchase price of land, such notes having inherently and of themselves no lien. Therefore, such transferee becomes a simple creditor of the original vendee. This condition of the transferee is in no way dependent on the question whether the notes were in fact given for a part of the purchase money, and because the transferee under such circumstances obtains no lien affords no reason why the character of the note is changed. It is still a note for the purchase money of land, but one to which no superior lien is given by law.

In the case at bar there arises no question of lien or title. There is no contest between creditors. The single question is: Has the

holder of a promissory note given for the purchase money of personal property the right to have the property for which the note was given, while in the hands of the maker of the note, seized under process of attachment? We think so. There is nothing in any of the foregoing cases which changes the character of the note as purchase-money notes; indeed, such character cannot be changed, because it exists as a fact; and the true meaning of the rulings made are that, by the act of a transfer of a debt which carries no liability on the part of the vendor of land to see the notes paid, the statutory lien on the property for which they were given is lost, because the vendor has been paid for the property. All the questions which were raised and decided in the foregoing cases depended either upon the liens of judgments or the equity of the vendee under his contract. The statute declares that process of attachment may issue in behalf of any creditor whose debt is created by the purchase of property, upon such debt becoming due, when the debtor who created such debt is in possession of some of the property for the purchase of which the debt was created. There is no question here but that the plaintiff in error is indebted to the defendant in error. The relation of debtor and creditor therefore exists. No question is made that such debt is due, and none suggested that the debtor is not in possession of the property for which the note was given. It seems to us that this complies with the statute, and although the note has been transferred by the original payee, without indorsement to the present holder, its character as a purchase-money debt is not changed. The consideration of this note was the purchase of the property now sought to be attached, and, whether transferred or not transferred, that fact must continue to exist. As it does exist, and other conditions required by the statute being present, the process of attachment may issue in behalf of the present holder of the note against the property for the purchase of which the debt was created. Judgment affirmed.

(106 Ga. 217)

HENDERSON WAREHOUSE CO. et al. v. BRAND.

(Supreme Court of Georgia. July 25, 1898.)

PARTNERSHIP — PLEADING — WAREHOUSEMEN — CHARGES — INSURANCE — ESTOPPEL — TENDER.

1. When the petition in an action against a partnership contains an allegation that the same is composed of certain named persons, and there is no plea of "no partnership," but, on the contrary, all of these persons unite in an answer admitting the truth of such allegation, a verdict in the plaintiff's favor binds the partnership and all the alleged members thereof who were served.

2. A contract between a warehouse firm and a customer, by the terms of which it, in consideration of specified sums per bale per month, agreed to handle and store his cotton, and keep the same insured in his own name, is not compelled with merely by keeping all the cotton in

the firm's warehouse, including that of this customer, insured generally, under policies taken out in the name of the partnership; and in such case this customer is entitled, upon a settlement with the partnership for the proceeds of his cotton sold by it, to have a deduction from these gross charges for handling, storage, and insurance, in an amount equivalent to what the insurance for which he stipulated would have cost at current rates.

3. When such customer received from the firm what purported to be the net proceeds of his cotton, he being at the time in ignorance of the fact that it had violated its contract to keep the same insured in his own name, he was not estopped from bringing his action for the value of such insurance; nor was it incumbent upon him to tender back the money he had actually received, he being, in any event, entitled to keep the same.

4. It appears from the record that the requests to charge were, so far as legal and pertinent, covered by the general charge given to the jury; the charges complained of were substantially correct and adapted to the testimony; the evidence warranted the verdict; and there was no error in denying a new trial.

(Syllabus by the Court.)

Error from superior court, Clarke county; N. L. Hutchins, Judge.

Action by E. M. Brand against the Henderson Warehouse Company and others. There was a judgment for plaintiff, and defendants bring error. Affirmed.

John J. Strickland, for plaintiffs in error. E. T. Brown and O. H. Brand, for defendant in error.

LITTLE, J. The defendant in error brought suit in the court below against C. B. Griffith, E. R. Hodgson, A. H. Hodgson, and J. M. Hodgson, whom he alleged to be partners, using the firm name of the Henderson Warehouse Company, and that they were indebted to him in the sum of \$722.75 on an open account, a bill of particulars showing the items being attached to the petition. It was further alleged that in September, 1898, the plaintiff entered into a contract with defendants to take charge and store, for the plaintiff, certain cotton in their warehouse in the city of Athens, for which the defendants were to receive 50 cents per bale for each bale of said cotton for the first month, and 25 cents per bale for each bale of cotton for each succeeding month, and that said charges when paid were to be in full for storing, handling, and insuring the cotton. The petition further alleged that the plaintiff expressly contracted and agreed with the defendants that they would insure petitioner's individual cotton in his own name, to be identified in the policy of insurance by his own individual mark on said cotton, which was β , and for his own use. It is alleged that the defendants did not so insure his cotton, and did not take out the policy of insurance in his own name, identifying and describing said cotton as it was marked; that he had stored at defendants' warehouse 341 bales of cotton, identified and marked with his individual mark, for 20 months, under said contract; that the cost

and reasonable charge for insurance alone on said cotton was 10 cents per month per bale, making the entire cost on 341 bales for 20 months aggregate \$682. It was further alleged that, some two months prior to filing the petition, the plaintiff sold his cotton so stored, and had a settlement with the defendants for storage, insurance, etc., and paid to defendants for insurance on 341 bales of cotton for 20 months, with the understanding at the time he so paid the same that the defendants had performed their part of the contract in reference to insuring the cotton, and had insured the same in his own name, identified by his mark; but that since said payment he has ascertained that the defendants did not so insure his cotton, but they, nevertheless, demanded and collected of him, in the settlement, full charges according to their contract, which included the stipulation as to insurance; that the defendants had no right to charge and receive from him anything for insurance; and he institutes the action to recover the value of the insurance on 341 bales of cotton, aggregating \$682, which he had paid to the defendants. By the petition, plaintiff also seeks to recover the value of cotton samples, which he alleged to be of the weight of 500 pounds, and of the value of \$35, which the defendants had agreed to keep for him. He also includes in the suit the value of a basket, 50 cents, and also an item of \$4.75 for an overcharge on one bale of cotton which had been lost by the defendants. The defendants answered the petition, and, after admitting the formal parts, and denying certain material allegations, set up as their defense the following facts: Under their contract, they were to have 30 cents per bale on 120 bales of cotton for each month the same remained in their warehouse; that they agreed, for the price mentioned, to insure petitioner's cotton and keep the same insured; and that they did insure it and keep the same insured in the manner usually followed by warehousemen, and complied fully with their contract in relation to insurance. They aver that while it is true the 341 bales of cotton marked, as alleged in the petition, were sent to their warehouse, it is not true that all were there under the contract mentioned; that 120 bales were there at 30 cents per month; and that 97 of these were there 20 months, and 21 bales for 17 months. They aver as true that, in the summer of 1895, plaintiff sold his cotton, and paid defendants for insurance on 341 bales for the actual time the cotton was in the warehouse. They deny that the insurance was 10 cents per month. They aver that, at the time of the settlement, they had performed their part of the contract, and presumed the plaintiff knew it. They deny that at the time of the settlement the plaintiff made any claim as to the want of insurance. They admit the loss of one bale of cotton, and aver that they made it good at the time of the settlement.

They deny liability to pay for the sample cotton or basket, and aver that, at the time of the settlement, all matters between them, including insurance and every other claim growing out of the contract, was fully and completely settled, and that all facts concerning the same were known to both parties. The defendants aver that the plaintiff is indebted to them in the sum of \$263 under a mistake in the settlement in relation to the storage charges, for which they pray judgment. The plaintiff amended his petition, alleging that it was a part of the contract that he was to pay storage for six months, whether cotton remained that long or not, and it was also a part of the contract that the defendant should insure his cotton in some solvent insurance company, in his individual name, and for the full value of the cotton. The evidence introduced on the trial of the case was conflicting. That introduced on the part of the plaintiff tended to support the allegations of the petition. The jury returned a verdict in favor of the plaintiff for \$205.20, besides interest. The defendants made a motion for a new trial on the grounds that the verdict was without evidence to support it, and contrary to law, and also on the further grounds that the court erred in giving to the jury certain instructions, and in refusing to charge as requested.

1. It is complained that the jury found a verdict against C. B. Griffith, one of the defendants, when the evidence shows that C. B. Griffith had gone out of the firm before any but a few bales of plaintiff's cotton was received. It may be noted in this connection that the plaintiff filed his petition against several persons as constituting a firm, one of these persons being O. B. Griffith. The allegations were that this firm, so composed, was indebted to the plaintiff in the manner set out, and the details of the plaintiff's claim were fully given. Process was prayed against the defendants, and personal service was had upon the defendant Griffith. All of the defendants, including Griffith, answered to the merits of the case; and there was no plea on the part of the defendant Griffith of "no partnership," and no averment that he individually was not liable. On the contrary, the allegations of the petition that the partnership existed, and that Griffith was a member thereof, were expressly admitted to be true in the answer filed by the defendants; and Griffith joined with the other defendants in denying the contract set up by the plaintiff, and averring another contract as existing between the parties, and joined with the other defendants in pleading to the action on its merits. Under the provisions of Civ. Code, § 2637, it is not necessary, where partners are sued in their firm name, that the partnership should be proved, unless denied on oath by a plea in abatement. The evidence for the plaintiff tended to show that the contract set up by

the plaintiff was made with the warehouse firm when the defendant Griffith was a member of that firm; and if there was any reason why he, as a member of said firm, was not liable with the other members, that fact should have been set up by a plea, and supported by evidence. In the absence of such, it is too late, after verdict, for him to complain, and the verdict cannot be set aside on this ground.

2. The court was requested to charge the jury, in relation to the insurance of the plaintiff's cotton, that if the jury believed from the evidence that the cotton while in the warehouse was fully covered by insurance in some solvent company doing business in Athens, and that in case of fire plaintiff would have been fully protected from loss, this would be a compliance with the contract as to insurance, and the plaintiff could not recover, whether the insurance policies were in his name or in the name of the defendants; that if the cotton was insured in the defendants' name, and a fire had occurred, plaintiff could have protected himself, either by having the insurance policies transferred to him, or by suing the defendants and garnishing the company, or by allowing the defendants to have collected the policies, and proceeding directly against them for the value of the cotton. There being no evidence of the insolvency of the defendants, plaintiff would have been protected if you believe his cotton was insured as contended by defendants. We think this request to charge was properly refused. The contract testified to by the plaintiff was that the defendants agreed to insure his cotton, and take the policies in the plaintiff's name, describing his cotton by his individual mark, thus segregating plaintiff's cotton from the remainder of the cotton stored in the warehouse, and covering it specially for the plaintiff's direct benefit. The request to charge assumed that the terms of this contract were, in law, complied with, whether the insurance policies were taken in the name of the plaintiff or in the name of the defendants, merely because of the fact, as they claim, if insured in the defendants' name, and a loss had occurred by fire, the plaintiff could have protected himself by a transfer of the policies, or by bringing suit against the defendants, and would have been protected in the absence of evidence of insolvency of the defendants. A contract of fire insurance is a contract of indemnity against loss by fire. The owner of the cotton had the right to choose the person or corporation with whom he would make this contract of indemnity. If he preferred that a fire insurance company should directly agree to pay his loss, it was his right to exercise such preference, and it was not in the power of the other contracting parties to substitute any firm or individual to make the contract of indemnity. It is conceivable that a person would be willing to risk a regularly established insurance company, rather

than a business firm, although solvent. It was also the right of the owner of the cotton to enter into such a contract as would cause the adjustment of the loss to be made directly with him, and not be complicated by transfers of the policies, or by a suit and the issuance of summons of garnishment against the indemnifying contractor. At common law a strict and literal performance of the terms of the contract was required; but by rules of equity, either adopted by statute or recognized by the courts, a substantial compliance with the terms of the contract is sufficient; and, if any damage is suffered from a failure to comply strictly with the contract, it may be recovered by action. See authorities cited in note 53, p. 628, Clark, Cont. Where a party has entered into a contract to perform work and furnish materials of a specified character, and the other party agrees to pay for the same upon the performance of the contract, although the work may be performed and materials furnished, yet, if not done in the manner stipulated, no action will lie for compensation. The promise must be performed as required by the contract, to entitle the party to recover therefor. Clark, Cont. p. 627, note. See, also, *Hardeman v. English*, 79 Ga. 387, 5 S. E. 70. If it be true that the contract entered into between the parties contained the stipulation testified to by the plaintiff in the court below, it was not a performance of such stipulation on the part of the warehouse company to have covered all of the cotton in their warehouse, including that belonging to the plaintiff, with a general policy of insurance payable to itself, and the court committed no error in refusing to give the charge requested.

3. The court was requested to charge the jury as follows: "If you believe that such settlement was made between plaintiff and defendants, and plaintiff did not know of the facts as to how his cotton had been insured, and could not have found out by reasonable diligence, then he might have a right to set aside the settlement, and reopen it; but he cannot do so in this proceeding, and could not recover until he had set it aside, and placed the defendants in the same position they were prior to the settlement; that is to say, before plaintiff could recover or go back of the settlement, he would have to tender to the defendants the money that defendants had paid out, based on that settlement, and place them in the position they were prior to the settlement." We find no error in the refusal of the court to give the charge as requested. It is not questioned in this case that the defendant in error had a large sum of money coming to him from the sale of his cotton in excess of the charges of the warehouse company for storage, insurance, etc. Hence it was not a right that the warehouse company had, after a sale of the cotton, to retain, under any circumstances, so much of the proceeds as exceeded the amount of their charges; and, if the defendant in error should

be required to turn over to the warehouse company all the money he received, he would be turning over his own money, to which the warehouse company had no claim. It was not necessary for the maintenance of the present action that the plaintiff should rescind or offer to rescind the settlement made with the warehouse company, and tender back the money he had actually received in the settlement. It appears, as before said, that the money thus received by the plaintiff was the net proceeds from the sale of cotton belonging to him, which had been sold by the warehouse company under his direction, and was what remained from such sale, after deducting charges for storage, insurance, etc., as contemplated by the contract under which said cotton was stored and to be insured. If the warehouse company had fully performed its contract, the plaintiff received no more in the settlement than he was entitled to have. By Civ. Code, § 3712, it is provided that in order for a party to rescind, without the consent of the opposite party, for nonperformance by him of his covenants, both parties must be restored to the condition in which they were before the contract was made. The doctrine of rescission is based upon restitution, and it is only applicable generally where restitution can or ought to be made. It must be apparent that this doctrine can have no application in the present case. The plaintiff had acquired nothing under the settlement which the warehouse company was entitled to have restored. The theory of the plaintiff is that they did not turn over to him enough; that he ought to be allowed the deduction for insurance to be made, in ignorance of the fact that the insurance had not been taken according to the agreement. If this be true, what should be restored, and for what purpose? The company could not claim to hold the proceeds of the cotton after the payment of its charges. They were not its owners. The defendants insist that the plaintiff paid no more charges than were due; but there is no evidence tending to show, and no claim, as we understand, made by the company, that he did not pay as much as was due. The issue is then resolved into the questions of fact: What was the contract in relation to insurance, and did the warehouse company comply with the terms of the contract? If it did, the settlement holds good. If it did not, and, at the time of the settlement, the plaintiff was ignorant of that fact, and allowed the warehouse company to retain a sum sufficient to pay the insurance, believing that it had been taken according to the contract, he would certainly have a right of action to recover the amount so retained, without turning back to the company the amount concerning which there was and is no dispute.

4. The refusal of the court to charge as requested in the second, third, and fourth grounds of the motion for a new trial is qualified by notes of the presiding judge, that

the principles of law contained in these requests were covered by the general charge, and therefore need not be further considered, except to say that the portions of such requests not embraced in the general charge, according to the notes of the judge, ought not to have been given. The charge of the court in full is not in the record, and the statement of the judge made in connection with these grounds that the principles of law requested to be given in charge, so far as legal and pertinent, were covered in the general charge, meets the objection that the judge committed error in refusing to charge as requested. There is ample evidence found in the record to support the verdict if the jury believed the witnesses introduced for the plaintiff to support the allegations made in the petition; and this court would not be authorized to set it aside and grant a new trial for the want of evidence. Judgment affirmed.

(105 Ga. 191)

BALLARD v. ORR et al.

(Supreme Court of Georgia. July 25, 1898.)

DEPUTY CLERK OF COURT—ATTESTATION OF INSTRUMENTS.

A deputy clerk of the superior court, appointed under section 4359 of the Civil Code, who has duly qualified, is empowered by law to attest deeds and other written instruments for registration; and the court committed no error in admitting in evidence a registered mortgage, attested by such officer, over an objection based on the invalidity of such attestation.

(Syllabus by the Court.)

Error from superior court, Morgan county: John C. Hart, Judge.

Action between Vallie Ballard and John Orr and others, executors. From the judgment, Ballard brings error. Affirmed.

George & George, for plaintiff in error. W. R. Mustin, for defendants in error.

LITTLE, J. 1, 2. The questions of fact which arose in the case were properly submitted to, and passed upon by, the jury; and, after considering the grounds, we find that the trial judge committed no error in overruling the motion for a new trial. It is not necessary that the questions so raised should be referred to in detail here, further than to say that it being admitted that at the date of the mortgage from Heyser to Baccus title to the land in dispute was in Heyser, and it appearing that the proceedings of foreclosure were regular, the burden was on the claimant to show a title or right superior to the mortgage, provided the latter created a valid and subsisting lien on the land. To defeat this lien it was not sufficient to show that there had been a contract for the purchase of the land by Houk prior to the date of the mortgage, without showing knowledge or notice of such contract on the part of the mortgagee. It was not attempted to show that the mortgagee had actual notice or knowl-

edge of that contract; nor does the evidence clearly show at what time Houk went into possession under the contract with Heyser, so as to charge the mortgagee with notice of his claim. We are not, therefore, able to say that the verdict of the jury was contrary to law and the evidence in the case.

The main point in the case, and the one upon which it turns, under the pleadings and evidence, as shown in the record, is whether the mortgage made by Heyser to Baccus, and which was recorded, constituted a valid lien on the land. The plaintiff in error insists that the instrument created no lien, because at the time of its execution Heyser was clerk of the superior court of Morgan county, and that it was attested by another witness and Baldwin, deputy clerk of the superior court of Morgan county, and it was upon this attestation that the instrument was admitted to record by the deputy clerk, without any further probate than that made by the attesting witnesses. The contention is that a deputy clerk cannot legally attest and admit to record a mortgage executed by a person who was at the time the clerk, and therefore the principal of the deputy. The court overruled the objection made to the admission in evidence of the mortgage so executed, and charged the jury that the same was properly executed and properly admitted to record, and was notice to the world, notwithstanding the fact that the mortgagor was at the time of the execution of the mortgage the clerk of Morgan superior court, and one of the attesting witnesses was a deputy clerk of the same court, and attested the mortgage in that capacity. So that the question is clearly presented whether, under the laws of this state, a deputy clerk of the superior court is authorized by law to officially attest the execution of a mortgage so as to entitle it to record. While Heyser at the time of the execution of the mortgage was the clerk of the superior court, the execution of a mortgage by him was, of course, his personal act,—that of an individual,—with which his office was in no way connected; and if Baldwin, as a deputy clerk of the court, was an officer authorized by virtue of his office to attest the execution of a mortgage, such attestation would be as good when made to the act of Heyser individually as to the act of any other individual. By section 3620 of the Civil Code it is provided that to authorize the record of a deed, if executed in this state, it must be attested by a judge of a court of record of this state, or a justice of the peace or notary public, or clerk of the superior court, in the county in which the three last-mentioned officers respectively hold their appointments, or if, subsequent to its execution, the deed is acknowledged in the presence of either of the named officers, that fact, certified on the deed by such officer, shall entitle it to be recorded. Our system of attesting deeds and other instruments requiring record is the equivalent of an acknowl-

edgment of the execution of such instruments, made by the maker as required by the common law, and practiced in most of the states. Under our statute, attestation by one of the officers named, together with another witness, dispenses with the necessity of acknowledgment, and acknowledgment in the presence of a proper officer dispenses with the attestation of its execution by an officer.

By section 4359 of the Civil Code, clerks of the superior courts "have the power to appoint a deputy or deputies, and may require from them bonds with good security, who shall take the same oath as the clerks do before entering upon the discharge of their duties, and whose powers and duties are the same as long as the principal continues in office and not longer, for the faithful performance of which they and their securities are bound." It is further provided by sections 259 and 260 of the Political Code that the bonds given by deputies must be payable to their principals, for the same amount and with the same conditions for their conduct as deputies as are contained in the bonds of the principal clerks, and these bonds must be recorded in the same office and in the same manner as the bonds of the principals, and also that it shall be at the option of any person who claims damage from the principal officer for the act of his deputy to sue the bond of the deputy instead of the bond of the principal. It is further provided by section 240 of the Political Code that all deputies, before proceeding to act, must take the same oath as their principals take, which must be filed in and entered on the minutes of the same office, and with the same indorsement thereon. It must be noted, however, that these provisions cannot apply to any agent or representative or any person who may be employed in particular matters only. Such a person is not a deputy, in contemplation of the Code. It would thus seem that the provisions of our statute have gone very far towards making the deputy clerk appointed under the provisions of section 4359 of the Civil Code a public officer. In his work on *Public Offices and Officers* (section 570), Mr. Mechem says: "Where a public officer is authorized to appoint a deputy, the authority of that deputy, unless otherwise limited, is commensurate with that of the officer himself, and in the absence of any showing to the contrary it will be so presumed,"—citing *Abrams v. Ervin*, 9 Iowa, 87; *Ellison v. Stevenson*, 6 T. B. Mon. 275; *Triplett v. Gill*, 7 J. J. Marsh. 482; *Com. v. Arnold*, 8 Litt. 816; *Hope v. Sawyer*, 14 Ill. 254. This author further says: "Such a deputy is himself a public officer, known and recognized as such by law. Any act, therefore, which the officer himself might do, his general deputy may do also,"—citing 9 Iowa, 87. There is a decided conflict in the reported cases on the question in whose name a deputy officer should act. It seems now, however, to be well settled that, where the authority exercised by the deputy is mani-

restly a derivative and subsidiary one, it is the authority conferred upon the principal, and not an authority inherent in the deputy. It follows in such cases that the authority must be exercised in the name of him in whom it exists, and not in the name of him who has no recognized authority. But where the deputy is recognized as an independent public officer, and is endowed by law with authority to do any act which his principal might do, the authority exists in the deputy himself, by operation of law; and, not being derived solely through the principal, it is well executed in the name of the deputy. *Calender v. Olcott*, 1 Mich. 344; *Allen v. Hazen*, 26 Mich. 142. So far as concerns the authority of a special deputy, who is a mere agent or servant of the principal, his acts can be properly exercised only in the name of the principal. *Council of Village of Glencoe v. People*, 78 Ill. 382. As already seen, the provisions of our statute in relation to the appointment of deputy clerks by clerks of the superior courts are that the powers and duties of the deputy so appointed are the same as those of the principal, as long as such principal continues in office. In order, therefore, to determine the official powers and define the official duties of a deputy clerk appointed as provided, we are to ascertain only what are the powers and duties of the principal clerk. Section 4361 of the Civil Code prescribes the duties which are required of the clerk of the superior court, and by paragraph 16 of that section he is required "to make a minute on all conveyances or liens of the date left for record and the date recorded, to be signed officially, which shall be evidence thereof, and to attest deeds and other written instruments for registration." It will be observed that the power to attest deeds and other written instruments for registration is not an incidental power given to the clerk of the superior court as an officer, but it is by this section made the official duty of the clerk to make such attestation. Being the official duty of the clerk so to do, if the deputy clerk is invested with the powers and charged with the duties of the clerk, then it must follow that to the deputy is given the power, and it is made his duty, to make such attestations. A large number of cases are cited in 1 Devl. Deeds, § 473, which support the rule that, when an officer having power to take an acknowledgment of a deed is authorized to appoint a deputy, the deputy also has power to take and certify an acknowledgment. In the case of *Miller v. Thatcher*, 9 Tex. 482, it was ruled that a deputy had no power to take an acknowledgment; but in the case of *Cook v. Knott*, 28 Tex. 85, this ruling was reversed, and on objection that the deed offered in evidence was not duly registered, because it had been authenticated for record and recorded by the deputy clerk of the county court, the Texas court held that the deputy had authority to authenticate the deed for record. See, also, *Touchard v. Crow*, 20 Cal. 150; *Herndon v. Reed*, 82 Tex. 647, 18 S. W.

665; *Summer v. Mitchell*, 29 Fla. 179, 10 South. 562. The cases of *Goodwyn v. Goodwyn*, 11 Ga. 178, and *Graves v. Warner*, 26 Ga. 620, do not, as we understand them, conflict with our reasoning in this case. If they did, it would be sufficient to say that the provisions of our Code, as they now exist, on the subject, in more explicit terms, enlarge the authority given to deputy clerks; and we are constrained to rule that under these provisions a deputy clerk of the superior court, appointed in the manner prescribed by the Code, who is given general authority by the appointment, and who has complied with the provisions of law in his qualification as deputy, has the same authority to officially attest the execution of deeds and other instruments requiring record, and to take acknowledgments of the execution of such instruments, as is given to the principal clerk, and that he has this power by virtue of his office as deputy clerk, and in the exercise of this power he uses his own name and authority, and not those of the principal clerk. He may therefore attest a paper executed by the individual who is the principal clerk in the same manner, and it will have the same effect as his attestation to papers executed by any other individual. And the court committed no error in admitting the mortgage in evidence, and in charging the jury as set out in the motion. Judgment affirmed.

(105 Ga. 646)

JOINER v. STATE.

(Supreme Court of Georgia. Oct. 13, 1898.)

CRIMINAL LAW—INSTRUCTIONS—HARMLESS ERROR—MURDER—EVIDENCE.

1. It is proper for the court, in the trial of a case where the evidence is both direct and circumstantial, to define to the jury each class of evidence, and explain the difference between them.

2. That some of the instructions embraced in the charge of the court to the jury in a criminal case were not warranted by the evidence will not be held cause for a new trial, when it is apparent that these instructions tended to benefit, and could not in any event have resulted in injury to, the accused.

3. That the court, after stating to the jury an important contention of the accused, did not in that immediate connection inform them what effect should be given to this contention if found true, is not cause for a new trial, when, from other instructions and in the very nature of things, it is palpably apparent that the jury could not have failed to understand that if this contention was established, they should acquit the accused.

4. Mere failure to charge concerning the impeachment of witnesses will not require a new trial when the attention of the court was not called to this subject, and there was no request to charge thereon.

5. The evidence fully warranted the verdict, and the record discloses no good reason for setting it aside.

(Syllabus by the Court.)

Error from superior court, Bibb county; W. H. Felton, Jr., Judge.

Harry L. Joiner was convicted of murder, and brings error. Affirmed.

John R. Cooper, for plaintiff in error. Roland Ellis, Robt. Hodges, Sol. Gen., and J. M. Terrell, Atty. Gen., for the State.

LUMPKIN, P. J. On the trial of Joiner, who was indicted for murder, and found guilty, with a recommendation that he be punished by imprisonment in the penitentiary for life, the court, in its charge to the jury, gave to them a correct definition of direct evidence, and explained to them the difference between it and circumstantial evidence, and also gave them instructions upon the law of voluntary manslaughter and justifiable homicide. These things are complained of in the motion for a new trial filed by the accused, which alleges that the evidence was entirely circumstantial, and that it contained nothing warranting the instructions just mentioned. The motion also alleges that the court erred in stating to the jury that the accused, denied the killing, or that he had anything to do with it, without further instructing them that, if this contention were true, they ought to acquit the accused. It is further insisted in the motion that the court erred in not instructing the jury that a witness can be impeached by proving contradictory statements, and that, when a witness has contradicted himself, it would be a question for the jury whether he should be believed or not.

1. This was not a case of purely circumstantial evidence. Much of the testimony was direct and positive, and much of it was circumstantial. It follows, therefore, that the first ground of alleged error, as above set forth, was not well taken.

2. After a careful study of the evidence in the record, we are strongly of the opinion that it contained nothing warranting the judge in charging either upon the law of voluntary manslaughter or of justifiable homicide. Apparently, it was a case of assassination, and the only substantial issue was whether or not the accused was the person who did the killing. Accordingly, there is much strength in the position that the instructions just referred to ought not to have been given; but, assuming this to be so, the fact that they were given constitutes no cause for a new trial in the present case. If the accused had been acquitted, that would have been an end of the case. If he had been convicted of voluntary manslaughter, the question for decision would be altogether different. *Dyal v. State*, 97 Ga. 428, 25 S. E. 319. Inasmuch, however, as the jury found him guilty of murder, and did so upon very strong and convincing evidence of his guilt, he was not injured by the charges now under consideration. Indeed, they "tended to benefit rather than harm the accused." *Hudson v. State*, 101 Ga. 524, 28 S. E. 1010.

3. It is inconceivable that a jury of any intelligence would convict one on trial of any grade of homicide, if they believed that he neither did the killing nor had any connec-

tion with it. Besides, it distinctly appears that the judge plainly and unequivocally instructed the jury that, if the state had not established beyond a reasonable doubt that the accused did the killing, he should be acquitted. In view of the entire charge, there is not the slightest room for doubt that the jury fully understood they ought not to find Joiner guilty unless fully satisfied that he committed the homicide.

4. The court was not requested to give any instructions relating to the impeachment of witnesses, and, accordingly, failure to do so will not be held cause for a new trial. *Smith v. Page*, 72 Ga. 539; *Stevens v. Railroad Co.*, 80 Ga. 19, 5 S. E. 253; *Cole v. Byrd*, 83 Ga. 207, 9 S. E. 613; *Lewis v. State*, 91 Ga. 168, 16 S. E. 986.

5. As already stated, the evidence against the accused was strong and convincing. Indeed, we hazard nothing in saying that the verdict of guilty was demanded. The accused was fortunate in obtaining the recommendation by which the death penalty was averted. Judgment affirmed. All the justices concurring.

(106 Ga. 640)

BROWN v. STATE.

(Supreme Court of Georgia. Oct. 13, 1898.)

CRIMINAL LAW—SETTING ASIDE VERDICT—DISQUALIFICATION OF JUROR—APPEAL—OBJECTIONS TO EVIDENCE—HOMICIDE—EVIDENCE—NEW TRIAL—NEWLY-DISCOVERED EVIDENCE.

1. An extraordinary motion to set aside a verdict on the ground that one of the jurors was not a resident of the county at the time of the trial raises an objection proper defectum, and arises too late after the verdict, though the movant did not know the fact alleged until after the verdict. Were the rule otherwise, this court will not reverse the judgment of the court below when it appears from the counter showing made by the state at the time of hearing the motion that there was sufficient evidence to authorize the judge to conclude that the facts alleged in the motion were not true.

2. This court cannot consider a ground in a motion for a new trial alleging error on the part of the court below in admitting certain testimony, it not appearing in the motion or the bill of exceptions that any objection was ever made to the admission of such testimony.

3. On the trial of an issue made by a plea of not guilty under an indictment for murder, whether the sheriff had previously had the jail guarded for fear the defendant might be lynched was immaterial, and the court did not err in excluding such testimony from the jury.

4. The charge of the court fully, fairly, and correctly presented to the jury the law bearing upon the issue involved; and, in the light of the entire charge, there was no merit whatever in any of the exceptions taken to the portions thereof set forth in the motion for a new trial.

5. In the trial of a murder case the jury, should they find the defendant guilty, are vested with absolute power to recommend, or not, the defendant to life imprisonment, as they see proper, and a failure to recommend can under no circumstances authorize the court to set aside their verdict.

6. There was no error in overruling the ground in the motion based on newly-discovered evidence, when it did not appear that either the defendant or his counsel did not know of

the newly-discovered testimony until after the verdict. Especially is this true when most of such newly-discovered testimony was either immaterial or impeaching in its nature, and when all of it was met by rebutting affidavits presented by the state contradicting the affidavits of defendant used in support of his motion.

7. The evidence in this case was sufficient to sustain the verdict.

(Syllabus by the Court.)

Error from superior court, Bryan county; R. Falligant, Judge.

Willie Brown was convicted of murder, and brings error. Affirmed.

Giquilliat & Stubbs and P. W. Williams, for plaintiff in error. W. W. Osborne, Sol. Gen., and J. M. Terrell, Atty. Gen., for the State.

LEWIS, J. The defendant was indicted for the murder of Thomas Benton, alleged to have occurred in Bryan county on April 25, 1898. A plea of not guilty was entered. The following facts, substantially and briefly stated, appear from the testimony in the case: Tom Benton, the deceased, was a white boy, 16 years old, but small and delicate for his age. The defendant, a colored boy, was about the same age, but of larger stature. Early on the morning of the day above named, the deceased, by direction of his father, started on a trip from their home in a one-horse wagon to a station on the railroad some eight miles distant, in order to bring back some goods for the purpose of use in the country store owned by the father. The deceased was given money by the father to pay for these goods. He had proceeded but about three miles on his journey to the station when he was killed. The body was found late in the afternoon behind a log, a few feet from the roadside, where had stood his horse and wagon and dog all day. In a mortal wound in the neck was found sticking his own knife. There were bruises on the body, and signs of a scuffle on the adjacent ground. The defendant was seen in company with the deceased at or near the spot where the body was found. Defendant had also in charge a wagon drawn by a mule. When first seen, he was sitting in the wagon with the deceased. When seen the second time, he was on the ground, ostensibly mending some portion of his harness; both teams being stopped in the road adjacent to where deceased was killed. No other person was found in company of the deceased after he left his home with the wagon. Two spots of blood were noticed upon the drawers of the defendant at the coroner's inquest. While the sheriff was removing the defendant, for safe-keeping, from the jail in Bryan county to Savannah, defendant stated that he would tell the sheriff something, if he would not say anything about it until after they left the railroad station which they were then approaching. This promise was given, and it appears that the sheriff complied with it. Defendant appeared distressed on account of

his father being in jail, charged with the same crime, and was weeping. He then confessed that he had killed deceased; that the deceased had started to run, and fell over a log, and he thereupon jumped on him, and cut his throat with a knife. He stated that he secreted his pants, and the money he took from the body of the deceased, at a particular place (designating it), and that upon the pants would be found blood of the deceased. Upon a search of the place, neither the pants nor the money was found, but evident signs were observed where something had been apparently hidden, and afterwards removed. The jury returned a verdict of guilty, without recommendation. The defendant moved for a new trial, and, upon his motion being overruled, he excepted. He afterwards also filed an extraordinary motion for a new trial, upon the ground that one of the jurors was not a resident of Bryan county, but a resident of Chatham county, at the time of the trial, and that he did not know this fact until after the verdict. This motion was also overruled by the court, and the defendant excepted. We will consider both exceptions in this opinion.

1. The proposition announced in the first sentence of this headnote has been so frequently decided by this court that any further discussion of the same is entirely unnecessary. *Costly v. State*, 19 Ga. 628; *Gormley v. Laramore*, 40 Ga. 253; *Meeks v. State*, 57 Ga. 329; *Hill v. State*, 64 Ga. 453; *Henderson v. Fox*, 83 Ga. 234, 9 S. E. 839. But, even if this ground of exception to this juror had been made in time, there would have been no error in overruling the same, under the facts of this record. The question of the qualification or competency of a juror is one exclusively for the court. The state presented a counter showing, by an affidavit of the juror himself, to the effect that in point of fact he was at the time of the trial a resident of Bryan county; and the circumstances to which he swore, showing his residence, were sufficient to authorize the judge to conclude that he was competent to serve in the case. In case of a conflict of evidence on such a question, this court will not interfere with the free exercise of the judgment of the trial judge in passing upon this issue of fact.

2. The following grounds appear in the motion for a new trial: "The court erred in permitting the alleged confession to go to the jury." "The court erred in permitting the witness W. G. Sutton to testify that he saw blood upon the drawers of the defendant." It nowhere appears from the motion that any objection was made to the admission of the testimony referred to in either of these grounds. Even if this fact appeared, we do not think, under the facts appearing in the brief of evidence, that the confession should have been excluded from the jury. There was no testimony whatever that it was induced by another through any hope of re-

ward or fear of punishment. The testimony that blood was seen upon the drawers of the defendant was certainly pertinent, and the garment itself at the time of the trial could not have been the highest evidence of how it appeared previously, and immediately after the killing.

3. There was no motion in this case for a change of venue, or for a continuance, on the ground of the excited state of the public mind, and the danger the defendant was in from lynching. Without making any such motion, the defendant's counsel announced "Ready," and went to trial on the merits of the case. As to whether or not the sheriff had kept the jail guarded, as a matter of precaution, and for the safety of the defendant, certainly throws no light upon his guilt or innocence.

4. Objection was made in the motion to that portion of the charge in which the court stated to the jury as follows: "Your object is to obtain the truth,—to determine who committed the crime; and when you have obtained the truth, and are satisfied to a conviction beyond a reasonable doubt, march up to your verdict with the same impartiality, and do your duty." In the same connection, and just previous to this sentence, the court had cautioned the jury particularly that the law knows no creed or condition, no color, no nationality; and they were, in effect, instructed that every defendant, whether he be rich or poor, high or low, should be tried with perfect impartiality. We can see no possible objection to an instruction by the court which, in effect, simply enjoins perfect impartiality between the state and the accused. Objection was further taken to the charge of the court as follows: "You are judges of the law and the facts, in this wise: You take the facts from the witness stand, the law as given you in charge by the court, apply the law to the facts, make up your verdict, and thus become judges of the law and the facts." The meaning of this was simply to charge substantially what this court has ruled as law upon the subject so often that it is unnecessary even to cite decisions.

5. Another ground in the motion for new trial is that "the verdict is contrary to law and evidence, in that the jury should have recommended the defendant to mercy." We cannot conceive of a case in which it can be said, as matter of law, that the jury might abuse their discretion by failing to recommend to mercy a convicted criminal. The power of a jury in a capital case to fix life imprisonment as the punishment, or to refuse to do so, is absolute, and cannot be controlled or interfered with by the courts. In such a matter the arm of this court is rendered absolutely powerless by the law, and, regardless of what the individual views of any member of this bench might be upon the subject of capital punishment in any particular case, we do not think it would be proper even to suggest, intimate, or advise, in

our adjudication, whether the death penalty or life imprisonment should be inflicted. The law has constituted another tribunal to pass upon this momentous issue, and we have no disposition to invade its prerogative.

6. It does not appear from the record that the alleged newly-discovered evidence was unknown either to the defendant or his counsel until after the trial, and hence there is an utter want of showing such diligence as would authorize the court to consider it as a ground for setting aside the verdict. The defendant's father made affidavit that he had used due diligence in ascertaining facts before the trial, and did not know of the newly-discovered evidence until after the trial; but no such affidavit, or even statement, appears from the defendant himself, or his counsel. Even if the defendant was of such tender age that the law would not charge him with any diligence in such matters, nevertheless his counsel's negligence would be imputed to him. This being a capital case, however, we have not paused here in the investigation of this question, but have carefully gone over the entire record; and we are less reluctant in rendering a decision sustaining the judge in overruling this ground of the motion because it appears by counter showing made by the state that the facts relied on as newly-discovered evidence were sufficiently rebutted, and, besides, they were mainly immaterial and impeaching in their nature.

7. It was earnestly insisted by plaintiff in error that the judgment below should be reversed, and a new trial granted, because the verdict was contrary to the evidence. We think that the brief statement of the facts given in the first part of this opinion is itself an answer to this contention. A confession of guilt, when corroborated, will sustain a verdict of guilty. The confession in this case was not only corroborated by proof of the corpus delicti, but was further corroborated by proof of the fact that the killing occurred in the manner and at the place indicated by the defendant in his confession. He stated that the deceased was overtaken by him after he had fallen over the log. Behind this identical log the body was found. He stated further that the purpose of the murder was to steal the money on the person of the deceased. The proof showed the money was absent from the body when found. He stated that blood was to be found upon his pants. The pants were not recovered, but blood was found upon the drawers, which had evidently permeated through the pants. He stated that the pants and money would be found at a designated place. While not found there, the place gave every appearance that something had been concealed there, and afterwards removed. It was certainly, to say the least of it, a plausible theory in this case that during the conversation between the defendant and the deceased in the wagon the former had ascertained that the latter had

money upon his person, and that afterwards he borrowed of the deceased a knife, ostensibly for the purpose of fixing his harness, but really for the purpose of assassinating the deceased, and when the deceased was assaulted he fled, and was overtaken and killed, after having fallen over a log, as stated in the confession. All confessions should be scanned with great caution and care, and we think this rule should be particularly invoked and given in charge to the jury when a confession is made, however voluntary, by one of tender age, while under arrest and in distress. This caution the judge emphasized in his charge, and we do not see how he could well have been more particular in his warnings to the jury upon the subject of accepting as the truth the confession of the defendant.

There being therefore no rule of law violated, and the verdict being supported by the evidence, we will not interfere with the discretion of the trial judge in overruling the motion for a new trial. Judgment affirmed. All the justices concurring.

(102 Ga. 565)

BYROM v. GUNN et al.

(Supreme Court of Georgia. June 9, 1897.)

TRIAL—ARGUMENT—EQUITY—REFERENCE—GUARDIANS—ELIGIBILITY—ACCOUNTING—JUDGMENTS—FRAUD—FOLLOWING TRUST FUNDS—SUBROGATION.

1. There was no error, in the trial of a case in which both sides had filed exceptions to an auditor's report, in allowing the opening and conclusion of the argument to that party against whom the report as a whole bore the more heavily, and against whom a judgment, in effect overruling such party's most important exceptions, would have resulted from a general approval of the report.

2. Exceptions of fact to the report of an auditor appointed in an equity case are not to be passed upon by a jury, unless approved by the court, and its discretion in refusing to approve such exceptions will not, unless manifestly abused, be controlled by the supreme court.

3. Where a guardian received and managed the ward's entire estate, and, though nominally succeeded by his wife in the trust, did not surrender to her any of the ward's property, but continued to hold and control all of the same exactly as if no change in the guardianship had taken place, having in fact procured his wife's appointment for unlawful purposes of his own, without regard to the ward's interest or welfare, so that, from the beginning until the appointment of a successor to his wife in the guardianship, he was practically, though not so all the while in name, the real guardian, he was, in a final accounting with the wife's successor, chargeable with interest upon the basis prescribed in section 3498 of the Civil Code.

4. It has at any time since the passage of the "married woman's law of 1868" been lawful to appoint a married woman guardian either of her own child or of another person. Where, however, such a woman, who had been appointed guardian of a lunatic, as the successor of her husband, could not be held liable as such guardian, because she had, at the instance of a next friend of the ward, been removed from the guardianship on the ground that her original appointment was void, she could not, in defense to an action against herself and her husband for an account and settlement and for subject-

ing to the ward's claim property held by her, but paid for in part with the ward's funds, lawfully complain of the husband's being charged with compound interest under the section above cited, or of the making of a judgment against him embracing such interest expressly binding upon such property, if the same was in other respects subject.

5. Where a husband mingled funds of his own, funds belonging to his wife, and funds belonging to a ward, and indiscriminately used the same in divers real-estate transactions, in the course of which he made numerous purchases, sales, and reinvestments, sometimes taking title to property thus bought in his own name, and at other times in his name as trustee for the wife, and where, as an outcome of all these operations, it finally resulted that she obtained against him, in an equitable proceeding in which the ward was not represented, a judgment establishing in the wife, as against the husband, the title to a considerable amount of realty, consisting of various separate parcels, titles to which he had taken in both of the ways above indicated, and into which, as a whole, the funds of the ward were traceable, though it was impossible to ascertain how much of any of the three funds went into any particular parcel, and where in the above-mentioned transactions, which took place prior to the rendition of such judgment, the husband was acting as agent for the wife, and he and she collusively procured that judgment to be rendered for the purpose of hindering, delaying, or defrauding his creditors, *held*: (a) That the act of the husband in intermingling the various funds referred to was, in law, the act of the wife, so far as concerned the rights of the ward. (b) That such judgment, though binding and conclusive between the husband and wife, was not so as to the ward. (c) That, under the facts recited, all of the property covered by such judgment, including not only that to which the husband took titles in his own name, but also that to which he took titles as trustee for his wife, could lawfully be subjected to the satisfaction of the ward's claim against him, in so far as the same rested upon the misappropriation of the ward's money in the manner above stated.

6. It appearing in the present case that the husband, as former guardian, was liable to the ward, not only for money used as indicated in the preceding note, but also because of a devastavit in failing, as such guardian, to collect money due the ward, there was not, in view of the auditor's findings of fact as approved by the court, any error in adjudging that the property which he had purchased with the intermingled funds, and to which he had taken titles in his own name, was subject to the satisfaction of the ward's claim arising from such devastavit, as well as that founded upon the misuse of the ward's funds, but the property to which the former guardian took titles as trustee should also have been adjudged subject to the satisfaction of the claim arising from such misuse. There was no error in providing, in the judgment rendered, for a subrogation of the wife, in the contingency therein stated, to the right of the present guardian to receive any sum hereafter collected upon the claim which the former guardian had failed to collect.

7. This case, upon its substantial merits, is controlled by what is above laid down; and, while some errors were committed both by the auditor and the trial judge, none of them require special notice, or are of any material consequence, save those on the part of the judge, which are corrected by directions given in the judgment herein rendered.

(Syllabus by the Court.)

Error from superior court, Bibb county; W. H. Felton, Jr., Judge.

Action between John S. Byrom, guardian,

and N. M. Gunn and others. A judgment was rendered, and the parties, respectively, bring a main bill and a cross bill of exceptions. Affirmed.

Gustin, Guerry & Hall and J. M. Du Pree, for plaintiff in error. Hill, Harris & Burch, for defendants in error.

PER CURIAM. Judgment on main bill of exceptions affirmed, with directions; on cross bill, affirmed.

(105 Ga. 530)

BARNES v. STATE.

(Supreme Court of Georgia. Oct. 12, 1898.)

CERTIORARI TO COUNTY COURT—CRIMINAL LAW—AFFIDAVIT OF POVERTY.

1. An affidavit attached to a petition for certiorari to review the judgment of a county court in a criminal case, in which the affiant made oath that, "owing to his poverty, he is unable to pay the cost or give the bond and security as required by law," substantially complies with the requirements of section 765 of the Penal Code, notwithstanding such affidavit includes the words relating to the giving of bond and security. This is so because the affidavit unequivocally sets forth the inability of affiant to pay the cost, and does not state conjunctively his inability to give the bond.

2. The ruling made in the case of *De Loach v. Richards*, 19 S. E. 717, 94 Ga. 730, is not in conflict with what is here held. That case is incorrectly reported. The record shows that the affidavit conjunctively stated that the affiant was unable to pay the cost, "and" give security, etc. A similar reference has heretofore been made to the case. See *Flanagan v. Scott*, 31 S. E. 23, 102 Ga. 399.

(Syllabus by the Court.)

Error from superior court, Hancock county; S. Reese, Judge.

Lee Barnes was convicted of crime, and brings error. Reversed.

W. H. Burwell, for plaintiff in error. R. H. Lewis, Sol. Gen., for the State.

PER CURIAM. Judgment reversed.

(105 Ga. 559)

DISMUKE v. STATE.

(Supreme Court of Georgia. Oct. 12, 1898.)

MISDEMEANOR—CHANGE OF VENUE—ORDER.

1. A judge of the superior court may, in his discretion, transfer a misdemeanor case from the superior to the county court for trial, without regard to the court in which such case originated.

2. An order for such transfer, however, cannot be granted in vacation.

(Syllabus by the Court.)

Error from superior court, Sumter county; Z. A. Littlejohn, Judge.

J. H. Dismuke was convicted of a misdemeanor, and brings error. Reversed.

J. A. Ansley, Allen Fort, and J. F. Watson, for plaintiff in error. F. A. Hooper, Sol. Gen., by C. R. Crisp, for the State.

FISH, J. A special presentment was returned by the grand jury of Sumter county charging J. H. Dismuke with the offense of

31 S.E.—36

keeping a lewd house. This presentment was transferred by the judge of the superior courts of the Southwestern circuit to the county court of Sumter county for trial. The accused filed special pleas in the county court, to the effect that it had no jurisdiction of the person or subject-matter of the case, (1) because the presentment had been transferred after adjournment of the superior court, and during vacation, and that the judge of the superior court had no power to make the transfer during vacation; (2) because the case originated in the superior court, and not in the county court, and that the judge of the superior court had no authority to transfer such a case, either in term or vacation; and for these reasons the case was still pending in the superior court. These pleas, upon demurrer, were stricken by the county judge, and error assigned in petition for certiorari. The certiorari was overruled, and the petitioner excepted.

We will consider the points made in the pleas in the reverse order of presentation.

1. Can a misdemeanor case originating in the superior court be legally transferred to the county court for trial? We think the legislature clearly intended to confer upon the judges of the superior courts authority to transfer such cases. As indicating this intention, the act of 1872 (Acts 1871-72, p. 298, § 22) provided that all misdemeanors pending in the superior court of a county at the time of the establishment of a county court for that county should be transferred for trial to such county court. While this section of the act may have been void, as an attempt to deprive the superior court of its constitutional jurisdiction of such cases, yet it shows that the general assembly intended to make no distinction, as to the power of superior court judges to transfer misdemeanors, between cases originating in the superior court and those originating in the county court. The act of 1879 (Acts 1878-79, p. 132) is "An act to define the jurisdiction, power and proceedings of every county court," etc. By the second paragraph of the first section of this act, jurisdiction is given "to try all offenses committed in the county, for which the offender is not punishable capitally or by imprisonment in the penitentiary; which criminal jurisdiction shall be exercised as hereinafter set forth." As to how criminal cases shall be tried, section 8 provides that, "when a criminal case is first called for trial, the defendant shall be asked by the judge, whether he demands as a condition to trial, indictment or presentment by a grand jury, and if he make no such demand, the fact shall be entered of record. He shall then be asked whether he demands a trial by jury, and if he make no such demand, that fact shall be recorded; and thereafter a written accusation shall be made out and proceeding shall be had thereon as in section 299 of the Code of 1873." Section 9 provides that, if the accused demands indictment or presentment, he shall be bailed

or committed. Section 11 says: "Such indictments or presentments, as may be transferred to the county court by the superior court, shall be tried therein in the manner herein set forth, except asking the defendant if he demands indictment or presentment." The act says nothing more about the transfer of indictments and presentments from superior to county courts. While section 11, just quoted, does not expressly confer upon judges of the superior courts authority to transfer misdemeanor cases from the superior to the county courts for trial, yet the existence of such power is clearly recognized, and the section makes no distinction between cases originating in the superior courts and those originating in the county courts. The language is certainly broad enough to cover both classes of cases. One of the great purposes of the establishment of county courts was to relieve the superior courts of the trial of misdemeanor cases by providing a tribunal wherein such cases might be disposed of more promptly and with less expense to counties. If only such cases can be transferred to the county courts as originated therein, then the principal object for their establishment will be greatly impaired. The judges of the superior courts, in circuits having county courts, have construed the law as giving them authority to transfer, in their discretion, all misdemeanor cases pending in their courts to the county courts, without reference to the court in which such cases originated, and this has been the practice for more than 20 years past. We think such practice clearly authorized under the law.

2. Judges of the superior courts have no authority in vacation to grant orders transferring misdemeanor cases pending in such courts to the county courts. "Said judges cannot exercise any power out of term time, except the authority is expressly granted." Civ. Code, § 4325. The solicitor general contends that authority to transfer misdemeanor cases in vacation to county courts is granted by section 4323 of the Civil Code. We do not think so. That section, after conferring power upon the judges of the superior and city courts to hear and determine, in vacation, without any order passed in term, motions for new trials and certiorari, adds: "And all such other matters as they now can hear and determine in term time, and which are not referred to a jury." While the granting of an order transferring a misdemeanor case from the superior to the county court is a matter which is not referred to a jury, yet it is not a matter to be heard and determined in term or at any other time. The section does not expressly grant the power to transfer, and such authority cannot otherwise exist. The judge of the county court erred, therefore, in sustaining the demurrer to the special plea, that the case could not have been legally transferred in vacation, and the certiorari should have been sustained. Judgment reversed. All the justices concurring.

(106 Ga. 412)

HOWARD et al. v. CASSELS.

(Supreme Court of Georgia. July 27, 1898.)
GUARDIAN—AUTHORITY—RATIFICATION—CONTRACT—
—ENTIRETY—VENDOR AND PURCHASER
—PARTIES.

1. Where a testamentary guardian enters into a contract for the purchase of land, pays a part of the purchase money with the funds of his wards, and executes a promissory note in his representative capacity for the balance, on a suit instituted by the vendor to obtain a judgment on the note the minor wards are not necessary parties. If the contract thus entered into is authorized by law or the terms of the will, the guardian, being the legal representative of the wards, is the only necessary party defendant in such a case, and a judgment against him binds their property in his hands. If the execution of such a contract is not within the power of the guardian, it may bind him in his individual capacity, but cannot, in any event, bind the property of the wards.

2. While the wards may have a right of action against their guardian for an illegal and unauthorized investment of funds belonging to them, by which such funds are lost, and this right of action may extend to any person who, with a knowledge of the facts, received the funds, yet the wards cannot maintain a proceeding in which, while claiming the fruits of an alleged illegal investment, they deny the vendor's right to proceed against the property he sold for the balance of the purchase money. If they ratify the investment, and claim the property purchased, they ratify also the proceeding by the vendor to collect the balance of the purchase money out of the property sold. Such a contract is not several in its terms, and must be ratified in its entirety, or repudiated altogether.

(Syllabus by the Court.)

Error from superior court, Dekalb county; J. S. Candler, Judge.

Action by Helen S. Howard and others, by next friend, against Raleigh G. Cassels. From a judgment for defendant, plaintiffs bring error. Affirmed.

Townes & Nicholes, for plaintiffs in error.
Arnold & Arnold, for defendant in error.

LITTLE, J. The plaintiffs seek to set aside a judgment in favor of Inman against George W. Howard, their testamentary guardian. They allege that they were not made parties to the action; that they had a good defense to it, which was that the note sued on was given by Howard, their guardian, in his capacity as such, and did not bind the plaintiffs, nor should such judgment be a lien on their property, because the testamentary guardian did not have the power to incumber the estate of the minors in any manner; and, referring to the judgment, they pray that it be declared null and void as against them and their property, and that it be set aside. We cannot see the necessity for the decree prayed for. If it be true that the guardian had no legal power to enter into a contract which would bind the property of his wards, then they were not bound by such contract; not would it be necessary for their protection that they should be made parties, and urge a defense in a suit on a contract which did not include them in its obligations. If

the guardian alone was sued on the note, and the minors were not parties, they would not be bound by the judgment rendered. If, on the contrary, the guardian had the power to bind the property of his wards by his promise to pay, then the property of the wards would be bound by virtue of the power he had to make the contract; but in neither event would it be necessary to make the minor wards parties defendant in such an action. The suit in which the judgment was rendered was based on a promissory note executed by the guardian. This note he was personally bound to pay. There was, as we understand it, no effort made to obtain a judgment binding the property of the wards, but a judgment by default was rendered against the guardian, his contract being unconditional. No judgment is set out in the pleadings, and, of course, we have no means of ascertaining its character. It makes no difference that the judgment rendered designates him as the guardian of the plaintiffs; it is, nevertheless, only a personal judgment. "A judgment rendered against one as guardian is no more than a judgment against him without the addition, for the word 'guardian' is only descriptive personæ." *Tobin v. Addison*, 2 Strob. 8. Our Code (section 2555) declares: "A guardian cannot, * * * by any contract other than those specially allowed by law, bind the property of his ward, or create any lien thereon." In *Story on Promissory Notes* the rule governing the question is laid down as follows: "And, as to trustees, guardians, executors, and administrators and other persons acting *en autre droit*, they are by our law generally held personally liable on promissory notes, because they have no authority to bind *ex directo* the persons for whom or for whose benefit or for whose estate they act, and hence, to give any validity to a note, they must be deemed personally bound as makers." See *Lovelace v. Smith*, 39 Ga. 130. In *McFarlin v. Stinson*, 56 Ga. 396, this court ruled that an executor could not bind the estate of his testator by a promissory note executed by him, and signed as executor; and in *Gaudy v. Babbitt*, *Id.* 641, it was in terms held that this rule has not been relaxed as to executors, administrators, or guardians; and in *Harrison v. McClelland*, 57 Ga. 581, it was held that a note signed as administrator bound the maker individually. So that, if our reasoning be correct, the promissory note given by Howard as guardian bound him individually; and, if no power was conferred on him by the will which created him guardian to so bind the estate of his wards, then, while the judgment rendered became a lien on his property, it did not create any lien on the property of the latter. We do not mean to say that there are no contracts entered into by guardians which can be enforced against the property of the wards. There may be, but, when such is the case, it is brought about generally, not by

virtue of the contract alone, but as a result of an equity in favor of the promisee. In all such cases, however, the pleadings and proof must show the subsisting equity. As a matter of law, guardians of the property of wards are trustees, whose powers over the property of their *cestui que trustent* are defined by law. Among these powers are not included the execution of a contract binding the estate of his wards; hence, where such a contract was sought to be enforced against him, it was not necessary that the wards should be made parties to the suit; and, inasmuch as the judgment rendered on such contract created no lien on the property of the wards, there can be no reason for entertaining the petition on their part to set aside such judgment. In this case the guardian was invested with his power by will. It was entirely competent for the testator to fix his powers, and it was also competent for the testator to confer on the guardian the power to contract, and by his contracts bind the estate of the wards. If this power was conferred by the will, then the contract made by the guardian depends for its validity on that instrument, and the effect of the judgment rendered on such a contract is determined, not by the law regulating the powers of guardians, but by the powers given him by the will. But if we admit that, in this case, power was given to him to bind the property of his wards by his contract as guardian, even in that case the wards are not necessary parties in a suit to enforce such contract, because the contract of the guardian is authorized to be made, and, when made, to bind the estate of the ward, by the terms of the will of the donor, who had the power to annex such conditions.

2. The petition alleges that the guardian of the plaintiffs purchased a described tract of land for the sum of \$2,500; that he only paid \$2,000 of the purchase price, and gave his promissory note for the remaining \$500, signed by the maker as guardian. It further alleges that the guardian had sufficient property belonging to the wards to pay the entire purchase money for the land, but that he did not do so. It alleges that the note was traded to Inman; that it was sued to judgment; and that the execution issuing on such judgment was levied on the land so purchased, which was sold under the execution, and bought by Cassels, who was put in possession. It further alleges that Howard, the guardian, at the time of the purchase, received a bond from Pendleton, conditioned to make title to him as guardian on payment of the balance of the purchase money as expressed in the note. The plaintiffs allege that they have tendered to Pendleton the balance of the purchase money as expressed, and have demanded a deed to the land and possession; and they pray that the sheriff's deed to Cassels be canceled, that Pendleton pay to Cassels the amount paid out by the latter, and that Pendleton be required to

make a deed conveying the land to the plaintiffs. In other words, the plaintiffs allege that it was an illegal act for their guardian to make the purchase, but that he did make it, and paid \$2,000 of money belonging to them as part of the purchase money. Under these circumstances they claim the benefit of the purchase, and insist that they have the right, on payment of the balance of the purchase money, to have a title to the property, and possession. Thus, they seek to ratify a part of the transaction, but at the same time they repudiate that part of the contract which reserved title to the land in Pendleton, with the right in the latter to proceed against the land for the collection of the balance of the purchase money. We think this cannot be done after suit for balance of purchase money, and a sale of the land under the judgment therein obtained. Conceding the purchase made with the funds of the wards to have been illegal, then the guardian is liable to the wards for the money so illegally used; and this is true not only of the guardian, but of all other persons who, with a knowledge of such illegal use, participated in the conversion of their money. Under well-settled principles, the wards can follow the money so paid into the hands of any one who received it with a knowledge of their rights and of the illegality of the transaction; but it is not consistent to ratify an illegal investment made by the guardian, and repudiate a part of the contract by which the guardian undertook to pay the balance of the purchase money before he received a title. The rule is that the principal cannot ratify a part and repudiate a part. He must adopt the whole contract, or none. Civ. Code, § 3021. And a ratification relates back to the act ratified. Id. § 3019. See, also, *Hunter v. Stembbridge*, 17 Ga. 243; *Perry v. Mulligan*, 58 Ga. 479; *Barclay v. Hopkins*, 59 Ga. 568. So that, if the plaintiffs claim this land, such claim must be based, either on a ratification of the action of their guardian in making the purchase, or because their money went into the purchase. If they ratify the illegal act, such ratification extends back to the contract of purchase, and they must ratify the contract as an entirety. If it be contended that they are following their funds, and are attempting to recover the land because their funds went into its purchase, as a resulting trust, then, under the doctrine of such trusts, they might have a right to have the land for which their money paid; but in this case the land is not alleged to be in possession of the persons who received the money belonging to them. The guardian did not acquire a title to the land, but, under the contract, it remained in the original vendor; and, while it may be true that the wards had an equitable interest in the land to the extent of the amount of their funds which went towards its purchase, it is a question whether the equity so possessed by them attaches to the land while in the hand of a purchaser at

judicial sale, by which sale title, under the terms of the contract, first passed out of the vendor. If the allegations in the petition be true, it is certain that Pendleton could not now convey title to the land. In our opinion, the wards are not entitled to have a decree vesting in them title to the land on the simple tender to Pendleton of the balance of the purchase money contracted to be paid by the guardian. It is too late, after a sale of the land has been made under a judgment rendered on a note given for the balance of the purchase money under the terms of a contract, to demand of the original vendor of the land that he make a title on payment of the balance of the purchase money originally contracted to be paid. If the wards stand on the contract made by their guardian, they must not only take that part which is favorable to them, but that other part also which made the land subject to be sold for the balance of the purchase money.

It is a matter of regret that the record does not contain more of the facts. We cannot determine to whom Pendleton conveyed the title to the land, if he ever conveyed it to any one. We do not know from this record whether, when Pendleton traded the note to Inman, he gave to the latter title, so as to comply with the terms of the bond which he had executed to the guardian. These are pregnant questions, which, in one view of the case, materially affect the rights of the plaintiffs. We only deal with the case as it is brought to our attention. The plaintiffs, under the statement of facts made in the petition, are not remediless. Certainly, if the stated facts are true, the guardian would be liable to them for the value of their property which he misapplied. Whether this liability extends to those who received it, and to the purchaser of the land, are questions to be governed by facts not shown in the record. But, under any view we take of the case, the plaintiffs are not entitled, under the facts alleged in the petition, to a decree for the land, and the court committed no error in sustaining a demurrer to the petition. Judgment affirmed. All the justices concurring.

(105 Ga. 543)

SOUTHERN RY. CO. v. MORRISON.

(Supreme Court of Georgia. Oct. 13, 1898.)

RAILROADS — INJURIES TO LICENSEES — CONTRIBUTORY NEGLIGENCE.

1. A railway company is not liable for personal injuries received by an employé of one of its patrons in moving a loaded freight car which had been delivered and left safely standing on a side track for the purpose of being unloaded, even though such injuries may have been occasioned because of a defect in a brake attached to the car, and the company was chargeable with notice of its condition, if the person was injured in consequence of his having voluntarily placed himself in a perilous situation, and failed to exercise ordinary care and diligence as to the matter of his own safety.

2. Whether the agent of the railroad com

pany did or did not consent that the consignee should move the loaded car from the place of delivery to a point on the track more convenient for the consignee, if in so moving the car it conclusively appears that the person injured stood on the bumper of the car, with one foot against the lumber with which it was loaded, and in this position attempted to control the movements of the car by the use of the brake while passing down a grade, and if it be further shown that while in such position he fell and was run over by the car, such gross negligence and want of care will bar a recovery against the railroad company, whether the car was or was not moved with the assent of the railroad company.

(Syllabus by the Court.)

Error from city court of Elberton; P. P. Proffitt, Judge.

Action by Nathan Morrison, by next friend, against the Southern Railway Company. There was a judgment for plaintiff, and defendant brings error. Reversed.

Geo. C. Grogan, A. G. McCurry, and Hamilton McWhorter, for plaintiff in error. W. D. Tutt, for defendant in error.

LITTLE, J. This was an action to recover damages for a tort alleged to have been committed by the plaintiff in error on the person of the defendant in error. In addition to the statement of the case given above, it is only necessary, for the consideration of the principles of law on which we think the decision of the case must rest, to refer to certain portions of the evidence contained in the record. A car load of lumber, consigned to Campbell, which was sold by the latter to the Elberton Planing Mill, was transported by the plaintiff in error, over its road, to Elberton, and placed on a side track leading to the planing mill; being coupled to two other cars. Campbell, the consignee, hired the defendant in error and other laborers to unload the lumber from this car. When they were making preparations to unload the lumber, the person in charge of the planing mill objected to its being unloaded at the particular point where the car had been placed by the railroad company. Then, according to the witness King Morrison, "he went to see Mr. Campbell, who was down at the depot, on the platform," and told him of the objection raised to having the car unloaded at the place where it stood. This witness further stated that then the agent of the railroad told Mr. Campbell that the car would have to be unloaded, and, if not promptly unloaded, he would have to pay storage on it, and that "it would have to be unloaded, if it has to be moved." Campbell, the consignee, testified that the car could have been unloaded where it was. " * * * When Morrison came down to tell me what Mr. Swarengin said about not mixing the lumber, Champion [the agent] asked me when I was going to get the car unloaded. * * * I told him what Swarengin had said. He said: 'The lumber does not belong to Swarengin. It belongs to you. And I must get it unloaded, or you must pay storage.' He said that 'the car will have to be unloaded, if it

has to be moved.' He did not, however, make any proposition to move it. I know that he needed the car. The freight train had left. I never knew of any cars being moved on that side track before by the consignee, with the knowledge and consent of the company. The lumber on the car was loaded high, and bulged forward some, and rested against the brake. I have known of consignees moving cars on that track, but never knew it done with the knowledge of the agent of the railroad. The grade at that point was rather steep, and a car could get away from you." The evidence further tended to show that the brake on this car was defective; that before being moved it was safely "choked"; that the railroad company was in the habit of leaving cars on the side track, to be unloaded for the planing mill, and the consignees moved them whenever they wanted to do so. The witness testified that he did not know that any agent of the company knew of such moving, but was sure that some of the train hands did. The engineer who brought in the car testified that the car causing the injury was left on the side track at Elberton, near the planing mill, at a point designated by the foreman of the mill, "scotched up," and in an entirely safe condition. The defendant in error testified: That his leg was cut off by a car running over it while he was in the employ of Campbell, unloading lumber. "The lumber was loaded on a flat car, and Campbell told me to get up there and stop the car when it started off. The lumber was loaded so high that I could not stand on it. I put one foot on the bumper, and the other against the lumber, and got hold of the brake. * * * I started to turn the brake, when it broke off. * * * There was no other place on the car that I could have gotten on to operate the brake. I got on the loaded car, put one foot on the bumper and the other on the lumber, and undertook to regulate with the brake the speed of the car down grade. I did not know the use of the ratchet wheel. I did not know it was fixed to hold the brake when it was applied. * * * I never worked on a railroad. As I started to turn the brake, it broke off. I fell off in front of the car, which ran over my leg."

The evidence is voluminous. There was no conflict as to the manner in which the injury was inflicted, and we have only referred to certain portions of the evidence in order to ascertain the relative rights of the parties. The theory of the plaintiff in the court below was that the railroad company was guilty of negligence in not having a proper and safe brake on the car. Assuming that the brake was defective, was that fact, as to this plaintiff, negligence? The presumption of negligence against common carriers, where there is a loss of goods, arises by operation of law. Civ. Code, § 2264. And a railroad company is liable for any damages done to persons or property by the running of locomotives or cars, the presumption in all cases being

against the company. *Id.* § 2321. But evidently the running of locomotives or cars referred to in the statute is confined to those cases where the company, by its servants, agents, or employes, is operating the cars or locomotives in some manner. Even in these cases, notwithstanding the presumption, no one can recover damages for injuries to person or property sustained by such running of the locomotive or cars where the injury is caused by his own negligence. *Id.* § 2322. It is elementary law that where there is no duty there is no negligence, and that a party who bases an asserted right of action upon the negligence of the defendant must show the breach of a specific duty owing to him. *Elliot, R. R. p. 602.* We are of the opinion that no presumption of negligence arises, under the facts of this case, against the railroad company, because the injury was not occasioned by the operation or running of the car by any servant, agent, or employé of the railroad company. The injured man was a stranger to the company. He himself testified, not only that he was not an employé of the railroad company, but that at the time he undertook to manage the car he did so as the employé of the consignee, and by the express direction of the latter; that he was wholly inexperienced in such matters; and, unless we can treat the consignee as authorized to act for the company in putting the car in motion, no presumption of negligence can, as a matter of law, arise against the railroad company. In his work on Torts (2d Ed., p. 660) Judge Cooley lays down the rule that in every case, in order to recover, the person injured must point out the duty which is supposed to have been neglected, and how it arose. As no presumption of negligence can arise under the facts of this case, what duty to the defendant in error has been shown to rest on the company? It was not that of a carrier of passengers, nor can it be that due by a railroad company to an employé. The maxim *respondet superior* means that a railway, like other masters, is civiliter responsible for the acts of its servants, if the particular act causing the injury be within the scope of, and be done in the exercise of, the servant's delegated authority. *Patt. Ry. Acc. Law, p. 99.* And the reason of the rule is explained to be that where one is injured by the act of another, and it is sought to make some person other than the one who occasioned the injury responsible, it is sufficient to show that the person whose negligence caused the injury was at the time not acting on his own account, but as a servant in the business of his master, and the damage resulted because the business was not conducted with due care. *Id. p. 100.* But the rule does not apply to cases where the railway does not stand in the character of employer to the person by whose act the injury has been occasioned. See *Burrows v. Railway Co.*, 63 N. Y. 556; *Railroad Co. v. Spicker*, 105 Pa. St. 142; *Frost v. Railroad Co.*, 10 Allen, 387. The person shown to have

been injured in this case was not an employé, and the duty of providing safe machinery, tools, and appliances did not extend to him. The test of the existence of the relation of master and servant is found in the exercise by the railway company of authority in appointing the servant, in directing his acts, in receiving the benefit of his acts, and in reserving the power of dismissal. *Patt. Ry. Acc. Law, § 104*, and authorities cited in note 6. The defendant in error, when his relation is so tested, cannot be treated as an employé, and there did not exist any duty on the part of the company to him in that capacity.

But it is said by counsel for defendant in error that the principle ruled by this court in the case of *Railway Co. v. Booth*, 98 Ga. 20, 25 S. E. 923, controls this case in his favor. Such is not our construction of the ruling made in that case. We have carefully examined it, and think that the case is rested on sound legal principles not applicable here. There the railroad company undertook to furnish cars to be loaded with lumber by a shipper on a side track at his mill. This undertaking carried with it a duty on the part of the railway company to furnish safe and suitable cars for the purpose of being loaded, and this duty, by force of the agreement, extended, not only to the shipper, but to the persons whom he employed to load the cars for him. While loading a car with lumber, from its defective condition, unknown to the shipper and his employes, the car, or a part of it, turned over, fell upon an employé, and killed him. Undoubtedly the company was charged, under its contract, with the duty of furnishing cars which were safe for the purpose for which they were contracted to be used; that is, loaded with lumber. This work the shipper could do by himself or his servants, and on proof that the loading was properly done, but that, owing to a defect in the car, a servant of the shipper was killed, this court held that the company was liable, if the defect was of a character discoverable by the exercise of ordinary care on the part of the company, and if the injured person could not, by the exercise of ordinary care, have avoided the consequences to himself. The principles ruled are clearly distinguished and sound. If we apply them to the facts of this case as shown by the record, at most it would be held that it was the duty of the railroad company to have transported the lumber in a car safe for unloading by the consignee, Campbell, and that this duty extended to Campbell and his servants, one of whom was the injured man, and if, in properly unloading the car, the defendant in error, being a servant, had been injured because of a defect in the car discoverable by the company in the exercise of ordinary care, which injury the servant, on his part, could not have avoided by the exercise of ordinary care, the company would then have been liable for the injury. But the defendant in error

was not injured in any attempt to unload the car. There was no defect in the car, so far as the evidence shows, which prevented it from being unloaded with safety. If there was a defect in the brake, this of itself did not render the cars unsafe for unloading. The injury occurred to the defendant in error when, having gotten upon the car, he allowed it to be put in motion, undertaking to control the speed while running down a decline of the track. The rule is well settled that even if an employé goes upon the track, or elsewhere upon the company's premises, not in the line or discharge of his duty, and without any invitation, express or implied, he is, at most, a mere licensee, to whom the company owes no duty to keep such place safe (3 Elliott, R. R. § 1251); and, further, if an employé works with a machine which he was not required to use, or uses a machine for a purpose for which it was not intended by the employer, or if one employed to do a designated kind of work, or to work at a particular place, voluntarily undertakes to do some other work, or goes to a place different from that assigned him by the contract of employment, he cannot successfully insist that he is within the protection of the rule that the master must exercise ordinary care to protect him against injury (*Id.* § 1308). By a parity of reasoning, the servant of another, seeking to recover damages from a railroad company for injuries sustained by him while shifting or moving a car on a siding, which had been left safely standing on such siding by the company for the purpose of being unloaded, is not entitled to recover, unless he shall make it appear that he was thus moving or shifting the car by authority from the company, or at least that the invitation extended to him to unload such car embraced such authority. Nor would he be entitled to recover, even if he had authority to so move the car, unless he made it appear that he could not by the exercise of ordinary care have avoided the consequences of the company's negligence. See *Railway Co. v. Booth*, *supra*. The undertaking of the railroad company, as we understand the evidence in this case, was to deliver the car on the side track to be unloaded, but it was not to deliver on the side track a car which utterly inexperienced persons might be at liberty to move down a decline to another place. And for the purpose of this case we are entirely within the terms of the statute when we say that if the undertaking had been to deliver a car on the side track for that purpose, and the person injured had been an employé, when he climbed on the end of the car, and stood with one foot on the bumper and the other against the lumber with which the car was loaded, and while relying on the brake to keep him in position as well as to stop the car, we know of no principle of law under which the injured person could have recovered damages under such circumstances. Had

an employé placed himself in that position,—not upon, but on the outside of, a heavily laden car,—and, being so placed, allowed the car to be put in motion to run down a grade, expecting to save himself by hanging onto the brake, which proved to be defective, the law would have forbidden a recovery, because, unquestionably, such injury would have been occasioned by his own negligence. To charge any person or corporation owning or operating a line of railroad, either with or without knowledge that a car delivered under such circumstances as are found to exist here would be moved before it could be unloaded, in the absence of any or all of its servants or agents who were accustomed to move cars, with the reckless act of a volunteer entirely ignorant as to the handling of cars, who apparently observed not the remotest precaution looking to his safety, is something which neither the law nor our sense of justice will permit. We sympathize with the unfortunate young man who thus lost his limb. More than sympathy on our part would work a gross injustice to others.

There are a number of exceptions made, which, under the view we take of the case, it is not now necessary to pass upon, as another trial of the case is to be had. From a careful review of the evidence, and for the reasons heretofore given, the verdict rendered in this case is, in our opinion, contrary to law and the evidence, and we are therefore constrained to rule that the court erred in refusing to set it aside and to grant a new trial. Judgment reversed. All the justices concurring.

(105 Ga. 592)

SIKES v. STATE.

(Supreme Court of Georgia. Oct. 12, 1898.)

CRIMINAL LAW—NEW TRIAL—DISQUALIFIED JUROR
—OATH—ADMINISTRATION—EVIDENCE.

1. Relationship, within the prohibited degrees, of a juror to the defendant in a criminal case, although unknown to the defendant and his counsel until after verdict, is not a sufficient ground to set aside the verdict on a motion for new trial.

2. On the trial in open court of the issue in a civil case, an attorney at law in such case may lawfully administer an oath to a witness.

3. There was some corroboration of the chief witness for the state in this case, and whether such corroboration was sufficient to support a verdict of guilty was a question for the jury, under proper instruction from the court.

(Syllabus by the Court.)

Error from superior court, Tattnall county;
R. L. Gamble, Judge.

J. B. Sikes was convicted of perjury, and brings error. Affirmed.

H. J. McGee and Jas. K. Hines, for plaintiff in error. B. T. Rawlings, Sol. Gen., for the State.

SIMMONS, C. J. 1. Sikes was indicted for the offense of perjury, and, upon trial, was

convicted. He made a motion for new trial, upon the grounds that the verdict was contrary to law and the evidence, and that one of the jurors who tried his case and agreed to the verdict of guilty was his third cousin, and was therefore disqualified to sit upon the jury. The usual affidavits of ignorance of the accused and his counsel of this fact were attached to the motion. The court overruled the motion, and the defendant excepted. We think that the court did not err in overruling this ground of the motion. In the case of *Wright v. Smith* (Ga.) 30 S. E. 651, this question was fully investigated by the court, and it was ruled that "relationship of a juror, within the prohibited degrees, to the unsuccessful party in a case, although unknown to such party or his counsel until after verdict, is not sufficient ground for a new trial." The reasoning of Mr. Justice Lewis in that case is satisfactory to the court, and is adopted as the views of the court in the case now under consideration.

2. It was insisted in the argument here, under the general grounds that the verdict was contrary to law and the evidence, that there was no lawful oath administered to Sikes in the case of *Yeomans against Bazemore*, in which it was alleged that the perjury was committed. The evidence in the present case shows that the oath was administered by an attorney of the court who represented one of the parties in the case of *Yeomans against Bazemore*; that he obtained a continuance of the case on the testimony of Sikes; and that he, in open court, administered the usual oath to the witness. It is now claimed by counsel for Sikes that the attorney had no authority under the law to administer this oath; that the oath was not lawful; and that, therefore, Sikes should not have been convicted of perjury. This same question was made in the case of *Thomas v. State*, 67 Ga. 460. On that case, counsel for defendant objected to the solicitor general's administering the oath to the witnesses; the trial judge held that he was a proper officer of the court to administer the oaths; and this court affirmed that ruling. In the case of *Baker v. State*, 97 Ga. 347, 23 S. E. 829, the indictment alleged, among other things, that the oath was administered by one Morris, an attorney at law in the court, representing one of the parties to the case pending. One of the grounds of demurrer to the indictment was that it did not show that a lawful oath had been administered to the defendant before he committed the perjury alleged. The demurrer was overruled, and that ruling was affirmed by this court. Thus, this court has held that the solicitor general may lawfully administer the oath in a criminal case, and that an attorney representing one of the parties in a civil case may lawfully administer the oath in that case. The solicitor general or the attorney, when he, in open court, administers oaths to witnesses, is a mere organ or mouthpiece of the court. In our opinion, it is the same

as though the judge presiding administered the oath himself. The attorneys are officers of the court, and, when they administer oaths to witnesses, they simply represent the court, and the oaths are as legal and binding as if the judge had himself repeated the words of the oaths.

3. It seems from the record that Sikes, on the motion to continue the civil case, testified that he had subpoenaed one Finley as a witness in the case sought to be continued, and that he had in person handed him the subpoena. On the trial of Sikes for perjury, Finley testified that Sikes had never handed him a subpoena in that case, or any other. Thus far we have oath against oath. Had the evidence then closed, Sikes could not have been convicted. Section 991 of the Penal Code declares, however, that, in a case of perjury, one witness and corroborating circumstances may be sufficient to authorize a conviction. Counsel for plaintiff in error claim that there were no corroborating circumstances, or, if any, that they were not sufficient to authorize a conviction. In order to corroborate the testimony of Finley that he had never been subpoenaed in the case above mentioned, the state introduced the clerk of the court, who testified that he had examined the records for this subpoena, and had failed to find any record of it. The law requires the clerk to keep a subpoena docket, in which shall be entered every subpoena issued in any case, the name of the witness, the case, etc. Had the clerk issued a subpoena to Sikes to be served on Finley, and done his duty, the number of the subpoena, the case, and Finley's name would have appeared upon the subpoena docket. Not appearing there, according to the testimony of the clerk, the fair presumption would be that no subpoena had been issued, and, therefore, that Sikes could not have served such an one upon Finley. However this may be, it was a question for the jury to decide whether Finley's testimony was sufficiently corroborated. Under the Code of the state and the decisions of this court, the sufficiency or weight of corroborating circumstances is for the jury alone, not for the court. When the jury finds that the corroboration is sufficient, and the trial judge is satisfied with their finding, this court will not interfere with the latter's discretion in refusing a new trial unless it is manifestly abused. In the case of *Ransone v. Christian*, 56 Ga. 356, Jackson, J., in discussing the amount of corroboration necessary in cases of this kind, remarked: "We think the circumstances should be such as to convince the jury,—such as so to strengthen the one witness as to induce them to believe that he has sworn truly, and that the plaintiff swore falsely. If the jury are satisfied with the weight of the corroborating circumstances, it is enough. There must be sufficient corroboration to satisfy them, and how much would be exactly equal to the weight of another witness it would be hard for us to prescribe or for them to calculate."

See, also, *Powers v. State*, 44 Ga. 209; *Bell v. State*, 73 Ga. 572; *Evans v. State*, 78 Ga. 351. Judgment affirmed. All the justices concurring.

(105 Ga. 599)

GAY v. STATE.

(Supreme Court of Georgia. Oct. 12, 1898.)

ABANDONMENT OF CHILD—FORMER CONVICTION.

Upon the trial of an indictment under section 114 of the Penal Code, charging a father with willfully and voluntarily abandoning his child, leaving it in a dependent and destitute condition, proof of actual desertion by the father is necessary to complete the offense. Where a father has actually deserted his child, leaving it in the condition above referred to, and has been convicted of and punished for the offense, he cannot be again convicted for a violation of this section, unless it be shown that he has returned to the discharge of his parental duty to the child, and has again deserted it; and this is true notwithstanding it appears on the second trial that the original abandonment is willfully and voluntarily continued, and the condition of the child remains dependent and destitute.

(Syllabus by the Court.)

Error from criminal court of Atlanta; J. D. Berry, Judge.

Alexander Gay was convicted of abandoning his child, and brings error. Reversed.

F. R. Walker, for plaintiff in error. Jas. F. O'Neill, for the State.

COBB, J. Alexander Gay was tried in the criminal court of Atlanta upon an accusation charging him with the offense of abandoning his child, leaving her in a dependent and destitute condition. The accused filed pleas of former conviction and not guilty, and the issues thus arising were, by consent, submitted to the decision of the judge without a jury, upon an agreed statement of facts, which was, in substance, as follows: Accused is the husband of Sally Gay. They have one child, Lillian, born in 1896. Neither has any property from which the child can derive a support. The accused has for some years had good, paying employment as a laborer; but he refuses now, and has constantly refused since the begetting of the child, to pay anything to the maintenance or support of either his wife or child. He abandoned his wife and child before the birth of the latter, and has refused to live with the wife or support the child since its birth. The wife has no means of support except her manual labor, and she lives with her father, who is forced to assist her; otherwise the child would be thrown upon the charity of the public. The child was abandoned by the father, and "left in a dependent and destitute condition," before its birth. On February 2, 1897, the accused was convicted in the criminal court of Atlanta for the abandonment of his child which had taken place prior to that date, and he paid the fine which was then imposed upon him. He has never returned to his family, or provided for it or for the

child in any way, since the abandonment which was the foundation of the conviction above referred to. The court entered judgment refusing to sustain the plea of former conviction, and adjudging the accused guilty of the offense charged in the accusation. To this judgment the accused excepted.

The accusation in the former case, as well as in the present case, was brought under section 114 of the Penal Code. This section had its origin in an act of the general assembly approved December 13, 1886, which was as follows:

"An act to add an additional section to the 4th division, part 4th, title 1st, of the Penal Code.

"4. Section 1. Be it enacted," etc., "that if any father shall willfully and voluntarily abandon his child or children, leaving them in a dependent and destitute condition, such father shall be guilty of a misdemeanor, and on conviction thereof shall be punished as for other misdemeanors." Acts 1886, p. 151.

In 1879 an act was passed making the wife a competent witness in prosecutions under the act just quoted. Acts 1878-79, p. 66. The original act, as thus amended, now appears in the Penal Code in the following language:

"If any father shall willfully and voluntarily abandon his child, leaving it in a dependent and destitute condition, he shall be guilty of a misdemeanor. The wife shall be a competent witness in such cases to testify for or against her husband." Section 114.

The accused having been convicted and punished under this section, and being a second time placed upon trial for what is claimed to be the same offense, it becomes necessary to determine whether the word "abandon," in the statute, refers to one completed act of desertion continuously persisted in, and therefore constituting only one offense, or whether the desertion willfully continued in from day to day constitutes each day a separate act of abandonment. In other words, does the actual desertion of a child by a father under circumstances which would render him liable to punishment under the law constitute the offense, and when this actual desertion is once punished is the law satisfied, or does an actual desertion, once taken place and willfully persisted in, make a separate and distinct case of abandonment for each day that it continues? If the former is correct, the accused was improperly convicted in the present case. If the latter position is sound, the judgment of conviction was right. In order to determine this question, it is necessary to ascertain what was meant by the general assembly when they used the word "abandon" in this statute. The word "abandon," in its ordinary sense, means to forsake entirely; to renounce and forsake; to leave with a view never to return; to give over entirely; to forsake or renounce utterly. See Webster's and the Standard Dictionaries. When referring to the desertion

of a wife by a husband, the word has been defined to mean "the act of a husband in voluntarily leaving his wife with an intention to forsake her entirely, never to return to her, and never to resume his marital duties towards her, or to claim his marital rights. Such neglect as either leaves the wife destitute of the common necessities of life, or would leave her destitute but for the charity of others." And. Law Dict. 4. The word "abandonment," when referring to the act of one consort in leaving the other, is defined to mean "the act of the husband or wife who leaves his or her consort willfully, and with an intention of causing perpetual separation." Bouvier, Law Dict. And as "the willful departure of the husband or wife from the society of the other and the common home, with an intention never to return or to resume the marital relation." Rap. & L. Law Dict. In Schouler, Dom. Rel. (5th Ed.) 219, it is declared that "abandonment by either spouse consists in leaving the other willfully, and with the intention of causing their perpetual separation." In the case of *State v. Davis*, 70 Mo. 467, where the court had under consideration the meaning of the word "abandon" in a statute which punished a father who should abandon his child or children, and fail, neglect, or refuse to maintain and provide for them, Henry, J., in the opinion, says, "'Abandonment' does not mean a mere temporary absence from home, or temporary neglect of parental duty." In the case of *Stanbrough v. Stanbrough*, 60 Ind. 275, the court had under consideration a statute which provided for the relief and support of married women when deserted by their husbands, and it became necessary to determine what the word "abandonment" meant when used in such a connection. Niblack, C. J., in the opinion, says, "'Abandonment,' in the sense in which it is used in the statute under which this proceeding was commenced, may be defined as the act of willfully leaving the wife, with the intention of causing a palpable separation between the parties, and implies an actual desertion of the wife by the husband." In the case of *Moore v. Stevenson*, 27 Conn. 14, the court had under consideration the meaning of the word "abandon" in a statute which authorized a married woman abandoned by her husband to transact business as a feme sole; and the conclusion was reached that in such a statute the abandonment was complete when the husband "voluntarily left the wife, with an intention to forsake her entirely, and never to return to her, and never to resume his marital duties towards her, or to claim his marital rights." Applying to the word "abandon," as found in this statute, the meaning which is to be drawn from the definitions above given, it seems clear that, to constitute the abandonment of a child by a father, there must be an actual desertion, accompanied with an intention to entirely sever, so far as it is possible to do so, the parental relation, and throw off all obligations

growing out of the same; that, when the effect of this separation is to leave the child in a dependent and destitute condition, the offense, under the statute, is complete; and nothing less than this will constitute the offense. The act of desertion, and the attempt to throw off all parental obligation, are necessary, component parts of the offense. The continued refusal to provide for the support of the child after the actual desertion takes place is necessary to complete the offense, but it alone is not an offense, under the statute. It therefore follows that if a father desert and forsake his child, and the consequence of such desertion is that the child is left in a dependent and destitute condition, the father becomes amenable to the law, and may be punished for that offense; but persistent refusal to provide for the support of the child will not constitute a new offense, unless it is accompanied by another act of desertion. Applying these principles to the present case, the accused was entitled to a discharge on his plea of former conviction. When he deserted his child before its birth, and persisted in the refusal to maintain and support it after its birth, the offense of abandonment became complete; the two elements necessary being present. He cannot, however, be again convicted of abandonment, under this statute, until he shall return to the discharge of his parental duties, and be guilty of another act of desertion. That such is the case is to be regretted, but the meaning of the words contained in the statute requires this ruling. The statute is not a remedial measure, in the interest of the child, providing for its maintenance. It is a punitive measure, intended, in its enforcement, to deter parents from deserting their children and leaving them in the condition described in the statute. While abandonment of a child by a father is a misdemeanor, it is possible for the court to impose such a penalty, when the case is clearly made out, as would have the effect of deterring parents from abandoning their children, if it should not have the effect of making the delinquent father return to the discharge of his parental duties.

There is nothing in the decisions of this court bearing directly upon the question here involved. In *McDaniel v. Campbell*, 78 Ga. 188, it was held that an indictment which failed to allege that the abandonment was willful, and that the child was left in a destitute condition, was fatally defective. In *Bennetfield v. State*, 80 Ga. 107, 4 S. E. 869, it was held that while a father might be unable to live in peace with the mother of his children, and compelled by her conduct to separate from her, he was, notwithstanding, under a legal obligation to support the children begotten of her, although, on account of the tender years of the children, in order to support them it was necessary to support the adulterous mother; and where the father had caused his wife and children to be removed to another county, where the children

became dependent and destitute, the father was guilty of the crime of abandonment in the latter county. An examination of this case, we think, will show the act of desertion which was necessary to make out the offense of abandonment under the statute was completed in the latter county by the father's voluntary removal of the wife and children to that place, and leaving them there in such a position that the children became dependent and destitute. While the case of *Jemmerson v. State*, 80 Ga. 111, 5 S. E. 131, is not directly in point, the ruling made, and some of the language used by the present chief justice in the opinion, tend to support the conclusion reached in the present case. There the act of desertion took place in the state of Alabama. The wife and child subsequently came to this state, the child being then in a dependent and destitute condition. It was held that there was no offense against the laws of this state, notwithstanding that the child was then dependent and destitute within its limits, because the act of desertion, which was a necessary part of the offense, was committed beyond the limits of the state. In the opinion we find this language: "Before the state can convict of this offense, two things must affirmatively appear: (1) The willful and voluntary abandonment of a child by its father; (2) the leaving of the child in a dependent and destitute condition. It is not only necessary that these two things should affirmatively appear, but it also must appear that they occurred in this state. It appears from the testimony in this case that the abandonment of the children took place in Alabama five or six years before the finding of this indictment. This is one of the main ingredients of the offense charged, but of that part of the offense the courts of this state had no jurisdiction. And we do not think that the refusal of the father to support the children when notified of their condition by the mother, in this state, subsequent to the abandonment in Alabama, and the removal of the mother in this state, would be such an abandonment as contemplated by the Code of 1882 (section 4373). The abandonment is something more than 'leaving them in a dependent and destitute condition.' It means the forsaking and desertion of the children; the refusal of the father to live where they are domiciled, and to perform the duties of a parent to his offspring. If he abandons them in this manner in this state, and leaves them dependent and destitute, the offense is complete." In *Bull v. State*, 80 Ga. 704, 6 S. E. 178, it was held that a father who, within this state, willfully and voluntarily abandons his child before its birth, and persists in the abandonment afterwards, leaving it in a dependent and destitute condition, is guilty of a violation of the section under consideration. In *Crow v. State*, 96 Ga. 297, 22 S. E. 948, it was held that when, in the trial of an indictment for the offense of abandonment, the evidence

showed that the father had deserted the child before its birth, and notwithstanding such desertion made from time to time suitable provision for its support, and never at any time refused to make adequate provision therefor, a verdict of guilty was unwarranted by the evidence. Construing the statute in the light of these decisions, it seems to be settled that, to constitute the offense of abandonment, there must be an actual desertion, followed by a refusal to support, and that the absence of either would prevent the offense from being made out. As, after a completed act of desertion, there cannot be a new act of abandonment until a return to the discharge of the parental obligation, there can be no new offense of abandonment until such a return, followed by another act of desertion. The plea of former conviction should have been sustained, and the accused should have been discharged from custody. Judgment reversed. All the justices concurring.

(105 Ga. 689)

SMALLS v. STATE.

(Supreme Court of Georgia. Oct. 13, 1898.)

HOMICIDE—EVIDENCE—FORMER VERDICTS—STATEMENT OF ACCUSED—ARGUMENT OF COUNSEL
—ERROR CURED—INSTRUCTIONS.

1. It was not, in the trial of a criminal case, erroneous to permit the state to introduce evidence of a portion only of a statement made by the accused at a previous trial, without requiring the state to prove "the entire statement on the former trial"; the court ruling that no part of the statement would be excluded, and the accused being given an opportunity to introduce "the entire statement, if desired."

2. When, in the trial of a murder case, there was evidence showing that the accused at the time of the homicide was a fugitive from justice, charged with burglary, and the solicitor general in his argument before the jury inadvertently referred to the accused as "a burglar," but immediately, and of his own motion, withdrew this language, and stated that he merely intended to say the accused was "charged with burglary," and the judge followed up the correction thus voluntarily made by the solicitor general with appropriate instructions to the jury, the impropriety of applying to the accused the term first above quoted may properly be treated as having been cured, and therefore as constituting no cause for a new trial.

3. If evidence is admitted without restriction as to its applicability to the issues involved, counsel, in commenting upon it to the jury, has the right to draw from it any inference apparently reasonable and legitimate, and endeavor to convince the jury of the correctness of such inferences.

(a) That portion of the argument of the solicitor general of which complaint is made in the present case was not, in view of all the facts and circumstances in proof, improper.

4. Where, in a trial for murder, it was a seriously contested issue whether the fatal shot was fired by the accused or another, it would, of course, be erroneous for the judge to express or intimate an opinion that it was fired by the accused; but in determining whether or not a single sentence of the charge was, in this respect, objectionable, it is proper to consider the entire charge and all the instructions given in connection with this particular matter.

5. There was no error, while charging upon the statement made by the accused, in instructing the jury as follows: "If you find the statement consistent and true, you have the right to believe it in preference to the sworn testimony in the case. You should not do so carelessly or capriciously, but under your oath as jurors, considering his statement in connection with the sworn testimony in the case, and testing it in the light of such testimony, give it such weight as you think proper."

6. Mere failure to have a verdict or verdicts previously rendered in the same case covered up or concealed from the jury will not, in the absence of any request on the subject, be treated as error.

7. The requests to charge, so far as legal and pertinent, were so fully and fairly covered by the general charge given as to leave no room for doubt that the contentions of the accused therein embraced were understood and intelligently passed upon by the jury. Several of the requests were properly refused because giving them would have put the judge in the attitude of expressing an opinion upon contested issues of fact, or of requiring the state to carry a greater burden than the law imposes. The evidence, though conflicting, was amply sufficient to warrant the verdict.

Little, J., dissenting.

(Syllabus by the Court.)

Error from superior court, Chatham county; R. Falligant, Judge.

Abram Smalls was convicted of murder, and he brings error. Affirmed.

T. P. Ravenel and G. A. Mercer, for plaintiff in error. W. W. Osborne, Sol. Gen., and J. M. Terrell, Atty. Gen., for the State.

LUMPKIN, P. J. The plaintiff in error has been thrice convicted of committing the crime of murder upon James C. Neve. The first two verdicts of guilty were set aside by this court. See 99 Ga. 26, 25 S. E. 614, and 102 Ga. 31, 29 S. E. 153. We are now to decide whether or not the court below erred in overruling the motion for a new trial filed by the accused after his third conviction. This motion contains numerous grounds. Some of them are verified absolutely by the judge, others with qualifications and explanations, and others still are not verified at all. Our rulings upon the material points presented for decision are set forth in the headnotes. In discussing them we will state in connection with each the pertinent facts as we gather them from the record, and in this connection it is proper to say that we treat as true the recitals of fact contained in the motion for a new trial so far only as they are certified to be true by the trial judge.

1. The state offered oral evidence of certain expressions used by the accused while making his statement at one of the preceding trials, the state contending that there was a conflict between the same and certain declarations which the accused had made in his statement at the pending trial. This evidence was objected to on the ground that it was not admissible without requiring the state to prove all that was said by the accused in his statement at the previous trial. The judge admitted the evidence thus offered

by the state, at the same time distinctly ruling that he would exclude no part of the former statement, and that the accused might prove the entire statement, if he so desired. In *Lewis v. State*, 91 Ga. 169, 16 S. E. 986, it was held that, a prisoner "having been previously tried for the same offense, his statement then made, conflicting with the statement on the subsequent trial, is admissible against him for the purpose of contradicting the latter." We do not think, however, that the state was obliged to introduce evidence showing the whole of the previous statement. The rule of evidence is that when an admission, conversation, or declaration previously made by a party or a witness is pertinent, the side tendering evidence as to the same is at liberty to prove such portion only thereof as is deemed material, and the other side may then bring out the whole of the admission, conversation, or declaration, so far as so doing may be essential in order to arrive at the true drift, intent, and meaning of what was said on the previous occasion. See *Lowe v. State*, 97 Ga. 792, 25 S. E. 676. It is clear that all the rights of the accused as to the matter in question were in the present instance fully guarded and protected by the ruling of which complaint is made.

2. There was evidence for the state showing that the accused at the time of the homicide was a fugitive from justice, charged with burglary. In commenting upon this evidence the solicitor general inadvertently characterized the accused as "a burglar." Before any objection to this language had been made by counsel for the accused, the state's officer withdrew his remark; explaining to the jury that he had used an expression he did not mean to employ, and what he really intended to say was that the accused was "charged with burglary." It further appears that the judge followed up this voluntary explanation on the part of the solicitor general with appropriate instructions to the jury; cautioning them to disregard the statement first made by him, and not to allow the same to in any manner injuriously affect the accused in their deliberations upon his case. We think the unintentional impropriety committed by the prosecuting officer was thus effectually cured.

3. The state also introduced evidence tending strongly to show that the accused, while fleeing from arrest upon the warrant charging him with the alleged burglary, had committed an assault with intent to murder upon one Humphreys, a constable. This evidence was admitted generally, and without any restriction whatever as to its applicability to the issues involved in the pending murder trial. The learned counsel for the plaintiff in error earnestly insisted in the argument here that the evidence just referred to was received merely to show that the accused at the time of the homicide was a fugitive from justice, charged with the crime of as-

sault with intent to murder; that Neve, the deceased, had knowledge of this fact, and accordingly had authority to arrest the accused. We are, however, compelled to deal with the case as it is presented by the record, and there is nothing in the record to show that the evidence relating to the assault upon Humphreys was not admitted for all pertinent purposes. This being so, it was unquestionably the right of the solicitor general, in his argument before the jury, to draw from this evidence any inferences apparently reasonable and legitimate, and to endeavor to convince them of the correctness of such inferences. He dealt at some length upon the facts and circumstances connected with the assault upon Humphreys, and discussed the matter in detail. He contended among other things that the flight of Smalls after assaulting Humphreys up to the time when Neve sought to arrest the accused was, although three days had intervened, continuous, and that his conduct during the entire time was a matter which the jury had a right to consider in arriving at his real attitude on the occasion when Neve was killed. Upon the assumption that he was slain by a bullet from a rifle discharged by Smalls, "the vitally controlling issue in the case was whether, in committing the homicide, the accused was resisting a lawful attempt to arrest him, or in good faith making a defense against an unlawful assault upon himself, or what he honestly believed was such an assault. The motives of the accused were directly in issue, and any evidence fairly illustrating or throwing light upon the same was competent, as being explanatory of his conduct under the surrounding circumstances." See 99 Ga. 31, 29 S. E. 153. Anything which tended to throw light upon the attitude, intention, and purposes of the accused at the time of the fatal rencounter between Neve and himself was legitimate matter of proof, and a proper subject of comment. Whether the accused on that occasion was in a state of armed hostility to, and deliberate defiance of, the lawful authorities, or was in good faith standing upon his defense, and seeking to resist an unlawful assault upon himself, was one of the most important questions in the case, and the correct solution of it necessarily depended upon what inferences should be drawn from all the facts and circumstances in proof. In determining what his real attitude on the occasion referred to was, the fact that he was a fugitive from justice, charged with two grave offenses, and the further fact that while a warrant authorizing his arrest for one of them was about to be served upon him he shot the arresting officer, under circumstances manifesting a total disregard of human life, surely shed some light upon the disputed issue as to who was the real aggressor in the fight which resulted in Neve's death. If Smalls had been endeavoring to escape arrest for a mere misdemeanor, it would have been far less likely

that he would have been disposed to make a desperate resistance to the officer, or to kill him, to prevent being taken in custody. We therefore agree with the trial judge in holding that the argument of the solicitor general which is complained of in the motion for a new trial was not improper,—the more especially as proof of the facts upon which he was commenting had been allowed to go to the jury without restriction as to the purposes for which it could be considered.

4. At the trial the state insisted that the evidence showed that Neve was killed by a bullet from a rifle discharged by Smalls. The defense was (1) that Neve's death was caused by a bullet fired from a pistol in the hands of one McCabe; and (2) that, even if the deceased was killed by the rifle ball, Smalls shot in self-defense, and should therefore be acquitted. The judge, in his charge, fairly and distinctly stated to the jury these contentions of the accused. He dealt with them in the order above indicated, and told the jury in the plainest terms that if Neve was killed by McCabe, and not by Smalls, the latter could not be convicted upon the pending indictment. After leaving this matter entirely free from doubt or the possibility of misunderstanding, his honor took up the other branch of the defense, and gave in charge to the jury the law which would be applicable in the event they should find that the rifle ball fired by Smalls caused Neve's death. While instructing the jury on this subject the judge submitted for their determination the question "whether at the time the prisoner fired the fatal shot the officer was attempting to take his life, or any effort of that kind was being made"; using the language quoted. Taken by itself, the phrase, "at the time the prisoner fired the fatal shot," is seemingly an expression of opinion, or at least an intimation, that the prisoner inflicted the mortal wound; but, as will have been seen from what is said above, the judge had already disposed of that portion of the defense which consisted of a denial on the part of the accused that the death of Neve was caused by his act, and was dealing exclusively with that branch of the defense which was based upon the hypothesis that, although the prisoner did fire the fatal shot, he did so in self-defense. It is therefore apparent that the jury could not, by the instructions given them, have understood the judge as intending to tell or to intimate to them that Smalls actually fired the fatal shot. Taking into view the entire charge, and bearing in mind the connection in which the language excepted to was used, it cannot be seriously contended that the same resulted injuriously to the accused.

5. The precise point dealt with in the fifth headnote arose in the case of *Keller v. State* (Ga.) 31 S. E. 92, and is disposed of by the decision therein rendered. All of us, except Mr. Justice LITTLE, who adheres to the opinion that the charge relating to the prisoner's statement under review in that case was

erroneous, are still satisfied that the contrary view is correct.

6. The question of practice to which the sixth headnote relates has been several times considered by this court. If a party desires a verdict rendered at a former trial of the same case concealed from inspection by the jury, he should present a request to this effect. See *Railway Co. v. Dooley*, 86 Ga. 295, 297, 12 S. E. 923; *Hudson v. Hudson*, 90 Ga. 582, 589, 16 S. E. 849; *Fulton Co. v. Phillips*, 91 Ga. 65, 16 S. E. 260; *Dawson v. Briscoe*, 97 Ga. 408, 24 S. E. 157.

7. Counsel for the accused presented to the judge a number of requests to charge the jury which stated correct and pertinent propositions of law. These were, however, covered by the general charge given, which was very full and impartial,—so much so that we are impressed with the conviction that there is no room for doubting that the contentions of the accused as stated in these requests were understood and intelligently passed upon by the jury. Other requests were properly refused. Some of them were to the effect that the burden of exhuming the corpse of Neve, and extracting therefrom the bullet by which he was killed, so that it could be ascertained beyond question whether or not it was discharged from the rifle fired by Smalls, or the pistol of McCabe, rested upon the state, rather than upon the accused. Other requests assumed, as matter of fact, that the state had unlawfully resisted the exhumation of the dead body. There was also a request by which counsel for the accused sought to have the jury instructed that the failure of the state to introduce a named witness was a circumstance discrediting the bona fides of the prosecution. It appears that this witness was as accessible to the accused as to the state's officers. We think all the requests last referred to were properly refused. It seems obvious, without discussion, that the trial judge would have committed grave error in giving the same in charge to the jury.

The only remaining question is, was the evidence sufficient to warrant the verdict? The testimony was decidedly conflicting; but accepting as true, as the jury had a right to do, the version of the homicide given by the state's witnesses, the accused was properly found guilty of murder. This court cannot undertake to determine where the truth of a case lies, when the evidence is conflicting. This function, under our system, belongs exclusively to the jury, whose action in any case is, within prescribed limits, subject to review by the trial judge. After he has approved a verdict which is supported by evidence, this court has no power to set it aside, unless some error of law was committed at the trial. Judgment affirmed. All the justices concurring, except LITTLE, J., who dissents solely because, in his opinion, the charge referred to in the fifth headnote was erroneous.

(105 Ga. 68)

JONES v. STATE.

(Supreme Court of Georgia. Oct. 12, 1898.)

BURGLARY—POSSESSION OF STOLEN GOODS—CIRCUMSTANTIAL EVIDENCE—INSTRUCTIONS.

When, in a trial for burglary, the fact of the breaking and entering has been clearly shown, as well as that certain articles of value were taken from the house at the time of the burglarious entry, and it also appears that, early in the morning of the day after the burglary was committed at night, the accused was in absolute possession of a part of the stolen goods, such possession is a circumstance tending to show that the accused is guilty of the offense charged. Not being of itself conclusive of guilt, it is the duty of the trial judge to give in charge to the jury the principles of law by which the weight of such circumstances is to be determined in ascertaining guilt, and also under what circumstances a conviction on circumstantial evidence is warranted, without any request to do so. But when, in addition to such evidence, it further appears that, without notice that he was suspected of the crime, the accused attempted, the day after the burglary, to escape; that his account of such possession was unsatisfactory and entirely insufficient to rebut the presumption raised by his possession; and when the charge of the court, saving the omissions referred to, was full and complete, the jury being properly instructed as to the weight they could give to the statement which recited the manner of acquiring possession, and the law touching reasonable doubts fully explained,—a new trial will not be granted. It would be otherwise if the evidence made the case close or doubtful, or if the account given of the manner in which the possession of the stolen goods was obtained was probable or consistent.

(Syllabus by the Court.)

Error from superior court, Bibb county; W. H. Felton, Jr., Judge.

Raymon Jones was convicted of burglary, and brings error. Affirmed.

John R. Cooper, for plaintiff in error. Roland Ellis and Robt. Hodges, Sol. Gen., for the State.

LITTLE, J. Jones was indicted in the superior court of Bibb county for the offense of burglary. The proof very clearly showed that the storehouse of the firm of Culver & Corbin, situated in the city of Macon, was burglariously entered at night, and certain razors and pistols, of value, were taken therefrom. Some of these articles were identified and recovered the next morning after the burglary, and it was clearly shown that the plaintiff in error, in the early morning after the burglary had been committed the previous night, had pawned the goods identified, for a small amount of money. It was further shown that when the plaintiff in error, who was near the place where the goods were pawned at the time they were recovered, saw the officer coming towards him, he ran and endeavored to make his escape. The only explanation made by the defendant was contained in his statement, and that was that early in the morning he had purchased them from a small boy, whom he did not know. Without attempting to set out the evidence in detail, the above

facts, as we understand the record, were clearly shown. He was convicted and sentenced, and a motion was made for a new trial. Exception was taken to several particular portions of the charge which the court gave to the jury. After consideration of these exceptions, we are of the opinion that no error was committed; and the only grounds which we consider it necessary to consider are those urged in the tenth and eleventh grounds of the motion, which are that the court erred in not charging the jury with reference to the possession of stolen property, and in not giving in charge the rule in regard to circumstantial evidence contained in section 984 of the Penal Code.

The general rule is that, where a larceny has been committed, the recent, absolute, and unexplained possession of the stolen goods raises a presumption of the guilt of the person having such possession, sufficient to warrant a conviction. 12 Am. & Eng. Enc. Law, p. 845. It has been ruled in quite a number of cases that, where such possession is shown to exist immediately after the theft, it is almost conclusive of guilt (Id. p. 846, note 1); that, where indicatory evidence on collateral points is added to the fact of the recent possession of stolen property, it is sufficient to support the conviction of burglary (*Billinglea v. State*, 56 Ga. 686; *Brown v. State*, 61 Ga. 811; *Smith v. State*, 62 Ga. 663; *Wilkerson v. State*, 73 Ga. 799; *Eubanks v. State*, 82 Ga. 62, 9 S. E. 424; *Mangham v. State*, 87 Ga. 549, 13 S. E. 558). There can be no doubt but what the evidence in this case, fairly considered, is sufficient to support the verdict of guilty. It is true that the possession of goods stolen at the time of the commission of a burglary is but a circumstance. If it is recent, it is, when unexplained, a very strong circumstance tending to show the guilt of the possessor, and it is sufficient to put the burden of explaining the possession on the person charged with the offense. And on this subject Mr. Greenleaf, in his *Law of Evidence* (volume 1, § 84), says: "But possession of the fruits of crime recently after its commission is *prima facie* evidence of guilty possession; and if unexplained, either by direct evidence, or by the attending circumstances, or by the character and habits of life of the possessor, or otherwise, it is taken as conclusive." To the undoubted fact of the possession of goods taken from the house at the time of the commission of the burglary, proof is added that without being charged with the crime, and without any intimation having been given that he was wanted for any purpose, on the approach of the officer the defendant fled and attempted to escape. While this is not conclusive evidence of guilt, yet it is a circumstance which may be considered as tending to show guilt. More than this, the explanation given by the defendant in his statement to the jury as to how he acquired the possession must have been

wholly unsatisfactory, and indeed could only make the presumption of his guilt stronger.

We have said this much on the question of the guilt of the defendant as established by the evidence in the record. We agree with counsel for plaintiff in error that the court should have instructed the jury in relation to the law applicable to the recent possession of stolen property. As we have seen, such possession is but a circumstance, and the jury should have been so told, and further properly charged that the weight to be given to this circumstance depended upon the nature of the property, how recently it had been stolen, and such other principles of law as illustrates the value of the evidence. The fact of recent possession being a circumstance which the state relied on to convict the accused of burglary, the court should have given in charge to the jury the law as to what amount and character of proof is necessary to warrant a conviction on circumstantial evidence. Penal Code, § 984. We are asked, however, to award a new trial in this case because of the failure of the court so to charge. This we cannot do. We desire it understood, however, that, if it were a doubtful case,—indeed, if there were any evidence tending to rebut this almost conclusive presumption of guilt; if there were even a plausible explanation as to how the possession was acquired,—the failure to charge as indicated would demand at our hands a reversal of the judgment. In the case of *Tarver v. State*, 95 Ga. 222, 21 S. E. 881, it is ruled in the headnote that, "in passing upon the possession of stolen goods as evidence offered to show criminality, the time which elapsed between the theft and the possession, and the manner in which the possession was accounted for, or that it was not accounted for at all, are material matters for the consideration of the jury, to which the court, by appropriate instructions, should direct their attention." And it was ruled in the case of *Hamilton v. State*, 96 Ga. 302, 22 S. E. 528, that "the failure to give some such instruction, in a close and doubtful case [like the case then being considered], will entitle the accused to a new trial." While we are in entire harmony with these two cases, we find that the charge of the court, while it omitted to deal with the law applicable to the question of the possession of stolen goods, and instructions as to conviction on circumstantial evidence, was otherwise full and explicit. The jury were charged in relation to the presumption of innocence which arose in favor of the defendant. The law as to reasonable doubts was fully and succinctly given. The attention of the jury was directed to the statement made by the defendant, and they were told that the force and weight and effect which they should give the statement was entirely a matter for the jury; and, as the statement appears in the record, it is devoted almost entirely to the manner in which pos-

session of the stolen goods was acquired. This is not a close or a doubtful case upon the facts as they appear. Indeed, so far as we are to judge, the plaintiff in error is plainly guilty, under the law. And while the failure of the court below to charge the law applicable to the recent possession of stolen goods as a circumstance tending to show the guilt of the defendant, and the amount and character of circumstantial evidence necessary to convict, are just grounds of criticism from a legal standpoint, we are not satisfied to reverse the judgment because of these omissions from the charge, when with them the same verdict must have been rendered. Judgment affirmed. All the justices concurring.

(106 Ga. 657)

LEWIS v. STATE.

(Supreme Court of Georgia. Oct. 13, 1898.)

CRIMINAL LAW—JOINT INDICTMENT—EVIDENCE—FORCIBLE DETAINER—INSTRUCTIONS

1. On the trial of a person who is jointly indicted with another for the offense of forcible detainer, evidence of the acts and conduct of such other, in the presence and under the direction of the person on trial, is admissible.

2. In the trial of such a case, evidence that the prosecutor had instituted against the accused a civil action of forcible detainer for the same land, and that such proceeding was still pending, is irrelevant.

3. The requests to charge, so far as legal and pertinent, were covered by the general charge, which was free from substantial error. The verdict was sustained by the evidence, and there was no error in refusing a new trial.

(Syllabus by the Court.)

Error from city court of Savannah; T. M. Norwood, Judge.

Sarah Lewis was convicted of forcible detainer, and brings error. Affirmed.

Giquillat & Stubbs, for plaintiff in error. Alexander & Hitch and W. W. Osborne, Sol. Gen., for the State.

CORB, J. Sarah Lewis and Henry Hamilton were jointly indicted, charged with the offense of forcible detainer. Upon the separate trial of Sarah Lewis the evidence was, in substance, as follows: Waters, the prosecutor, had been in possession of the property in controversy for 17 years. On April 19, 1895, he found Sarah Lewis and Henry Hamilton in possession. She told Hamilton, in the presence of prosecutor, to remain in possession. She urged him to remain, and not let prosecutor enter. She had put Hamilton in possession. Hamilton was standing with a lock and chain in his hand, and had come in obedience to Sarah's command. Said he was obeying Sarah's orders, and could not let prosecutor in. On that day he made no demonstration. Subsequently prosecutor returned. Sarah was in the door, urging Hamilton to keep prosecutor out. Prosecutor could not have gone in without knocking him down. Sarah was talking in a loud manner, using violent and offensive language. Pros-

ecutor, on another occasion, went to the property, when Hamilton was on the outside, when prosecutor said to him: "You here yet? I want my property." Sarah was in the door. Prosecutor attempted to take the lock out of Hamilton's hand. Hamilton came down with his fist, and told prosecutor to get out of there. Prosecutor looked at Sarah, and asked if she sent that man to fight. She said, "I put him there." She had a stick in her hand. Prosecutor turned away, and said he would go and see his lawyer. When prosecutor went the first day he found the gate locked. Hamilton said he was put there to defend the lot, and he was going to do it. He did not strike prosecutor. He made a lick at him. That was when prosecutor had hold of the lock. Prosecutor tried to take it out of his hands. The accused introduced Hamilton as a witness, whose testimony was in material conflict with that of Waters. In her statement she denied that she had a stick or threatened to hit Waters, and claimed to have put Hamilton in possession because she thought it was her property. She bought it and paid for it. She did not authorize Hamilton to hit Waters. She told Waters to let Hamilton alone, and talk to her. She put him in. There was also evidence tending to impeach Waters by proof of contradictory statements made on the former trial of the case.

This is the third time that the controversy involved in the present case has been before this court. In *Lewis v. State*, 99 Ga. 692, 28 S. E. 496, where the accused had been convicted of the offense of forcible entry and detainer, this court held that, as there was no evidence of a forcible entry, such a finding was contrary to law, and directed a new trial. In *Lewis v. State*, 101 Ga. 532, 28 S. E. 970, it was held that the solicitor general had a right, over the objection of the accused, to enter a nolle prosequi on the indictment for forcible entry and detainer, notwithstanding the former trial of the case. After the indictment for forcible entry and detainer was disposed of in the manner referred to, the indictment in the present case against the accused for forcible detainer was preferred by the solicitor general, and returned as true by the grand jury. The accused upon the trial of this indictment was convicted, and, her motion for a new trial being overruled, the controversy is here again on a writ of error sued out by her.

1. The motion for a new trial complains of "error in admitting the testimony of Waters as to the acts of Hamilton at the time of the alleged detainer, over objection that, as there is no principal and agent in misdemeanors, the defendant on trial could not be held responsible for the acts of another defendant not on trial, and such testimony was prejudicial to the defendant." We do not think there was any error in admitting the testimony objected to, either for the reason assigned or for any other reason. Hamilton

and the accused were jointly indicted, and the evidence shows that on each occasion, when the prosecutor was at the house which he claimed was forcibly detained by them, they were both present, and that Hamilton was actively participating in the acts relied upon to make out the case of forcible detainer, and he was obeying the instructions of the accused given to him in the presence of the prosecutor. The assignment of error does not point out with that distinctness which is required the evidence which is objected to, but, treating the assignment as well made, a review of the entire evidence shows the state of facts above referred to. Under such circumstances, it needs no argument to demonstrate that, where two persons are jointly indicted for an offense, evidence of the acts and conduct of one in the presence of the other, in relation to the matter which is the subject of the offense, is admissible against the other on a separate trial for the offense.

2. Another ground of the motion for a new trial complains of "error in excluding testimony, sought to be elicited on cross-examination of Waters, that he had brought a civil action of forcible entry and detainer for the same land, which has been pending since 1895; the purpose being to aid the jury to arrive at the truth as to what was the animus of the prosecution." A person who is wronged by the forcible detention of his property is given a civil remedy to assert his right to a restitution of the possession of which he is forcibly deprived. Civ. Code, § 4823 et seq. This is a remedy for the civil wrong, and is intended for the assertion of a private right only. As forcible detainer, from its very nature, in addition to being a civil injury, is also a public wrong, the law provides that any person who commits such an act shall be indicted and punished. Pen. Code, § 340. It is expressly provided in regard to the civil remedy that such proceedings shall not exempt any person guilty of forcible detainer from indictment and punishment. Civ. Code, § 4832. The sole object of the civil remedy is the restitution of possession to the person entitled thereto. It is true that one of the results flowing from a conviction under an indictment for the public wrong is a restitution of possession, but this is not the controlling purpose to be accomplished by the indictment. The proceedings by indictment are not for the purpose primarily of determining private rights. They are for the purpose of punishing a disturber of the peace, and the punishment which is placed upon him is one that, on account of the character of the offense, is peculiarly appropriate,—fine or imprisonment, accompanied by restitution of the property which he has acquired by his disregard of the peace and good order of the community. The property is restored to the prosecutor, not for his benefit, but for the purpose of punishing the accused. The civil remedy, which is found in our Civil

Code, and the procedure by indictment for the public offense, which is found in our Penal Code, are each brought from the common law, without any substantial change in the definition of the wrong, or in the manner in which it is to be remedied, whether dealt with as a private or as a public wrong. 3 Bl. Comm. p. 179; 4 Bl. Comm. p. 148; Bish. New Cr. Proc. § 489 et seq.; 9 Enc. Pl. & Prac. p. 35. The two remedies, however, are provided for entirely different purposes, and we do not see what relevancy the pendency of a proceeding to enforce one remedy has upon the trial of a proceeding under the other. It is contended that, when a person is on trial for the crime of forcible detainer, the fact that the prosecutor had prior thereto instituted proceedings to enforce his civil remedy was admissible to show the animus of the prosecution. The animus of the prosecution in such a case is apparent. The prosecutor desires to punish the offender in the manner prescribed by law; that is, by fine or imprisonment, and an order which would restore to the prosecutor his property. We do not see what light would be thrown upon the animus of the prosecution by showing that the prosecutor in another forum was attempting to assert his private right. It will be noted that all that was offered to be proven in the present case was that a civil proceeding of forcible detainer was pending. It does not appear that any judgment had been rendered in that proceeding. If it had appeared that the civil proceeding had resulted in a judgment in favor of the accused, an entirely different question would have been presented. It may be that the order of restitution, following the conviction for the crime, must always come as a punishment upon the accused, without regard to the judgment that may have been rendered in the case in which the public were in no way interested; but, be this as it may, no such question is made by the present record, and will not be now decided. Even if the pendency of the civil proceeding could have been proven by evidence of the witness on cross-examination, the court was right in excluding the evidence, as it was irrelevant.

8. The charge of the court fairly submitted every issue in the case to the jury, and was free from substantial error. The requests to charge, so far as legal and pertinent, were embraced, in substance, in the general charge. The evidence authorized the verdict, and there was no error in refusing a new trial. Judgment affirmed.

(105 Ga. 662)

GARDNER v. STATE.

(Supreme Court of Georgia. Oct. 13, 1898.)

LARCENY—EVIDENCE.

Evidence showing that the accused took and carried away from a house, with intent to steal the same, the personal goods of another, will warrant a general verdict of guilty upon

an indictment which merely charges simple larceny.

Little, J., dissenting.

(Syllabus by the Court.)

Error from city court of Richmond county; W. F. Eve, Judge.

Parthenia Gardner was convicted of larceny, and brings error. Affirmed.

Russell & Rosenfield, for plaintiff in error. C. Henry Cohen, for the State.

LEWIS, J. The defendant was arraigned in the city court of Richmond county on an accusation charging her with simple larceny, in that she privately, wrongfully, and fraudulently took and carried away, with intent to steal the same, a lot of chickens, of the value of \$10. By consent, the case was tried before the judge of the court without a jury. The evidence in behalf of the state was to the effect that the defendant privately took and carried away from a large chicken house of the prosecutor the goods alleged to have been stolen. A judgment of guilty was rendered, and the case was brought to this court, alleging error in this finding, on the ground that it was contrary to law and the evidence, and that the offense proven, if any, was larceny from the house, and not simple larceny.

We do not agree with counsel for the state that a chicken house is not such a structure as could be the subject-matter of larceny from the house. The evidence showed that the house from which the goods were taken was "the large chicken house" of the prosecutor. No further description is given, but we are obliged to conclude from this that the structure was a permanent building or fixture erected on the place, and falls within the ordinary acceptance of the term "house." The fact that it was erected for safety of chickens can make no difference. It is none the less a house; and stealing chickens therefrom is as much larceny from the house as stealing corn from a crib. We therefore conclude that the facts in this case did make out the offense of larceny from the house; and the sole question remaining for solution is whether or not, on a charge of simple larceny, the accused can be legally convicted of this offense, when the proof shows that she was guilty of larceny from the house. "Larceny from the house is the breaking or entering any house with the intent to steal, or, after breaking or entering said house, stealing therefrom anything of value." Pen. Code, § 178. When the purpose to steal has been consummated, the offense includes every element of simple larceny. Every fact alleged in this accusation against the defendant was proven. The evidence went a step further, and showed, not an offense dissimilar, but one of the same class, containing an additional element of aggravation, yet including the offense with which defendant was charged. In the case of *Brown v. State*, 90 Ga. 454, 16 S. E. 204, it was held that "under an accusation which

charges, in terms of the statute, larceny from the house of certain hens and a rooster, a conviction may be had for simple larceny, the latter offense being included in the former." Simmons, Justice (now chief justice), in his opinion in that case, said: "The larceny proved, and for which the conviction was had, contained no element that was not included in the larceny as charged, and was a lesser offense, though both were misdemeanors, and the limit of the statutory penalty as to each offense was the same." We think the converse of this ruling is equally true,—that, where one is charged with a lesser offense, he may be legally convicted of the same, although the testimony may show him guilty of the greater, when it necessarily includes the less. To hold otherwise would lead to rather strange anomalies in criminal procedure. For instance, if one should be indicted for an assault, would it not be an unreasonable defense for him to set up that, while he did unlawfully make the assault, yet, inasmuch as it was coupled with an intent to murder, he should not be convicted of the lesser crime? If such a defense were available, then, if the facts of the case showed an assault with intent to murder, an acquittal would necessarily result; and upon being indicted afterwards for the larger offense, involving, as it did, the same transactions, he might, under previous rulings of this court, plead former jeopardy. Thus would result the liberation of a criminal simply because he was charged with a misdemeanor, but, in point of fact, he was guilty of a felony that included the misdemeanor.

There is no fatal variance between the allegations in this case and the proof. The statute does not require a designation of the particular place in the county where the crime was committed, nor a relation of all the means used by the criminal in perpetrating the offense. When charged with simple larceny, he is put upon notice that a conviction will be sustained by proof of the stealing, regardless of where in the county the theft took place. The case of *King v. State*, 54 Ga. 184, relied upon by counsel for plaintiff in error, is not in conflict with our decision in this case. There the defendant was charged with simple larceny, and the evidence disclosed that the property alleged to have been stolen was taken from the person; and the court held that the defendant could not be convicted of the felony with which he was charged. That ruling was manifestly correct. As the law existed at that time, a simple larceny of currency notes was punishable as a felony; but the punishment for taking the same goods from the person of another was entirely different. Of course, it would have been manifestly wrong to uphold a conviction for a felony when the proof showed that the defendant was guilty of a misdemeanor only. In the case of *Wyatt v. State*, 1 Blackf. 257, the defendant was in-

dicted for larceny. It was held that there was no error for the court to refuse to instruct the jury to find a verdict for the defendant should they be of the opinion that the offense proved amounted to burglary. In the case of *Skipworth v. State*, 8 Tex. App. 135, it was decided that a conviction for simple larceny was legal, notwithstanding the evidence might have been sufficient to sustain a prosecution for robbery. It will be seen from the opinion of Clark, J., in that case, that this ruling of the court was based upon the idea of the similarity between the two offenses of robbery and larceny, and that the former offense included the latter. "That the taking," says the court, "may have been 'by assault,' or 'by violence and putting in fear of life or bodily injury,' renders it no less a fraudulent taking; and, if the state elects to prosecute simply for fraudulent taking, the defendant cannot complain because the proof shows, not only this character of acquisition, but something more." See, also, *Rap. Larceny*, p. 275, § 244, and authorities cited. We conclude, therefore, that the decision embodied in the headnote is sustained both by reason and authority. Judgment affirmed. All the justices concurring, except LITTLE, J., dissenting.

(106 Ga. 833)

WILLIAMS v. STATE.

(Supreme Court of Georgia. Oct. 13, 1898.)

CRIMINAL LAW—APPEAL—REVIEW.

The evidence authorized the verdict. The charge of the court, construed as a whole, fairly submitted to the jury all of the issues in the case. There was no error in refusing a new trial.

(Syllabus by the Court.)

Error from superior court, Charlton county; J. L. Sweat, Judge.

Ben H. Williams was convicted of a crime, and he brings error. Affirmed.

L. A. Wilson and W. M. Oliff, for plaintiff in error. John W. Bennett, Sol. Gen., for the State.

PER CURIAM. Judgment affirmed.

(106 Ga. 827)

HICKS v. STATE.

(Supreme Court of Georgia. Oct. 13, 1898.)

MURDER—INDICTMENT—COMPETENCY OF WITNESS—NEWLY-DISCOVERED EVIDENCE.

1. An indictment which charges murder "by choking and by other means to the jurors unknown" is not demurrable, on the ground of indefiniteness in its description of the manner of the killing.

2. The competency of a witness is a question for the court, and not for the jury. Under the facts of this case, the court properly admitted the testimony of the witness whose competency was attacked, and there was no error in failing to submit to the jury the question of the witness' competency.

3. The newly-discovered evidence being of an

impeaching character, there was no error in overruling this ground of the motion for new trial.

4. In the light of the entire charge, there was no error in any of the rulings of which complaint is made. The evidence was sufficient to sustain the verdict.

(Syllabus by the Court.)

Error from superior court, Macon county; Z. A. Littlejohn, Judge.

Jeff Hicks was convicted of murder, and brings error. Affirmed.

W. G. Harrison, W. G. Munday, and Joseph K. Hines, for plaintiff in error. F. A. Hooper, Sol. Gen., C. R. Crisp, and J. M. Terrell, Atty. Gen., for the State.

SIMMONS, C. J. 1. The following special presentment was returned by the grand jury of Macon county: "The grand jurors, * * * in the name and behalf of the citizens of Georgia, charge and accuse Jeff Hicks with the offense of murder, for that the said Jeff Hicks, on the 24th day of April, in the year 1898, in the county aforesaid, did then and there unlawfully, and with force and arms, by choking and by other means to the jurors unknown, feloniously, and of his malice aforethought, kill and murder one Miley Hicks, in the peace of the state, being contrary to the laws of said state, the good order, peace, and dignity thereof." When Hicks was arraigned, he demurred to the presentment, on the ground that it was "wanting in that degree of definiteness which defendant has a right to demand before going to trial on the merits of the case, in that the language of said special presentment is too vague and indefinite as to the kind of weapon used and the means used in committing the said murder, as to enable this defendant to prepare his defense to said special presentment." This demurrer was overruled, exceptions pendente lite were taken, and error here assigned thereon.

Section 929 of the Penal Code declares that every indictment should be deemed sufficiently technical and correct "which states the offense in the terms and language of this Code, or so plainly that the nature of the offense charged may be easily understood by the jury." It will be seen from the presentment that the accused was charged with murder, the day and year of the commission of the offense was alleged, and that the killing was done feloniously and with malice aforethought. The manner of the killing was alleged to have been "by choking and by other means to the jurors unknown." The presentment states the offense in the terms and language of the Code, and the nature of the offense could easily be understood by the jury. The accused could likewise understand, from reading the presentment, that he was charged with the offense of murder by choking the woman named in the presentment, or by other means to the jurors unknown. It is argued by counsel for plaintiff in error that there are many kinds of "choking," and he refers to the definitions of the word given by

certain lexicographers. The plain, every-day meaning of the word "choking," as we understand it, is to prevent or interfere with the passage of air through the windpipe, either by internal obstruction or by external pressure. To "choke" a person is, in other words, to fill his mouth or throat with a towel or other substance, or to seize and compress his throat, so as to obstruct his breathing. This is what the grand jury meant when they used the word, and this is what the accused must have understood when the presentment was read to him. Upon the subject of the sufficiency of indictments in alleging the mode and manner of committing the crime, see *Studstill v. State*, 7 Ga. 16; *Hill v. State*, 41 Ga. 501; *Peterson v. State*, 47 Ga. 524; *Coxwell v. State*, 66 Ga. 309; *Thomas v. State*, 71 Ga. 44. The presentment alleges that the killing was done "by choking," and also "by other means to the jurors unknown." It appeared from the evidence introduced in the trial of the case, after the demurrer had been overruled, that the circumstances of the killing would not admit of greater certainty in stating the means employed in committing the offense. It was held in the case of *Com. v. Webster*, 5 Cush. 295, that "an averment in an indictment for murder that the defendant committed the crime at a place specified, 'in some way and manner, and by some means, instruments, and weapons, to the jurors unknown,' is sufficient, when the circumstances of the case will not admit of greater certainty in stating the means of death." We think, therefore, that the court did not err in overruling the demurrer to the presentment.

2. Pending the trial, a child 10 years old was offered by the state as a witness against the accused. It was objected by counsel for the accused that she, on account of her tender years, did not know the nature of an oath, and was not competent to testify. The court examined the child fully and fairly as to her knowledge of the nature of an oath, and her answers clearly show that she did understand the nature of an oath, and believed she would be punished if she swore falsely upon the trial. This was a matter for the court to decide, and we think, from the evidence disclosed by the record, that it was not error to admit the testimony of the child. Upon this subject, see *Moore v. State*, 79 Ga. 498, 5 S. E. 51, and cases there cited, and *Minton v. State*, 99 Ga. 254, 25 S. E. 626. It was also argued here that the court erred, after having decided that the child was competent as a witness, in not submitting that question to the jury in his charge. The competency of witnesses is always for the court, and we know of no law in this state which requires the trial judge, in a case like the one under consideration, to submit to the jury the question of a witness' competency. The court decides the competency, the jury the credibility, of a witness. The jury may look at a witness whose competency has

been attacked on account of youth, hear the evidence, and, if the evidence be confused, inconsistent, wild, and reckless, they may, in their discretion, refuse to give it credit, as they would that of any other witness who was discredited.

3. We have read the affidavits containing the newly-discovered evidence. All of this evidence which would be legally admissible on the trial is impeaching in its character, and the court did not err in refusing to grant a new trial upon this ground.

4. There are several complaints of errors of law in given extracts of the charge of the court. The judge, in approving the motion for new trial, states that these extracts are incomplete, and an examination of the record shows that this is true, and that in some places portions of sentences have been omitted from the extracts contained in the motion. When read in connection with the entire charge, the charges complained of contain no error. One ground complains of the charge given on the subject of confessions, but the trial judge certifies that this charge was given at the request of counsel for the accused. This being true, counsel are estopped to assign error thereon.

A careful examination of the whole case, as disclosed by the record, enables us to find no error which would authorize this court to grant a new trial. Judgment affirmed. All the justices concurring.

(105 Ga. 821)

FOSKEY v. STATE.

(Supreme Court of Georgia. Oct. 13, 1898.)

CRIMINAL LAW—APPEAL—REVIEW.

While the evidence of the defendant's guilt in this case is not entirely satisfactory to this court, yet, the verdict not being without evidence to support it, the discretion of the trial judge in overruling the motion for a new trial will not be interfered with.

(Syllabus by the Court.)

Error from superior court, Emanuel county; R. L. Gamble, Judge.

Robert Foskey was convicted of a crime, and he brings error. Affirmed.

Saffold & Mitchell, for plaintiff in error.
B. T. Rawlings, for the State.

PER CURIAM. Judgment affirmed.

(105 Ga. 242)

PARKS v. STATE.

(Supreme Court of Georgia. July 26, 1898.)

MURDER—DYING DECLARATIONS—VOLUNTARY MANSLAUGHTER—JUSTIFIABLE HOMICIDE.

1. Where, in a prosecution for murder, it was the theory of the state that the accused willfully and maliciously shot and killed the deceased, or, if that be not true, that the accused so recklessly and negligently fired his pistol as made the shooting of the deceased, from which his death resulted, the natural result of such firing; and where it was contended by the defendant that the shooting occur-

red between midnight and break of day on a very dark night; that, being attracted by a noise, he went to the end of the house, and discovered an object in his yard, which he halted, and receiving no response, and believing it to be a predatory animal, fired at it and killed the deceased,—it is held that the declarations made by the deceased as to the cause of his death and the person who killed him were admissible, if at the time of making them the deceased was in extremis, and conscious of his condition.

2. Held, also, that the law of voluntary manslaughter was not applicable to the facts of the case, and there was no error in failing to charge the law applicable to that offense, but the law of involuntary manslaughter was involved.

3. It was error for the judge to have charged in this case the law of justifiable homicide as set out in section 73 of the Penal Code. The provisions of this section have no application, under the facts of this case as shown by the evidence. The principles of law therein embodied are only applicable in cases of mutual combat, and do not apply in any case, unless the evidence, or some portion of it, shows that there had been a mutual altercation between the parties.

(Syllabus by the Court.)

Error from superior court, Hart county; S. Reese, Judge.

Allan Parks was convicted of murder, and brings error. Reversed.

A. G. McCurry, for plaintiff in error. R. H. Lewis, Sol. Gen., and J. M. Terrell, Atty. Gen., for the State.

LITTLE, J. Allan Parks was indicted and found guilty of the murder of Walker Brown. The verdict was accompanied with a recommendation to life imprisonment. The evidence of the attending physician showed that the deceased died from a gunshot wound inflicted in the back, just below the shoulder blade. The effect of the shot was a complete paralysis of the lower extremities, and a loss of sensation and motion. The testimony of J. F. Marett was to the effect that deceased was shot centrally in the back, close to the spinal column, and died on Sunday evening. The witness further testified as follows: "On Saturday before his death he told me that his condition was bad; that he knew that he was going to die; that half of him was dead at that time, and he was dying then. He said that Allan Parks shot him; that he had been working for Allan the day before, and Allan had promised him, if he would meet him at his house at four o'clock the next morning, he would let him have some whisky; that he went to Allan's house, and was standing in the yard, opposite the house, when Allan Parks and another negro man, whom he took to be Ben Parks, drove up; that they drove the horse to the back end of the house, and accused jumped out of the buggy, and came slipping into the front yard, and cocked his pistol; that he tried to tell him not to shoot, but that he did shoot at him, and deceased fell over, and could not speak for a while. He then called for help. Deceased further said that he wanted Parks

prosecuted, and that he had sent for witness to make the statement, so that he could be a witness on the trial. Deceased was twenty-two or twenty-three years old, and unmarried. The mind of the deceased at the time he made the statement was in its normal condition." Sam Williams testified for the defendant: That he was at the house of the accused when Walker Brown was shot. That the accused and his wife lived there. He saw Allan Parks immediately before the shooting. He had gone home with him. They had gotten together on Tuesday morning in South Carolina, below Fair Play. Accused and his brother were then going to the mountains. They were met by some men, who told them they had better not go. Allan then said he believed he would not go. They crossed Tugulo river at Shealer's Ferry, and returned to Allan's house, which is located near a public road. It was something after midnight when they got to his house, and they drove up to the back of the house. Accused then requested him to take out the mare, and said he would go in and see how his wife was, and also get some corn to feed the horse. The accused then went in the house. It was a very dark night, but witness heard accused go in the house, and after a while heard him call out, "Hello! Who is that?" like he was talking to somebody. He spoke in a loud voice. He was at one end of the house, and it seemed to witness to be the end where the chimney was located. Witness heard the hallooing before he heard the pistol fire. Did not hear the party whom accused was calling return any answer. After that, witness heard the pistol shot, and then heard a man speak. After the pistol was fired, deceased said: "Allan, come and help me home now. You have shot me through and through." Allan then came back, and told witness to go to him, and said that, if Walker had spoken, he never would have shot him. Deceased, hearing witness' voice, called to witness to come and help him, saying that he was shot all to pieces. Witness went to him, picked him up, carried him in the house, and put him in a comfortable position, and the accused went to get some one to go after the doctor. Witness did not know how far the accused was from the deceased when he fired. It all took place at Allan's house, and around at the chimney end of the house. Witness never saw deceased until after he fell. Found him in the yard. Did not know whether he could walk after he was shot or not. Witness heard him fall, but did not know whether he was in the yard when he was shot or not, nor did he know whether or not he fell as soon as he was shot. Witness saw him in about a minute after the time he heard him fall. Witness did not know how far the deceased had moved from the place where he was shot before he found him. The accused was at the chimney end of his house when witness heard him call the man. The pistol was fired back there. John C. Linder testified that the house in which

Allan Parks and his wife were living at the time the deceased was shot was located about 20 feet from the road. It was uninclosed. There were two doors to the house,—one in front, one in the rear. The chimney is in the end of the house; one door next to the yard, and one door behind; no door in the end of the house. Tugulo Linder, sworn, said: "I am the brother-in-law of the defendant. I went over to Allan's house the morning after Brown was killed, and saw fresh tracks behind the chimney. I knew deceased well. They were like his tracks. They were barefooted tracks. I had seen the deceased barefooted, and thought the tracks were those of the deceased. It had been raining the night before,—not enough to obliterate the tracks, which were located around at the back of the chimney. I noticed that the tracks crossed the yard to where he fell. Deceased lived eight or ten days after he was shot." In his statement the accused said that Walker was at his house on Saturday, Sunday, and Monday before Christmas. "On Monday I told him I was going off, and where I was going. I was not to return until Wednesday night or Thursday morning. I was going up in the mountains, but turned back. I went a short distance because my brother told me he knew where we could get liquor enough for Christmas. We turned and came back by Shealer's Ferry, and hurried on home, where I had left my wife sick. I got home a little after twelve o'clock at night, and drove up in the yard, and told Sam, who was with me, to take out the mare; that I would go in the house and get some corn, and see how my wife was getting along. I knocked at the door. My wife opened it, and I inquired how she was. I was in a hurry to get back to Sam, and went through the house, and into a room where I had some corn in a barrel. I got out the corn, and took my pistol with me, and started around the house. When I stepped out of the door I heard a noise at the corner of the house, in the stalks of cotton. I took my pistol in my hand and stepped out. I was very much alarmed, but could not see anything. Turned back to the side of the house, near which the cotton rows ran. I looked up in the chimney corner, and discovered something apparently in the shape of an umbrella. I called and asked: 'Who is that? What is it?' There was no response. I discovered that the object was moving, but could not tell whether it was coming to or going from me. I then fired at the bulk that I saw. When I fired, it looked like something rolled up and went to the left. There had been a rumor that something had been killing dogs, and I thought it was a bear, and I just turned around to go back and get a light, when the deceased hallooed, and scared me so bad I could not tell his voice. I asked, 'Who was that?' He said, 'Me.' I said, 'Me who?' At last he said, 'Walker;' and I said, 'What in the world are you doing there?' He said, 'I was not after you.' Those were the first

words he spoke. He said, 'Don't shoot me any more. You have killed me now.' I said, 'What made you run?' He said, 'I did not want you to see me.' I then turned and went back around the house to where Sam Williams was. Sam asked me who it was. I said it was Walker Brown. If he had spoken, I never would have shot him; and I said: 'Sam, you go to him. I am not going to him. He may have a pistol and shoot me.' I got Sam to go to him, and I told Sam to carry him in the house, and I went with him, and we laid him down before the fire; and I told my wife to warm some bricks and irons, and use them until we got the doctor. After we had laid Walker down, I asked him what made him do that. He said, 'Allan, you did not do any more than any other man would have done.' I said, 'What made you run?' He said, 'I didn't want you to see me.' I had never promised to meet him." The accused made a motion for a new trial, the first three grounds of which are: Because the verdict is contrary to evidence, and without evidence to support it; that the verdict is decidedly and strongly against the weight of the evidence, and contrary to law and the principles of justice and equity. The motion contained other grounds, which will be duly considered. As the case goes back to be tried again under principles of law not submitted on the trial in which the present verdict was rendered, we make no ruling on the grounds that the verdict is contrary to the evidence and against the evidence.

1. In the fourth ground of his motion the plaintiff in error complains that the court erred in admitting evidence of the dying declarations of the deceased, because the same are insufficient to go to the jury as dying declarations. We find no error in admitting this evidence, on the grounds taken by the movant. Section 1000 of the Penal Code authorizes the admission of evidence of this character in prosecutions for a homicide, when the person is in the article of death, and is conscious of his condition. At common law, dying declarations were admitted only from necessity. *Battle v. State*, 74 Ga. 101. But under our statute such may be proven even when there is other evidence of the homicide and the circumstances attending it. It is a sound principle, however, that in the admission and use of dying declarations great caution should be observed. *Campbell's Case*, 11 Ga. 374; *Mitchell v. State*, 71 Ga. 128. Under the provisions of our Penal Code, supra, such declarations of the deceased are confined to the cause of his death and the person who killed him. It was shown by the witness that at the time of the declarations the mental condition of the deceased was not affected. It was also shown that he declared himself conscious of his dying condition, that his lower limbs were at that time paralyzed from the effects of the wound, and that he did in fact die the next day. Even if any portion of this evi-

dence was objectionable, taken as a whole, it was certainly sufficient, under a proper construction of our statute, to go to the jury as a declaration of the deceased relating to the cause of his death, and the person who killed him.

2. Another ground of the motion for a new trial is that the court erred in failing to give in charge to the jury the law of voluntary manslaughter, which is defined by our Code to be the unlawful killing of a person without malice or deliberation, but upon a sudden heat of passion; and there must be either an assault on the person killing, or an attempt by the person killed to commit a serious personal injury on the person killing, or other equivalent circumstances, to justify this excitement of passion. In the present case the accused did not claim that the homicide was the result of passion. On the contrary, it was the theory of his defense, emphasized by his statement, that the killing was not intentional; that he did not know that the object at which he fired was a human being; and it is difficult to see, under the evidence as it appears in the record, how the law of voluntary manslaughter can be made to apply. A man has a right to eject an intruder from his house or premises, and to use such force as is necessary to accomplish that purpose; but a civil trespass on the land or property of another, not his dwelling house, is never sufficient to reduce the intentional killing of the trespasser, with a deadly weapon, from murder to manslaughter. *Hayes v. State*, 58 Ga. 35. However this may be, the law of voluntary manslaughter should not have been given to the jury, under the defendant's theory of the case, and his contention as to the manner of the homicide. It is also complained that the court failed to give in charge to the jury, although no request so to do was made, the law of involuntary manslaughter; counsel for plaintiff in error insisting that the statement of the accused rendered the law touching this grade of homicide applicable. The statement of the prisoner is not evidence, and while it is the duty of the trial judge, without a request, to charge the law applicable to all the theories of the case raised by the evidence, yet, as the statement is not evidence, it is not his duty, without a request, to charge a theory of the law which is raised solely by the statement of the accused. Had the request been submitted so to charge, we think that the law of involuntary manslaughter should have been given, as in our judgment it was directly applicable to the circumstances of the homicide as stated by the accused. According to his theory, the deceased was a trespasser upon his premises, and one concerning whose presence, in view of the time, place, and circumstances of the trespass, the defendant had a lawful right to inquire and repel. While one has not the right to slay another who trespasses on his land or property, without more, it is yet a duty which a man

owes both to his family and himself to ascertain the motive of one whom he discovers on his premises under suspicious circumstances, and to prevent the invasion of his house and immediate premises; and such duty becomes more pressing in the darkness of the night than in the light of the day. It was the right of the accused, on hearing a suspicious noise, to inquire into it. It was not his right, if he had discovered the object to have been a man concealing himself, to fire and kill him, nor, without more, to fire at a man, under such circumstances, with the intention to kill him. The defendant, in his statement, however, contends that his suspicions were aroused by hearing a noise at the end of his house; that he went there, and found an object in the corner by the chimney; that he had no idea it was a man, but thought the object, in the darkness of the night, was a predatory animal; and it was under these circumstances, after having called to ascertain more definitely what the object was, and receiving no reply, when the object moved, that he fired. If this statement of the circumstances attending the homicide be true,—and whether so or not the jury is to determine,—then the homicide could not be an intentional killing; nor, if they be true, could the killing be held such a negligent and reckless use of a deadly weapon as would authorize a verdict for murder. The circumstances of such a case make no parallel to one where a person fires recklessly into a building where people are congregated, or into a crowd gathered on the street, without intention to cause the death of any one. In the latter case the slayer could not justly claim that his act of firing was done without intention to take life, because taking life would be the natural result of his act. Whether the accused, if he took the life of the deceased under the belief that the object at which he fired was an animal trespassing upon his premises, should be held to be engaged in the commission of a lawful or unlawful act, does not affect the question; but if the deceased was slain, without any intention on the part of the accused to shoot a human being, under circumstances which did in fact induce him to believe that the object at which he fired was an animal trespassing upon his premises at night, he would not be guilty of any offense greater than involuntary manslaughter. We do not, of course, pass any opinion on the sufficiency of the evidence to support this contention of the accused. Whether he willfully and with malice aforethought slew the deceased, or whether, as contended by him, he fired at an object trespassing on his premises, which in the dead of night he had no reason to believe was a human being, and which he thought was an animal, was a question of fact, to be determined by the jury; and, had he requested an appropriate charge as to this law, it should have been given.

3. Another assignment of error is because

the court gave in charge to the jury, as applicable to the evidence in the case, the principles of law declared in section 73 of our Penal Code, in which is used the following language: "If a person kill another in his defense, it must appear that the danger was so urgent and pressing at the time of the killing, that, in order to save his own life, the killing of the other was absolutely necessary; and it must appear also that the person killed was the assailant, or that the slayer had really and in good faith endeavored to decline any further struggle before the mortal blow was given." This section of the Code contains principles of law wholly inapplicable to cases like the present. The accused rested his defense on the theory that the homicide committed by him was the result of misfortune or accident, and entirely without intention. Whether this be true or not, there was nothing in the evidence to which the section of the Code above quoted could be made applicable. There was no mutual combat, no evidence of any struggle, and no necessity for the slayer to retreat. The accused did not claim that the homicide was justifiable, but insisted that the deceased was killed as the result of misfortune; while the state claimed that the act was premeditated and voluntary, or the firing was so recklessly and negligently done as to make the act murder. Under either of these theories, and under any view which may be taken of the evidence, the charge given was error. The provisions of the section referred to apply in very many cases of homicide, but they have no application in any case unless an altercation between the parties precede the act of homicide.

4. It is unnecessary to rule on the other assignments of error contained in the remaining grounds of the motion for a new trial, inasmuch as the principles of law ruled above determine all the questions raised. Judgment reversed.

(105 Ga. 597.)

GLOVER v. STATE.

(Supreme Court of Georgia. Oct. 12, 1898.)

MURDER—SELF-DEFENSE—EVIDENCE—INSTRUCTIONS.

1. If, in a prosecution for murder, there be evidence of an altercation and mutual combat between the accused and the deceased, it is proper to charge section 73 of the Penal Code.

2. Unless a written request be a pertinent legal charge, the judge should decline to give it.

3. The evidence authorized the verdict, and there was no error in denying a new trial.

(Syllabus by the Court.)

Error from superior court, Elbert county; S. Reese, Judge.

Gabe Glover was convicted of murder, and brings error. Affirmed.

S. L. Olive, Z. B. Rogers, and A. G. McCurry, for plaintiff in error. R. H. Lewis, Sol. Gen., for the State.

FISH, J. 1. One of the grounds of the motion for new trial was that the court erred in charging the law as contained in section 73 of the Penal Code the assignment of error being that "said charge was not applicable to the facts and defense relied on in this case." That section is as follows: "If a person kill another in his defense, it must appear that the danger was so urgent and pressing at the time of the killing, that, in order to save his own life, the killing of the other was absolutely necessary; and it must appear, also, that the person killed was the assailant, or that the slayer had really and in good faith endeavored to decline any further struggle before the mortal blow was given." The question is, was this law applicable to the facts of the case? It is immaterial whether it was applicable to the defense relied on by the accused, if the evidence made it pertinent. According to the testimony of the witnesses for both the state and the accused, there was an altercation between the accused and the deceased, each one exhibiting a willingness to fight, and each drew a pistol before a shot was fired. It would seem from the testimony of some of the witnesses that the accused began the difficulty, and that he drew his pistol and fired first; from the testimony of others, that the deceased began the difficulty, drew his pistol, and fired first; and from others still, that the accused and the deceased fired simultaneously. This evidence therefore makes just the kind of case in which the law embraced in section 73 of the Penal Code is solely applicable. *Powell v. State*, 101 Ga. 9, 29 S. E. 309; *Teasley v. State* (Ga.), 80 S. E. 938; *Parks v. State* (Ga.) 81 S. E. 580.

2. Another assignment of error is that the court refused to charge a written request as follows: "If the defendant was where he had a legal right to be, and the deceased made an attack upon him with a deadly weapon, the defendant was under no obligation to retreat, but had a legal right to defend himself against such attack, so far as was necessary to accomplish his defense." The evidence shows that the difficulty occurred at a dance in a house where neither the deceased nor the accused resided, and that the one had as much legal right to be there as the other. The evidence presented no question as to the relative right of either of the contestants to be where he was at the time of the homicide. The request to charge as to the accused being under no obligation to retreat, and as to his right to defend himself against an attack upon him with a deadly weapon, was too broad. Under section 70 of the Penal Code, one who is himself free from fault may, without retreating, use whatever force is necessary to protect himself from a felonious assault, even to taking the life of his assailant, and be justifiable. So, under section 71, one free from fault may, without retreating, take human life, and be justifiable, if the circumstances are sufficient to

excite the fears of a reasonable man that a felonious assault is about to be made upon him, and the slayer, who is free from blame, acts under the influence of such fears, with the bona fide purpose of preventing the felony from being committed upon him. One who is himself to blame, however, has not the same right of standing his ground and of justification as one who is not at fault. When the slayer is at fault, then, to justify the homicide, his defense must come up to the principles of law embodied in section 73 of the Penal Code,—that there was an absolute necessity to kill to save his own life, and that the person killed was the assailant, or that the slayer had really and in good faith endeavored to decline any further struggle before the mortal blow was given. The request to charge should have stated that, if the accused was not at fault, he was under no obligation to retreat, etc. Without such qualification, there was no error in refusing to charge it. See *Allen v. State*, 28 Ga. 395.

3. The evidence authorized the verdict, and there was no error in overruling the motion for new trial. Judgment affirmed. All the justices concurring.

(105 Ga. 676)

CUNNINGHAM v. STATE.

(Supreme Court of Georgia. Oct. 13, 1898.)

INTOXICATING LIQUORS—ILLEGAL SALES—AGENCY.

Although one may lawfully act as agent for two or more principals in the same transaction if his duty to each does not require incompatible things in such transaction, yet when it appears that C., at the request of N., undertakes to purchase for the latter a quantity of spirituous liquor in a county where such sales are unlawful, and M., the owner of the liquor, is informed of the fact of such agency, and declines to sell on a credit, but delivers to the agent the liquor desired, with instructions to bring him back the money which is the agreed purchase price, or return him the liquor, such facts do not constitute C. the agent of M. to sell. The receipt of the purchase price by C. from N., and the delivery of the liquor under those circumstances to N. by C., do not render him subject to the provisions of the law which prohibits sales of liquor.

(Syllabus by the Court.)

Error from city court of Griffin; E. W. Hammond, Judge.

S. G. Cunningham was convicted of illegally selling intoxicating liquors, and he brings error. Reversed.

T. E. Patterson, for plaintiff in error. O. H. B. Bloodworth, Sol. Gen., and J. M. Kimbrough, Jr., Sol. City Court, for the State.

LITTLE, J. Plaintiff in error was indicted by the grand jury of Spalding county, in which the provisions of the act known as the "Local Option Act" are in force, with the offense of selling intoxicating liquor to one C. A. Nunnally. The case was tried in the city court of Griffin. The jury returned a verdict of guilty, on which the court passed judgment, and the defendant made a motion for new

trial. Besides the general grounds that the verdict is contrary to the evidence and without evidence to support it, and that it is contrary to law, the plaintiff in error alleged that the court erred in charging the jury as follows: "If you believe from the evidence that the defendant, at the instance of Nunnally, undertook to get whisky for Nunnally, and, in pursuance of such instructions, went to Manley for the whisky at Nunnally's request, and Manley declined to let defendant have the whisky on Nunnally's request, but delivered the liquor to defendant, and told him to bring the whisky back or the money for it back, and if you believe, under such instructions from Manley, defendant undertook to deliver the liquor to Nunnally, and collect the price thereof from Nunnally, such an arrangement would make the defendant the agent of Manley, although you may believe he was also the agent of Nunnally. One may be the agent of two parties at the same time. And if you believe from the evidence that, under such instructions from Manley, defendant took the whisky, and delivered it to Nunnally, and received from him the money for the same, you would be authorized to find the defendant guilty." A further ground of the motion alleges as error the refusal of the court to charge the jury as requested, and that, in that portion of the charge before set out, the court intimated what had been proven in the case. The motion for new trial was overruled, and the plaintiff in error excepted.

Briefly stated, the evidence was to the following effect: Nunnally testified that at the court house in Griffin, on the 2d of March, 1897, he approached Cunningham to get some whisky. Cunningham said he did not have any, but would try to get some for witness. Witness and Cunningham went up town after the adjournment of court, and Cunningham went off, and came back to the rear of a store where the witness was, and delivered him two half pints of whisky, for which witness paid Cunningham 50 cents. Witness testified, further, that he was paid \$5 for making the case against Cunningham, but did not know at the time of the transaction that any reward was offered. Another witness testified that he saw Cunningham deliver the whisky to Nunnally, and receive from Nunnally 50 cents. Witness was at that time on the watch, because he had heard that some whisky would be delivered to Nunnally there. Another witness (McWilliams) testified that he was present, and heard the conversation between Nunnally and plaintiff in error; that Nunnally asked Cunningham to get him some whisky. Cunningham replied that he (Nunnally) could get it as well as he (Cunningham) could. Nunnally said they would not sell to him; that Cunningham knew them better than he, and could get it for him. Another witness (Alford) testified that he was in Manley's room when Cunningham came in; that he told Mr. Manley that he desired to buy some whisky for Nunnally; Manley asked him if he brought the money; Cunningham replied

that he had not; that Manley then delivered to Cunningham two half pints of whisky, and told him he must bring him the money or return the whisky. This was, in substance, all the evidence in the case.

While the provisions against the sale of intoxicating liquors in jurisdictions where the local option act is in force should, for many reasons, be strictly enforced, we are not satisfied that this verdict should stand. The plaintiff in error may have been guilty of the offense as charged, but the evidence, as we understand it, does not necessarily show that he is. As a proposition of law, it is undeniably true that, if neither the principal nor the agent be authorized by law to make a sale of intoxicating liquor, an agent who makes such sale is personally punishable for the act, and that it is no defense that the person indicted acted merely as the agent or employé of another. *Black, Intox. Liq. § 372*, citing a number of authorities in note 30, p. 433. Section 6 of the act approved September 18, 1885, known as the "Local Option Act," declares that it shall not be lawful for any person within the limits of such county (where the act is in force) to sell or barter for valuable consideration, either directly or indirectly, intoxicating liquors, etc. Mr. Black, in his work on Intoxicating Liquors (section 403), says that "there are a great variety of cases in which the property and possession of liquors are transferred from one person to another, which do not come within the legal and technical meaning of the word 'sale,' and yet are obviously within the mischiefs intended to be remedied by the statute. In such instances, if the statute in terms specifies no other kinds of transfer than sale, the courts frequently are confronted with embarrassing questions." The plaintiff in error was charged simply with making a sale, and hence, to be lawfully convicted, it must be shown that he sold the liquor. And, defining the word "sale," in this connection, citing *Williamson v. Berry*, 8 How. 495, 544, the author from whom we last quoted says: "It means at all times a contract between parties to give and to pass rights of property for money which the buyer pays or promises to pay to the seller, for the thing bought and sold." While we do not rule that there can be no sale, in the sense of our statute, except for money, we refer to this definition as illustrating the legal definition of a sale which applies to a transfer of the title of intoxicating liquors as being a contract between the parties to pass the right of property to the seller for the thing bought and sold. To uphold the conviction in the present case, the evidence must therefore show that there was a contract between the plaintiff in error and Nunnally that the former should pass to the latter the right of property in the whisky delivered, and that Nunnally should have paid or promised to pay the agreed consideration for the whisky.

It is certainly true, as a legal proposition,

that, in contracts of bargain and sale, one may act through an agent. That a person may act as agent of two or more principals in the same transaction, if his duties to each are not such as to require him to do incompatible things, is equally sound as a proposition of law. *Mechem, Ag. § 67*. Where one, in a prosecution under the liquor law, interposes as a defense that he was not the seller of the liquor, but acted as the agent or intermediary of the buyer, agency is a question of fact to be determined by the jury under the evidence. As a matter of law, applicable, this court has held that if the accused merely bought whisky for another, using the money of the latter in making the purchase, this did not, either as a matter of law or of fact, constitute the accused the agent of both the seller and the buyer. If nothing more appeared, the agency was for the buyer. *Evans v. State*, 101 Ga. 780, 29 S. E. 40. And in the case of *White v. State*, 93 Ga. 47, 19 S. E. 49, the court ruled: "If the accused, acting bona fide as the agent of another, bought liquor for the latter, with the latter's money, and delivered it to the person for whom it was bought, these facts did constitute a sale of liquor by the accused." To relieve one who interposes such a defense, however, the fact of agency must be shown, for one who receives money and delivers whisky therefor may be treated as the seller; no other person filling that character in the transaction being pointed out by the evidence. *Paschal v. State*, 84 Ga. 326, 10 S. E. 821; *Grant v. State*, 87 Ga. 265, 13 S. E. 554.

It is therefore material, in passing on the guilt of the accused in this case, to determine whether, under the facts as they appear, plaintiff in error can be held to have acted as the agent of Nunnally in procuring the whisky. The evidence clearly shows that the whisky which Nunnally obtained was not owned by plaintiff in error. It is not necessary that the person prosecuted for the act of selling should own the liquor (*State v. Wadsworth*, 30 Conn. 55); but ownership is one of the elements which may well be looked to in determining who made the sale. The evidence, further, is that when the plaintiff in error was approached by Nunnally, who desired to get some whisky from him, he told Nunnally he did not have any, but would try to get him some. According to the testimony of another witness (McWilliams), who says he was present, Nunnally asked the plaintiff in error to get him some whisky, and gave some reason why the plaintiff in error would be able to get it for him. It will therefore be concluded that the original purpose of Nunnally in his interview with Cunningham was not to purchase the liquor from the latter, but to induce Cunningham to purchase the whisky for him from a party who owned it. The testimony of another witness (Alford), who was present at the time when Cunningham procured the whisky from Manley is to the effect that, when Cunningham went to

the owner of the whisky, he disclosed the fact of his agency, saying that he wanted to buy some whisky for Nunnally. Therefore Nunnally treated and recognized Cunningham as an agent to procure the whisky for him; and the owner of the whisky was also put on notice that Cunningham was not purchasing the whisky for himself, but for Nunnally. The purpose of the agent being thus disclosed, the owner of the whisky then asked if he brought the money; that is, if Nunnally sent the money. Ascertaining that Nunnally had not sent the money, then the owner, notwithstanding, delivered to the agent the desired amount of whisky, and told him that he must bring him the money or return him the whisky. When Manley thus delivered the liquor to Cunningham, while it went into the manual possession of Cunningham, it could scarcely be contended that Manley intended by this act to constitute Cunningham his agent to sell the whisky to Nunnally. He had been told that it was Nunnally who desired to purchase the whisky; that Nunnally had not sent by his agent any money to purchase it. Manley declined to sell it on a credit, which it was the evident object of the agent to accomplish. Manley was willing to sell to Nunnally for the money. When he therefore delivered the whisky to Cunningham, with instruction to bring him the money or to return the whisky, he, in effect, told Nunnally, through his agent, upon what terms he could purchase the whisky. These facts being communicated by Cunningham to Nunnally, the latter accepted the terms, and closed the contract, by sending the money through his agent to Manley. The contract was one of bargain and sale between Manley, the owner, and Nunnally, the purchaser, in which negotiations for the purchase were opened by Nunnally through his agent, Cunningham, and completed by such agent in delivering the purchase price to the seller.

In the case of *Com. v. Williams*, 4 Allen, 587, the supreme judicial court of Massachusetts approved a charge of the trial judge to the following effect: "If the defendant made an actual sale of the liquor, whether on his own account, or assuming to act as agent in the matter for [another], and whether the liquor belonged to him or not, and whether he had or had not authority from [that other] so to do, he would be responsible. * * * But, on the other hand, if the defendant merely informed some third person that Jason wished to buy, and was supplied by such third person with the liquor to deliver to Jason, and received of Jason the money to deliver to the seller, so as, in effect, to be but a messenger between the buyer and seller, the defendant would not be criminally responsible." This ruling seems to us to embody the law of this case. The evidence in the record does not establish the fact that the sale was made by the plaintiff in error. Therefore the verdict rendered is

not supported by the evidence, and should be set aside.

It follows from what has been said that that part of the charge of the court which instructed the jury that if they should believe, under instructions from Manley, that the defendant undertook to deliver the liquor to Nunnally, and collect the price thereof from Nunnally, such arrangement would make the defendant the agent of Manley, although the jury might believe he was also the agent of Nunnally, was error. The principle ruled in this case is clearly distinguishable from the ruling in the case of *Crabb v. State*, 88 Ga. 584, 15 S. E. 455. In that case, Crabb, who was the agent of the Southern Express Company, in a county in which the sale of spirituous liquors was prohibited, was convicted for selling liquor, on the proof that the whisky was sent by express, with instructions from the consignor to collect the purchase price on delivery; that, in pursuance of such instructions of the consignor, Crabb delivered the whisky, and received from the purchaser the amount agreed to be paid; and this court ruled that, where such an agent made the delivery and collected the money agreed to be paid to his principal, such agent is subject to indictment, if he acts knowingly in completing the sale. In other words, Crabb was never, at any time, the agent of the purchaser. He was exclusively the agent of the seller. When the liquor was delivered to the express company, by restrictions in the order to collect on delivery, such delivery to the carrier was not a delivery to the consignee, and no contract of sale had been completed unless until delivery was made; and when the agent delivered the goods and collected the purchase price, which was required in order to complete the sale, he necessarily participated in the sale, and was therefore liable as a seller. It will be noted that, in the case of *Crabb*, the court held the indictment to lie if the agent acted knowingly in completing the sale. This is good law, and has been so held by other courts. In the case of *State v. Goss*, 59 Vt. 286, 9 Atl. 829, the facts were that a box containing lager beer was sent by express to a person in Vermont, collect on delivery; that it was unlawful to make a sale of beer in the state of Vermont. The express agent collected the purchase price, and delivered the box. He was indicted for selling. One of his defenses was that he had no knowledge of what the box contained. On this point, the court says: "The turning point of this case is whether the respondent had reason to believe or suspect, for it appears that he did not know, that these packages contained what they did. If he did, he is charged with notice of their contents, and is guilty. If he did not, he is not charged with such notice, and is not guilty." We think the ruling in the *Crabb* case is sound, both upon principle and authority, but, as has been seen, is clearly distinguishable from the case under considera-

tion. Whether the plaintiff in error acted as the agent of Nunnally, as we have stated, is a question of fact. In our judgment, the evidence on the trial of this case constituted him such agent, and not a principal; and, for this reason, the judgment of the court below is reversed. All the justices concurring; LUMPKIN, P. J., dubitante.

(105 Ga. 709)

BACON et al. v. CAPITAL CITY BANK et al.

(Supreme Court of Georgia. Nov. 7, 1898.)

"FAST" WRIT OF ERROR—MISTAKE IN REMEDY—BILL OF EXCEPTIONS.

1. Where, upon the equitable petition of creditors, an injunction is granted, and a receiver is appointed to take charge of the assets of a firm,—such assets consisting of a large stock of goods and other property,—and the order appointing the receiver directs him to dispose of the goods in a particular manner, and no exception is filed to the granting of the injunction or the appointment of the receiver, but subsequently the judge modifies the original order, as to the disposition of certain of the goods which were claimed by one of the creditors, that creditor cannot file a bill of exceptions to the latter order, and obtain a "fast" writ of error thereon, and bring the case to this court for adjudication, under section 5540 of the Civil Code.

(a) The plaintiffs in error having mistaken their remedy, and there appearing to be merit in their contention, leave is granted to enter the bill of exceptions, or the official copy of it retained below, as exceptions pendente lite.

(Syllabus by the Court.)

Error from superior court, Fulton county; J. H. Lumpkin, Judge.

Action by the Capital City Bank against Moody & Brewster. Bacon & Co. intervene. From the judgment they except and bring error. Dismissed.

Hammond, Skeen & Longley, for plaintiffs in error. Glenn, Slaton & Phillips, W. R. Brown, Rosser & Carter, King & Anderson, Goodwin, Westmoreland & Hollman, Ellis & Gray, Arnold & Arnold, and Clay & Blair, for defendants in error.

SIMMONS, C. J. Upon the petition of various creditors, the assets of the firm of Moody & Brewster were placed in the hands of a receiver, and an injunction was granted against them and other parties, to restrain them from interfering with or disposing of the assets. Bacon & Co. intervened and made themselves parties before the granting of the injunction or the appointment of the receiver. They claimed in their intervention that they had sold a large quantity of cloth to Moody & Brewster, that it had been obtained from them by fraud, and that the title had therefore not passed from them to the purchasers. They asked permission of the court to identify the goods so claimed, and to retake them. The judge, in his instructions to the receiver, passed an order in relation to the goods of Bacon & Co., with which they were satisfied. Subsequently,

upon the application of other creditors, this order was modified. This modification was excepted to by Bacon & Co., and they filed their bill of exceptions, and had a writ of error brought to this court, under section 5540 of the Civil Code. When the case was called here, a motion was made to dismiss it upon the ground that it was prematurely brought to this court. In resistance to that motion the learned counsel for the plaintiffs in error insisted that it was properly brought, under the above-quoted section. That section provides that: "In all cases where an application for an injunction or receiver is granted or refused; in all applications for discharge in bail-trover and contempt cases; granting or refusing application for alimony, mandamus or other extraordinary remedy; * * * the bill of exceptions shall be tendered and signed within twenty days from the rendition of the decision," etc. Counsel contended that, although he did not except to the granting of the injunction or the appointment of the receiver, he had a right to bring the case here, under the words "or other extraordinary remedy"; and he relied upon the case of *Hayden v. Phinzy*, 67 Ga. 758, to sustain this contention. In that case it appears that an injunction had been granted restraining Hayden from interfering with the plaintiff's use and enjoyment of a certain house in Hall county. After the grant of the injunction, Hayden violated it. An attachment for contempt was issued against him, and upon the trial of the contempt proceedings the judge ordered that Hayden be imprisoned for 10 days. He excepted to that judgment, and brought the case here upon a "fast" writ of error. Motion was made to strike the cause from the docket of the term to which it was brought, and to transfer it to the docket of the next term. This court denied the motion, holding that "the power to attach for contempt for violating an injunction is absolutely essential to the effectiveness of the injunction itself. Hence a proceeding for that purpose is so connected with the injunction as that a decision upon it may be brought to the supreme court by a 'fast' writ of error." In our opinion, the case of *Hayden v. Phinzy* is not controlling in the present case. The disobedience of Hayden practically set the injunction aside, and was a contempt of the court which had granted the injunction. If the court could not enforce its injunction, the order would be rendered worthless. It was enforced by punishing the violator, and the court simply held that this proceeding for the violation of the injunction was so connected with the injunction itself that it could be brought here upon a "fast" writ of error. Jackson, C. J., said, in substance, that if an injunction was properly granted, and a person then violated it, and was attached for contempt, and could bring his exceptions to this court only under the general law, proceedings in injunction cases would be rendered entirely nugatory.

In the case now under consideration, the record does not disclose that any exception was taken by any one to the granting of the injunction or the appointment of the receiver. The order modifying the instructions to the receiver did not affect the injunction one way or the other. It was merely an act of the judge, changing the details of the disposition of the goods. Had he ordered them sold on the first Tuesday in July, and creditors had shown him some good reason why that was not a proper day for the sale, and he had changed it to the first Tuesday in August, this would have afforded as much right to a "fast" writ of error as do the facts of the present case. The words "or other extraordinary remedy" certainly do not give the right to parties, after the injunction has been granted and the receiver appointed, to except to orders of the judge changing the administration of the assets in the hands of the receiver. If the contention of plaintiffs in error is sound, a case of the kind now under consideration could never be ended by the trial court. Every order as to the details of administration granted by the judge could be excepted to and brought here. The proper practice, in our opinion, is for a creditor to file exceptions pendente lite to such orders as are unsatisfactory to him, and when the case is terminated in the trial court, and is brought here, to assign error in the regular bill of exceptions upon his exceptions pendente lite, or have them made a part of the record, and assign error on them in this court. This may in some instances amount to a great hardship, as is claimed to be true in the present case; but this court has no jurisdiction to entertain such a bill of exceptions as the present, however great may be the injustice to the party complaining.

(a) We have looked into the complaint made by the plaintiffs in error, and think there may be merit in it. For this reason we grant them leave to enter the bill of exceptions, or the official copy of it retained below, for record pendente lite. Writ of error dismissed. All the justices concurring, except LUMPKIN, P. J., absent on account of sickness.

(105 Ga. 617)

FINKELSTEIN v. STATE.

(Supreme Court of Georgia. Oct. 13, 1898.)

LARCENY—EVIDENCE—NEW TRIAL.

1. Where a purchaser of goods delivers to the seller a bill of money exceeding in amount the price of the goods, intending that the seller shall return the proper change, and the latter accepts the bill for this purpose, but, instead of returning the correct change, appropriates to his own use, fraudulently and with intent to steal the same, the bill so received, he is guilty of simple larceny.

2. Where a verdict is not without evidence to support it, this court will not interfere with the discretion of the trial judge in overruling the general grounds in a motion for a new trial.

Little and Fish, JJ., dissenting.

(Syllabus by the Court.)

Error from criminal court of Atlanta; J. D. Berry, Judge.

Mrs. I. Finkelstein was convicted of larceny, and brings error. Affirmed.

Goodwin, Westmoreland & Halleman, for plaintiff in error. Jas. F. O'Neill, for the State.

LEWIS, J. The defendant, by accusation in the criminal court of Atlanta, was charged with the offense of simple larceny, in that she "did wrongfully and fraudulently take, steal, and carry away, with intent then and there to steal the same, eight dollars and ten cents, in money, the property of J. C. Northcutt, and of the value of eight dollars and ten cents." The testimony for the state, in brief, is that Northcutt went into the store of Mrs. Finkelstein, and bought of her goods to the amount of \$1.90. He handed her a \$10 bill, from which to take payment. He claimed that she carried this bill to another part of the store, and placed the same in the money drawer, and, returning, handed him \$3.10 in change. He reminded her that the bill he handed her was \$10, which was denied, she contending that it was only a \$5 bill; whereupon she took from her stocking a \$5 bill, and exhibited it to him as the money she had received from him. In the meantime her husband came, who, learning of the accusation against his wife, seized the prosecutor, and desired to call in a policeman and to have the store searched, to see if the \$10 bill was therein. An altercation and fight ensued between the husband and Northcutt. No search was made. Defendant, in her statement, denied having ever received a \$10 bill; claiming that it was a \$5 bill paid her, and she placed the same in her stocking when it was handed her. There was some conflict in the evidence as to whether or not Northcutt was under the influence of whisky at the time. There was proof of defendant's good character by several witnesses. The defendant was found guilty, whereupon she filed a motion for a new trial, which was overruled, and she excepted.

1. The only question of law made by this record is whether or not the testimony on which the conviction rests makes a case of simple larceny. Section 155 of the Penal Code declares that "simple theft, or larceny, is the wrongful and fraudulent taking and carrying away, by any person, of the personal goods of another, with intent to steal the same." It is insisted by counsel for plaintiff in error that there was an entire absence of any fraud or deception on the part of the defendant in giving or receiving money, and that in the absence of such fraud there was no larceny,—certainly no simple larceny. This position is based upon the idea that to constitute theft the taking must be fraudulent, and that, if the property lawfully comes into the possession of the accused, under no circumstances can its subse-

quent appropriation by her be considered larceny. The bare fact of putting one's property in the possession of another does not necessarily deprive the owner of its legal possession. Although personal property may be placed by the owner in the hands of another, yet, if its custody is thus given upon condition that there should be at once returned for it its equivalent in value, neither the title to the property nor the right to its possession becomes complete until this condition has been complied with, and the constructive possession as well as the title remains in the owner. Where one, therefore, retains the goods thus received by him, and carries them away, with intent to steal the same, or any part thereof, before he has acquired any right of title or possession, he is guilty of theft; and the definition of simple larceny above quoted from the Code is broad and comprehensive enough to include such a theft in the general class of simple larceny. It is not denied that such a taking and appropriation of the personal goods of another constitute some crime, but it was insisted in the argument for plaintiff in error that the crime was that of a cheat and swindler. There is a broad distinction between this case and those in which an indictment for cheat would lie, based upon the fraudulent conduct of one in depriving another of his property. In the latter class of cases it is the intention of the owner to pass the title. There is no larceny. There is a want of an intent to steal, which, of course, is an essential ingredient of larceny. The title passes, and, while one may be guilty of such fraud in acquiring the title as would subject him to punishment as a cheat, yet he cannot be said to intend to steal that which the owner intended him to have. In the case we are now considering there was evidently no intent that the title to the bill handed by its owner to the defendant should ever pass, except upon condition that the owner should receive back the proper change as agreed upon in the contract of sale touching the articles purchased. Therefore, when the defendant carried it away, with intent to appropriate it to her own use without complying with this condition, she was guilty of stealing what did not belong to her, and to which she even had not acquired a perfect right of possession. Neither, under the facts of this case, could the charge of larceny after trust be maintained, under any definition of that offense in the Penal Code. If the offense committed falls within any of the provisions of our law on this subject, it must be included in section 191 or 194 of the Penal Code. The former section relates to factors, commission merchants, etc., "or any other bailee, with whom any money, or any other thing of value, may be entrusted or deposited." In no legal sense was this defendant the bailee of the owner of this money. There was really nothing intrusted to or deposited with her. It was a cash transaction. While,

with the consent of the owner, she received his money, yet it was contemplated that the two acts—one of receiving, and the other of paying back something in lieu—should be simultaneous. There was no delegated trust either to keep the money for any period of time, or to dispose of or use it for the benefit of either of the parties. In the case of *Sanders v. State*, 86 Ga. 717, 12 S. E. 1058, it was held that the words "or any other bailee," in the section cited, should be construed to mean other bailees of like character as those named just above; that is, bailees ejusdem generis. In *Cody v. State*, 100 Ga. 105, 28 S. E. 106, that decision is criticised; and Chief Justice Simmons, in the opinion delivered by him in the case of *Weaver v. Carter*, 101 Ga. 213, 28 S. E. 869, said that while *Cody v. State* virtually overruled the decision in 86 Ga. and 12 S. E., yet it was without in any way or manner reviewing the same as prescribed by the statute. But, so far as the question involved in this case is concerned, it matters not which of the two decisions cited presents the correct rule upon the subject.—neither is in conflict with our ruling in this case. For in *Cody v. State* there was evidently a delegated trust. There was not simply an exchange of property, involving acts by each party which were intended to be simultaneous, but the property was intrusted to the defendant for the purpose of holding and keeping it for the benefit of the bailor. In 2 Bish. New Cr. Law (2d div.) § 812, it is said, "If the owner of a coin passes it to a person, who is to take it out and get it changed, this one becomes neither a bailee nor otherwise in possession." The proposition that simple larceny of goods may be committed by a person, even if he acquires the lawful possession thereof, where there is no intention of the owner to part with the title, is sustained by abundant authority, both in the text-books and in the decisions of numerous courts of last resort in this country. We quote the following from 12 Am. & Eng. Enc. Law, p. 768: "The mere delivery of property to another for a special purpose vests in the person receiving it only the temporary charge or custody. The possession of the property remains in the owner, and a conversion of it is larceny, as in case of the delivery of money by the owner to another for the purpose of having it changed into other money of a different denomination." In 1 Bish. New Cr. Law, § 583, it is declared: "If one fraudulently, to steal another's goods, prevails on the latter to deliver them to him in a way to pass the property therein, he commits by this taking neither larceny nor any other crime, unless the transaction amounts to an indictable cheat. But if the permission extends to the possession only, and he takes and converts the whole to himself, he becomes guilty of larceny, because, while his intent is thus to appropriate the property, the consent which he fraudulently obtained covers no more than the possession." Again.

in volume 2 of the same work (section 815, 2d div.), it is declared: "If, on a sale of goods, the seller contemplates no credit, but the purchaser secretly purposes appropriating them to himself without paying, a delivery will not prevent the fraud being larceny; otherwise, if there is a credit." See, also, sections 816 and 817, giving instances where theft in the exchange of money similar to the present case is held to be simple larceny. In *Rap. Larceny*, § 3, is the following text: "So, one who, on receiving a bill to be changed, puts it in his pocket, with the fraudulent intent of converting it to his own use, and who refuses to deliver the change on demand, is guilty of larceny." *Hildebrand v. People*, 56 N. Y. 394, is a case so exactly in point that we quote its entire headnote: "Upon the trial of an indictment for larceny, it appeared that the prosecutor handed to the prisoner, a bartender, a fifty-dollar bill, to take out ten cents in payment for a glass of soda. The prisoner put down a few coppers on the counter, and, when asked for the change, put the prosecutor out of doors and kept the money. Held, that the prosecutor did not part either with the possession of or property in the bill, but, until the change was given back, the delivery was incomplete, and the bill remained, in legal contemplation, under his control and in his possession, and that larceny could be predicated upon the facts stated." On the same line, and sustaining the same principles, are the following cases: *Justices of Court of Special Sessions v. People*, 90 N. Y. 12; *Farrell v. People*, 16 Ill. 506; *Walters v. State*, 17 Tex. App. 226; *Com. v. Barry*, 124 Mass. 325; *Murphy v. People*, 104 Ill. 528. See, also, 46 Cent. Law J. p. 452, where the author cites a number of authorities to the same effect in a note attached to the case of *People v. Martin* (recently decided by the supreme court of Michigan) 74 N. W. 653. Authorities might be multiplied almost indefinitely, but the above, with the numerous citations which they embrace, are quite sufficient to be given in this opinion. The case of *Jones v. State*, 97 Ga. 430, 25 S. E. 319, is relied on by counsel for plaintiff in error to sustain the position that this was a case of being a cheat and swindler, and not of larceny. The marked distinction, however, between that case and the one at bar, is that there was an intention on the part of the little girl to pass to the seller title to the coin which she delivered to him in payment for the goods. On page 431, 97 Ga., and page 319, 25 S. E., Justice Lumpkin, in the opinion, says: "The artful practice and the deceitful means which he employed consisted in adopting the necessary precautions to keep her in this belief [that is, that the coin she was passing was a silver dollar], and thus enable him to obtain the valuable coin and satisfy her with the inadequate sum given back in change." She intended to pass the title to the \$20 gold piece if 75 cents were returned to her. In her mind the delivery of 75 cents to her was

all that she required as a prerequisite to parting completely with both possession and title to the gold coin. She did not expect to get \$19.75, or know that she was entitled to this amount, and accordingly there was no intention or purpose on her part to reserve title or right of possession of the coin until she actually got the amount of change which was really proper, viz. \$19.75. In the present case there is an absence both of the intent to pass title, and also of any fraudulent practice whereby the title was acquired. *Crofton v. State*, 79 Ga. 584, 4 S. E. 333, is cited to sustain the position that this is a case of larceny after trust, rather than simple larceny. It appeared in that case, however, that the defendant was actually intrusted with 95 cents and a newspaper belonging to the owner of the money for the purpose of carrying the same to another party, and having returned to him \$1, thus effecting a sale of his paper for 5 cents. It might with plausibility be argued that there was a delegated trust in the defendant, who was charged with the disposition of the property intrusted to him for the benefit of the owner. It will be seen, however, that the question as to whether or not the facts in that case constituted simple larceny was not raised at all. There was a contention that the offense constituted larceny from the person. The main issue passed upon by the court was whether or not there was any fatal variance between the proof and the allegations in the indictment. On the other hand, the case of *Harris v. State*, 81 Ga. 758, 7 S. E. 689, makes a much stronger case than the one at bar, either of being a common cheat and swindler, or larceny after trust. There the defendant procured the goods of the owner under the false representations that he was instructed by another party to purchase them. After receiving the goods, he appropriated them to his own use. This court held that the facts sustained the charge of simple larceny. In the case at bar the point was not made or argued that there was a variance between the accusation and the proof, because the former charged the larceny of \$8.10, and the evidence shows that the thing stolen, if anything, was a \$10 bill. We think the larceny, if any was committed, consisted really in stealing the \$10 bill, and not simply that portion of the change to which the owner was entitled, and failed to receive. In the case of *Walters v. State*, 17 Tex. App. 226, the defendant was charged with a felony, to wit, stealing \$20, and the proof showed that \$1 in change was given back by the defendant to the prosecutor. Defendant contended that the conviction should not be maintained for an offense higher than a misdemeanor, theft of an amount under \$20 being a misdemeanor under the statute. It was held that this contention was not good; that the larceny was really of the \$20 bill. We do not mean to say, however, that such a variance would have been fatal, and that, even if the point had been made, we would have felt com-

strained to sustain the same. This point was not only not made, but counsel for plaintiff in error treated the case, in the argument, as if the amount of money was properly stated in the indictment. The only legal proposition presented was whether the facts made simple larceny or some other crime.

2. The question of an intent to steal in this case was one for the jury, and we cannot say, in the light of the record, that the evidence was insufficient to support their finding. The jury accepted the testimony of Northcutt, the main witness for the state, rather than the statement of the defendant, notwithstanding the evidence of her good character. If Northcutt told the truth, there was enough to infer criminal intent, and we do not feel authorized to interfere with the discretion of the trial judge in overruling the motion for a new trial. Judgment affirmed. All the justices concurring, except LITTLE and FISH, JJ., dissenting.

(105 Ga. 635)

HECOX v. STATE.

(Supreme Court of Georgia. Oct. 13, 1898.)

CRIMINAL LAW—CONFESSIONS—LARCENY—WHAT CONSTITUTES.

1. A confession of guilt by the accused, freely and voluntarily made, is admissible in evidence against him, although such confession is coupled with the proposition on his part to settle or compromise the case or charge against him; such an offer of settlement not being induced by another.

2. If, after a money-changing transaction between A. and B. (whereby the former delivered to the latter two bills in exchange for smaller bills and a coin) had been completed, B., with the consent of A., either express or implied, took from his possession, ostensibly and as A. supposed, for the purpose of recounting the same, the smaller bills and the coin, but really with the intention of fraudulently retaining and appropriating to his own use three of these bills, and if, in pursuance of such intention, B. carried away the three bills, with intent to steal the same, he was guilty of simple larceny.

(Syllabus by the Court.)

Error from criminal court of Atlanta; J. D. Berry, Judge.

B. L. Hecox was convicted of larceny, and he brings error. Affirmed.

Thos. L. Bishop and Geo. P. Roberts, for plaintiff in error. Jas. F. O'Neill, for the State.

LEWIS, J. 1. It is insisted in this case that the confession of the accused was improperly admitted, inasmuch as it was done under a hope of benefit,—that his case might thereby be settled without a prosecution. It was not pretended that any such hope was induced by the witness or any other party. If any existed, it was entirely within the breast of the defendant himself. The confession was entirely voluntary, and, under section 1006 of the Penal Code, in order for a hope of benefit or a fear of injury to render it inadmissible, such hope or fear must be induced by another. Bohanan v. State,

92 Ga. 23, 18 S. E. 302. Chief Justice Bleckley, in delivering the opinion, on page 22, 92 Ga., and on page 303, 18 S. E., said: "If a man rears a crop of hope in his own mind from seeds of his own planting, and under its influence makes a confession, this will not exclude the confession as evidence. The hope that excludes is that, and that only, which some other person kindles or excites."

2. It is further contended in this case that the facts make it one of a cheat and swindle, or some crime other than simple larceny. Under the facts of the present case, there is no question but that the prosecutor had perfect title to the property alleged to have been stolen when the defendant took the same ostensibly for the purpose of ascertaining if he had given the correct amount of change. No objection appears from the record to his again handling the money for this purpose. There was at least a tacit assent for him to recount it. There was not only no intention to pass the title, but there was no trust delegated to the defendant to make any use or disposition of the property whatever for the benefit of the owner. Nor in any view could this be considered a case of larceny from the person. It was not a private taking from the person of the owner, without his knowledge, which is essential, under section 175 of the Penal Code, to sustain a charge of larceny from the person. The principle ruled in the second headnote is controlled by the decision this day rendered in the case of Finkelstein v. State, 31 S. E. 589. See the opinion and citation of authorities in that case. Judgment affirmed. All the justices concurring.

(105 Ga. 633)

BERRY v. STATE.

(Supreme Court of Georgia. Oct. 17, 1898.)

CRIMINAL LAW—DUTIES OF COURT AND JURY—ASSAULT—JUSTIFICATION.

1. It is the province of the court to construe the law applicable in the trial of a criminal case, and of the jury to apply the law so construed to the facts in evidence. While the impaneled jurors are made absolutely and exclusively judges of the facts in the case, they are, in this sense only, judges of the law.

2. The opprobrious words or abusive language which may, under the provisions of our Code, be given in evidence as a justification for an assault, or an assault and battery, are such as are used by the person assaulted or beaten, to the accused, at the time of the assault or assault and battery.

(Syllabus by the Court.)

Error from superior court, Fulton county; J. S. Candler, Judge.

John D. Berry was convicted of assault and battery, and brings error. Affirmed.

J. T. Pendleton and R. R. Arnold, for plaintiff in error. C. D. Hill, Sol. Gen., for the State.

LITTLE, J. John D. Berry was indicted by the grand jury of Fulton county for the offense of assault and battery upon the person of O. H. Stein. The indictment charged

that the battery was done with a bottle. On the trial of the case the evidence showed that the plaintiff in error attacked Stein in the dining room of the Kimball House, and it tended to show that, at the time the assault was made, Stein was at a table reading a paper; that the plaintiff in error approached him, leaned over, got a bottle from the table, and struck him, felling him to the floor, etc.; that two or three blows were stricken by the plaintiff in error. A witness also testified that the plaintiff in error struck Stein with a pistol. When persons present interfered, plaintiff in error desisted and left the room. In his statement the plaintiff in error stated that Stein was in charge of a paper in the city of Atlanta known as "The Looking Glass"; that in his paper Stein had repeatedly made publication in relation to his official and personal conduct; that sometime previous to the assault he had published an article severely criticizing the plaintiff in error, charging him with gaming, etc., and holding the plaintiff in error up to ridicule and contempt before the public in relation to other matters; that the article contained things which were not true; and that the attack on him was such as to indicate a personal malevolence. He stated that he had not seen Stein but once before, since the article appeared, and that on the night in question Stein looked at him, with an insulting leer and an iniquitous grin, and by these things called his attention to the article which he had written. Plaintiff says that he immediately walked around to the side of Stein, and put his hand on his shoulder, and the assault then occurred, and that he thought he was justified in doing what he did. Under the charge of the court, the jury returned a verdict finding the defendant guilty. He moved for a new trial, which was overruled, and he excepted, and made a number of assignments of error to such ruling, which consisted in the refusal of the court at the trial to admit in evidence on behalf of the defendant a copy of an article written and printed by Stein previous to the assault and commission of the battery, which it was alleged contained opprobrious words and abusive language of and concerning the defendant; in refusing to charge the jury that if they believed the person assaulted, on a recent occasion, not in the presence of the defendant, had written and published an article in a public newspaper in which he used opprobrious words and abusive language of the defendant, which was communicated, and the battery was appropriate and not excessive, the defendant would not be guilty; in charging the jury in language to the effect that it was immaterial what might have been published in a newspaper, that the justification of an assault and battery, by the proof of the use of opprobrious words or abusive language used by the person assaulted, refers to words used in the presence of the assaulting party, and does not apply to words writ-

ten or published in a newspaper; in charging the jury in language to the effect that the jury are the judges of the law as given by the court; and in refusing to charge: "The jury are not only judges of the facts, but of the law. If you differ with the court as to the law, you are exclusive judges of the law."

We have not attempted to set out the assignments of error in full. They raise only legal questions, which this brief summary sufficiently indicates. The ground of the motion which seeks to set aside the verdict as being contrary to law and the evidence in the case was properly overruled by the trial judge.

The legal questions raised by the motion for a new trial are two: (1) In what sense does the law make the jury judges of the law and the facts in the trial of a criminal case? (2) Are the opprobrious words or abusive language which, under the provisions of our Code, may be given in evidence as a justification for an assault or assault and battery, such words as are used to and in the presence of the person assaulting, or may such words or language as have, previously to the assault, been written and published in a newspaper, be given in evidence by the defendant as a justification?

As early as the case of *Anderson v. State*, 42 Ga. 9, this court held that, under a proper interpretation of the law, "the jury * * * were the judges of the law and the facts, so as to enable them to apply the law to the facts, and bring in a general verdict. But they had no right to make law. The law was laid down in the Code. It was the province of the court to construe the law, and give it in charge, and of the jury to take the law as given, apply it to the facts as found by them, and bring in a general verdict." Previous to that time it had been held that the jury were the judges of the facts and of the law. But that decision gave a different interpretation of the law as to the power of juries to judge of the law applicable to a case on trial, and the charge of the judge was in accord with the ruling there made. This has been followed, without exception, since the Case of *Anderson*, and is now the settled law of this state; and there was no error committed by the court in charging as set out in the ground referred to, and in refusing to charge as requested, on this subject.

2. The plaintiff in error alleges that the court erred in refusing to admit in evidence an article written and published by Stein in a newspaper previous to the assault, criticizing him, and containing, as alleged, opprobrious words and abusive language of and concerning the plaintiff in error; and erred in refusing to charge that the defendant would not be guilty if the battery inflicted by him was occasioned by the publication of such article in a public newspaper. Section 103 of the Penal Code contains the following

language: "On the trial of an indictment for an assault, or an assault and battery, the defendant may give in evidence to the jury, any opprobrious words, or abusive language, used by the prosecutor, or person assaulted or beaten; and such words and language may or may not amount to a justification, according to the nature and extent of the battery, all of which shall be determined by the jury." It is contended for the plaintiff in error that, under this provision of law, it was his right to submit to the jury evidence of any opprobrious words or abusive language which had been written and printed of him by Stein, previous to the difficulty, that such words and language might be considered by the jury, who were authorized to find, if they so thought, that they amounted to a justification of the assault and battery, the commission of which, as charged, was on the trial virtually admitted. It is not contended that at the time the battery was inflicted Stein used any opprobrious words or abusive language. This exact question has heretofore been before this court in the case of *Mitchell v. State*, reported in 41 Ga. 527, and the interpretation we give to this statute has been recognized as the law governing and restricting the admission of opprobrious words and abusive language as a justification of an assault, or assault and battery, to such as are used in the presence of the party assaulting, for many years unquestioned. In the case referred to, this court said "that the statute only embraces such cases where the opprobrious words are uttered in the presence of the party, which, in their nature, are supposed to arouse the passion, and justify, under certain circumstances to be adjudged by the jury, instant and appropriate resentment, not disproportioned to the provocation." On the argument of the present case, counsel for the plaintiff in error, under the rule, asked leave to review the decision in that case, which was granted, and we are now called on to determine whether we shall reverse the ruling there made, and hold the contrary proposition to be the law. On this question the present bench stands equally divided in opinion, and as, under the statute, in order to reverse a previous ruling of this court made by three judges, the concurrence of five of the members of the court is required (Act 1896, p. 44), the ruling made in the *Mitchell* Case, *supra*, must still stand as the interpretation which this court puts upon the statute in question. Mr. Justice LUMPKIN, Mr. Justice FISH, and myself agree that if we take the words of the statute as they stand alone, and read them literally, a construction which will admit in evidence printed or published words of abuse antecedent to the assault might be placed on the statute, without doing violence to the words which it contains. But if, in endeavoring to arrive at the legislative will and intention in the enactment of this statute, which is in derogation of the rule of the common law, we inquire

what was the old law, the mischief which it brought about, and the remedy by which the legislature intended to cure that mischief, we have gone very far towards the solution of the question.

It cannot be gainsaid that it is a well-recognized principle of criminal law that mere words or menaces do not, of themselves, constitute an assault. *State v. Church*, 63 N. C. 15; *People v. Lilley*, 43 Mich. 521, 5 N. W. 982; *Smith v. State*, 39 Miss. 521. If this proposition be true, then one who makes an assault and beats another for words or menaces cannot claim that the same was done as a defense, for it is the rule of the common law, as well as of nearly all the states of the Union, that mere threatening language and abusive words, however violent in character, unaccompanied by any overt act of hostility, cannot be a legal provocation for assault and battery. *Cushman v. Ryan*, 1 Story, 91, Fed. Cas. No. 3,515; *Keiser v. Smith*, 71 Ala. 481; *Scott v. Fleming*, 16 Ill. App. 539; *Crosby v. People*, 137 Ill. 325, 27 N. E. 49; *Morris v. Case*, 90 Ind. 143; *Thompson v. Mumma*, 21 Iowa, 65; *Richardson v. Zuntz*, 26 La. Ann. 313; *State v. Rider*, 90 Mo. 54, 1 S. W. 825; *State v. Workman*, 39 S. C. 151, 17 S. E. 694; *White v. State* (Tex. Cr. App.) 29 S. W. 1094; *Willey v. Carpenter*, 64 Vt. 212, 23 Atl. 630; *State v. Martin*, 30 Wis. 216. It must, therefore, be conceded that if, in any case, threatening language, or threatening and abusive language, is a defense to a charge of assault and battery, the defense must rest upon other considerations than the defense of one's self and the protection of one's person.

There are two states, and only two, so far as we have been informed, which, by statute, have changed this rule of law. These states are Georgia and Alabama. Section 3749 of the Code of Alabama declares that "on the trial of any person for an assault, an assault and battery, or an affray, he may give in evidence any opprobrious words or abusive language used by the person assaulted or beaten, at or near the time of the assault or affray; and such evidence shall be good in extenuation or justification, as the jury may determine." In construing this statute, the supreme court of Alabama, *Somerville, J.*, delivering the opinion, in *Brown v. State*, 74 Ala. 42, says: "This section must be construed in the light of the common law, which never permitted mere words to justify a blow upon the person using them. As expressed by an ancient common-law writer, no words whatever could amount to an assault. 1 Hawk. P. C. p. 110, § 1. The purpose of the statute under consideration was to modify this rule, so as to remit the whole matter to the determination of the jury, who are permitted, in cases of this nature, to justify or extenuate the conduct of one who strikes another under the influence of passion engendered by insulting language, when used at or near the time of the difficulty or affray.

This was a concession to the weakness of human nature, when fired by the heat of passion." It will be noted that the words of the Alabama statute confine the evidence to opprobrious words or abusive language used by the person assaulted at or near the time of the assault. Section 103 of the Penal Code of this state is different only in the fact that the Georgia statute, while permitting the defendant to give in evidence opprobrious words or abusive language, does not, in terms, confine such language to a period of time at or near the time of the assault; but the undoubted cause of the enactment of the statute was, as said by Judge Somerville in relation to the Alabama statute, a concession to human weakness, when fired by the heat of passion. It must, therefore, be concluded that, in making this departure from the common law, the legislature of Georgia intended to provide a measure of protection for one who, when excited by passion aroused by abusive language, assaulted the user of such language, provided that the battery inflicted was not disproportionate to the provocation which aroused the passion. This is not the only case in which our law recognizes, and to a certain extent excuses, acts of violence which are the result of passion. But, wherever it does do so, care has been taken to provide that there must be a just cause for the passion. As an instance: Provocation by words, threats, menaces, or contemptuous gestures will not reduce a homicide from murder to manslaughter. Such words or menaces may justly excite passion, but if, under the influence of that passion, one kills another, there is no justification and no mitigation. The passion, therefore, which justifies or mitigates,—more properly, mitigates the offense,—must arise from such circumstances as are serious in their nature, and against which a man's reason is not expected to prevail. While words and gestures are not sufficient to reduce the grade of homicide, although they provoke a passion, yet a passion which is aroused by an attempt to commit a serious personal injury less than a felony, or circumstances equivalent to this, will reduce the homicide to voluntary manslaughter. Again, under our law, in order to reduce the grade of homicide, the act must be done as the result of a sudden, violent impulse of passion; and it is declared that, if an interval elapses between the provocation and the homicide which is sufficient for the passion to subside, and for reason and calmness to resume their sway, the passion will afford no excuse. Therefore, however just the law may be to protect one who acts on the impulse of passion, no protection can be afforded unless the circumstances which arouse the passion are grave and serious, and from these circumstances passion suddenly results in a manner supposed to be irresistible. But if time has elapsed, whether the passion has in fact continued or not, the person committing the offense is not protected by the

law, because the passion is not sudden, and ought, in reason and with due deference to the weakness of human nature, to have subsided. In the light of these provisions of law we must construe the section of the Code invoked by plaintiff in error.

It has been urged upon us that, when one prints and sends forth to all the world opprobrious words and abusive language of another, it is sufficient to arouse passion; that, if such words do not amount to a libel, the person written about has no redress; and that the spirit of the statute under consideration will allow one, after time has elapsed, on the occasion of meeting the author of the publication, to give him a deserved chastisement. The reply is that there is no principle of law which recognizes the indulgence of a spirit of revenge, or tolerates the practice of the *lex talionis*, whether the wrongs be fancied or real. The underlying principle of the criminal law is protection, and while that law excuses to a certain extent, under given circumstances, the infirmity of human passion, it has gone to its fullest extent, under its paramount duty of protection, when it requires that the cause which justifies the passion shall be serious; that the passion so aroused shall be sudden and violent; and if one's passion, although justly aroused, has had time to cool, then passion shall be no defense. A careful reading of the statute must lead to the conclusion that no evidence of opprobrious words or abusive language except that which is used at the time of the assault can be given on the trial. It is provided that, on the trial of an indictment for assault and battery, the defendant may give in evidence to the jury opprobrious words or abusive language used by the prosecutor or person assaulted or beaten. Used when? The person is being tried for a particular act of assault and battery. He has no defense other than words and language. The reason that he may give such words or abusive language in evidence is that they might have been sufficient to excite his passion, and the whole matter is submitted to the jury for them to judge the battery and judge the cause, and determine whether the cause—that is, the words—amounts to a justification of the battery, and, in so determining, the jury must consider the words or language used, and compare them with the nature and extent of the battery. If the battery is disproportionate to the offense of the words which excited the passion, there can be no justification, and the words which can be given in evidence are those used by the prosecutor. We are therefore bound to conclude, from the language in which this section of the Code is framed, from the object of its enactment, in the light of the common law, and the general principles of criminal jurisprudence, that the evidence of opprobrious words or abusive language which is allowed to go to the jury in justification of an assault, or an assault and battery, are

those words and that language which provoked the passion at the time that the assault was made or the battery was committed. This provision has long been the law of Georgia. It has stood the test of time, and has not, by the construction given it, contributed the sanction of law to that spirit, which is not unnatural, to personally redress our grievances and avenge our wrongs. It is a wrong for one to use, without provocation, abusive language to another, but it is not a wrong without a remedy. Section 896 of the Penal Code makes the use of such language, when made in the presence of another, which tends to cause a breach of the peace, a misdemeanor. The redress, and the only redress, which society, in the enactment of its laws, affords to one of its members, is that redress which comes, after a legal investigation, by the judgment of a court. Revenge may be sweet, but the right to have it is not recognized by any principle on which the law of justification is founded. As civilization advanced, trial by wager of battle gave way to trial under the forms of law, which undertakes to both protect and punish. If we decline to accept it, and seek to redress our own wrongs from motives of revenge or retaliation, we become subject to its restraining and corrective force. These principles must govern in the real interest of society at large, however inconsistent they may be with the natural feeling, which seeks, even within bounds, to inflict individual corporal punishment for a wrong committed. The last-named provision of our Code has in view the preservation of the peace, and affords a punishment for one who, by use of abusive language, makes it probable that the peace will be broken. But if, notwithstanding such prohibition of the law, such words are used, and by such use the passion of a man is excited to a point where he beats another for using them, the jury may consider the character of the words, the extent of the battery, and declare that, in consequence of such words, the one who commits the battery shall not be punished, because they were sufficient to justify the passion which caused the defendant to strike. The court below, in our judgment, committed no error in refusing to admit in evidence the publication alleged to have contained the opprobrious and abusive language, nor in its charge on this subject as requested, and the judgment must be affirmed.

SIMMONS, O. J., and COBB and LEWIS, JJ. (concurring). Being bound by the decision in the case of *Mitchell v. State*, 41 Ga. 527, we concur in the judgment, but, as that case is under review, we think it should be overruled. Neither the reasoning of Chief Justice Lochrane in that case, nor that of Mr. Justice LITTLE in the present case, is, in our opinion, sufficient to support the conclusions reached by them. The statute declares that "on the trial of an indictment for

an assault, or an assault and battery, the defendant may give in evidence to the jury any opprobrious words, or abusive language, used by the prosecutor, or person assaulted or beaten; and such words and language may or may not amount to a justification, according to the nature and extent of the battery, all of which shall be determined by the jury." Pen. Code, § 103. The evident purpose of the general assembly in making this provision was to entirely abrogate the common-law rule, which recognized no such defense, and to give to the jury in such cases very wide latitude in determining whether words and language of the character described should in the case under consideration justify the assault or the beating, as the case may be. Each case was to be passed upon by the jury according to its peculiar facts. If the words were uttered in the presence of the accused, the jury were to determine whether they were of a character calculated to provoke an assault, and, if so, whether the beating which followed was "in its nature and extent" disproportioned to the insult given. If the words were not uttered in the presence of the accused, the jury were to determine whether the assault made on account of such words was, under all the circumstances, a sufficient justification of the beating administered, taking into consideration the character of the words and language, the lapse of time between their utterance and the beating, the efforts made by the accused to ascertain whether the words were really uttered, all the circumstances attending the beating, and the "nature and extent" of the same. If the words or language were written or printed, and not communicated to the accused by the person assaulted, the jury were to be allowed to pass upon the same, taking into consideration all the circumstances, as in cases where words not spoken in the presence of the accused are relied upon to justify the assault.

Such was, we believe, the intention of the general assembly, and, in order to limit the statute in its application to cases of spoken words uttered in the presence of the accused, it is necessary to read into it words which are not there found, and which, when read into the statute, give it a meaning directly antagonistic to the plain and manifest legislative intention, derived from the language of the statute as it stands. The purpose of the law was, of course, not to encourage or license the crimes of assault or assault and battery, but it was to deter the vituperator, the slanderer, and the libeler, and impress upon such lawless characters the fact that, under certain circumstances, the law, taking into consideration the weakness of human nature, would not hold the person wronged by them responsible, when the beating administered was not disproportioned to the provocation given in the words or language, whether oral, written, or printed, and whether used in the presence of the accused or otherwise. The effect of the decision in the *Mitchell Case*

being to prevent the application of the statute in cases where it was clearly intended to be applicable, we think that decision should be overruled, and the statute allowed to become operative.

(53 S. C. 576)

GARRAUX v. CITY COUNCIL OF GREENVILLE.

(Supreme Court of South Carolina. Nov. 24, 1898.)

CONSTITUTIONAL LAW—"TAKING" PRIVATE PROPERTY—MUNICIPAL CORPORATIONS—CHANGE OF STREET GRADE—RIGHT TO DAMAGES—REMEDY—CONCLUSIVENESS.

1. Changing the grade of a street after it had been once established, and buildings erected with reference thereto, is not "a taking" of property, within Const. art. 1, § 23, providing that "private property shall not be taken * * * for public use without just compensation being first made therefor."

2. Charter of Greenville, § 30 (19 St. at Large, p. 106), providing that any person damaged by the closing, or "altering" of any street shall be compensated by the city council, requires that compensation be made for any "altering" by grading that effects a change in the structural formation of the street.

3. Charter of Greenville, § 30 (19 St. at Large, p. 106), providing that any person damaged by the closing or altering of any street shall be duly compensated by the city council, and providing that, if the party damaged and the council shall be unable to agree, the damages shall be assessed by commissioners, and saving to either party an appeal therefrom, creates an exclusive remedy for ascertaining such damages, and this though the council should refuse to appoint a commissioner, for it may be compelled to do so.

Appeal from common pleas circuit court of Greenville county; James Aldrich, Judge.

Action by E. Garraux against the city council of Greenville. There was a judgment for defendant, and plaintiff appeals. Affirmed.

Haynsworth, Parker & Patterson, for appellant. B. A. Morgan, for respondent.

JONES, J. This is an appeal from an order of nonsuit in an action by plaintiff, the owner of a lot abutting on a street in the city of Greenville, for damages resulting from the lowering of the grade of the street by the city council. The evidence tended to show that plaintiff, in 1878, with reference to the grade of the street then established, erected a dwelling house and other improvements on said premises, and that in 1895-96 the city council, against her protests, cut down the grade of the street lower than in 1878, thereby rendering access to her premises difficult, and depreciating the market and rental value, to her damage estimated at from \$1,200 to \$2,000. It appeared also by the complaint and answer that plaintiff applied to the defendant, offering to submit the question of damages to commissioners as provided in the city charter, but defendant, denying its liability, refused to appoint a commissioner.

Neither the order granting the nonsuit nor the record before us discloses the grounds upon which the nonsuit was based. As the tes-

timony was sufficient to carry the case to the jury, provided defendant is liable to an action for damages resulting from grading its streets without negligence, we assume the ruling was based upon the proposition that defendant is not liable to such action. Whether the defendant is so liable will depend upon whether there is any constitutional or statutory provision making the municipality liable for compensation for injury resulting from the proper exercise of its governmental powers, and whether, if any remedy is provided therefor, such remedy is exclusive.

The only provision of the constitution bearing upon this question is in article 1, § 23, where it is provided: "Private property shall not be taken for private use without the consent of the owner, nor for public use without just compensation being first made therefor." The great weight of authorities is to the effect that a change in the grade of a street which diminishes the value of adjacent property is not a "taking" of property, within the constitutional provision above quoted. Cooley, Const. Lim. 671. According to 2 Dill. Mun. Corp. § 990, "municipal corporations, acting under the authority conferred by the legislature to make and repair, or to grade, level, and improve, streets, if they keep within the limits of the street, and do not trespass upon or invade private property, and exercise reasonable care and skill in the performance of the work resolved upon, are not answerable to the adjoining owner, whose lands are not actually taken, trespassed upon, or invaded, for consequential damages to his premises, unless there is a provision in the charter of the corporation, or in some statute, creating the liability. * * * And this is so although the grade of the street has been before established, and the adjoining property owner had erected buildings or made improvements with reference to such grade." The authorities in support of the doctrine stated are very numerous. We cite only the case of *Transportation Co. v. Chicago*, 99 U. S. 635. This court, in the very recent case of *Paris Mountain Water Co. v. City Council of Greenville*, 53 S. C. 89, 30 S. E. 699, stated, arguendo, that closing a street is not the taking of property. There is, therefore, no implied liability, under the constitution, resting upon a municipality to make compensation for injury resulting from grading its streets. Is there any statute imposing such liability? Appellant argues that section 30 of the charter of Greenville (19 St. at Large p. 106) provides for such liability. Respondent contends that this section does not embrace liability for injuries resulting from merely grading a street. Without setting out that section in full, or discussing again the point, it is sufficient to say that in the case of *Paris Mountain Water Co. v. City Council of Greenville*, supra, this court held that the provision in said section, that "any person damaged by the closing or from altering of any such street * * * shall be duly compensated therefor by the city council," imposes the liability upon

the city council to make compensation for injury resulting from grading a street, as the term "alter" includes any substantial change in the structural formation of the street, such as grading of the character mentioned. It is settled, therefore, that the charter of the city of Greenville makes the city liable to make compensation for injuries resulting from grading its streets in the manner complained of.

But the question still remains, does this statute afford a remedy, and is such remedy exclusive? The said section 30, *supra*, goes on to provide: "In case the said city council and the owners of land over which the same shall pass, or the persons damaged by the closing or altering as aforesaid, cannot agree upon the amount of compensation to be paid to such owners or persons, the same shall be assessed by these commissioners to be appointed, one by the city council, one by the landowner or person damaged, and the third by the two commissioners thus appointed; and in case any landowner shall neglect or refuse to appoint a commissioner within five days after notice so to do, then the chairman of the board of county commissioners of the county of Greenville shall appoint a commissioner, who, with the one appointed by the city council, shall select the third commissioner; provided, that either party may appeal from such assessment to the court of common pleas for said county, by serving written notice of such appeal upon the other party within five days after such assessment shall have been made, when the issue of value shall be submitted to a jury." Here, then, is a remedy. Is it exclusive? We think so.

In reference to the remedy for compensation for right of way provided by statute, this court has repeatedly held that such remedy is exclusive. *Leitzsey v. Water-Power Co.*, 47 S. C. 484, 25 S. E. 744, and cases cited therein. The fact that the city council refused to appoint a commissioner does not affect this question, any more than a refusal by the clerk of the court to discharge some duty imposed upon him in right of way condemnation proceedings. The city council could be compelled by mandamus to perform the ministerial duty of moving in the matter of appointing a commissioner, just as the chairman of the board of county commissioners of Greenville county, who is required to appoint a commissioner in the event the person damaged fails to appoint one within the time required. In this way both parties have the power and means to use the remedy provided by the statute. Mr. Dillon in 2 Mun. Corp. § 992, states that where the statute authorizing the opening and improving of streets provides a specific remedy, or a remedy other than an ordinary civil action, that remedy alone can be pursued; and in the case of *Transportation Co. v. Chicago*, *supra*, the supreme court of the United States, speaking in reference to street improvements by a city, said: "The remedy, therefore, for a consequential injury resulting from the state's action through its agents, if there be any, must

be that, and that only, which the legislature shall give. It does not exist at common law." We therefore affirm the order of nonsuit, but without prejudice to the right of plaintiff to seek compensation in the manner provided by charter of the city of Greenville. Judgment affirmed.

(123 N. C. 35)

DANIELS et al. v. FOWLER et al.

(Supreme Court of North Carolina. Nov. 22, 1898.)

APPEAL—NEW TRIAL—ACCOUNTING BY ADMINISTRATOR—CLAIMS AGAINST DECEDENT—HANDWRITING—EXPERT EVIDENCE—BOOKS OF ACCOUNT—FRAUD.

1. A motion for a new trial will be granted by the supreme court only for newly-discovered evidence proper to be heard by the trial court, and not for alleged misconduct of jury.

2. Where an administrator, who admits having received assets of the estate, has filed no report and rendered no account of the trust property for nine years, the heirs are entitled to an accounting.

3. Where, in an action for an accounting against an administrator who took possession of a deceased person's property under an alleged sale from one to whom it had been conveyed during decedent's last illness, and who credited the price on a claim against decedent, the books showing the accounts between decedent and the purchaser have been introduced, testimony of an expert bookkeeper concerning the account in controversy is admissible.

4. Where an administrator took possession of a decedent's property, and credited the price on an alleged claim of \$9,000, of ten years' standing, the credit side of claimant's books of account, showing a credit of \$600 on said claim during the nine years, is admissible on an issue whether the claim is fraudulent, where claimant in his testimony adopted the books as his evidence.

5. On an issue whether a claim against decedent for a balance due for an interest in a firm purchased by him from claimant is fraudulent, the tax lists for the year preceding and the year of the purchase, showing the amount at which the firm property was listed for taxation, are admissible.

6. During grantor's last illness he made a conveyance to his bookkeeper, who had been in his employ 25 years, and was insolvent. It was procured in the bookkeeper's absence by persons against whom fraud in procuring it was shown, and after grantor's death the bookkeeper refused to permit the guardian of his children to examine grantor's books of account. *Held*, that the question of the bookkeeper's participation in the fraud was for the jury.

Appeal from superior court, Pamlico county; Norwood, Judge.

Bill by L. G. Daniels and others against C. H. Fowler and others to set aside a conveyance, and for an accounting. There was a judgment for plaintiffs, and defendants appeal. Affirmed.

W. W. Clark and O. H. Guion, for appellants. Simmons, Pou & Ward, for appellees.

MONTGOMERY, J. Upon the call of this case in this court the counsel of the defendants made a motion, based on affidavits, for a new trial, on the ground of having discovered material evidence since the case was docketed in this court. The application is founded on

the alleged misconduct of one or more of the jurors. The instances, indeed, are few where this court has granted a new trial for such cause. In *Davenport v. McKee*, 98 N. C. 500, 4 S. E. 545, the court said on this subject, "The only case in which a new trial will be granted in this court is the discovery of such new evidence as was proper to be heard by the jury, a judge, or a referee, in passing upon and finding the facts, and not for irregularities occurring on the trial, and for which the judge, in his discretion, might set aside the verdict or finding and reopen the case." We are not disposed to make a departure from this rule, upon the facts disclosed in the affidavits before us.

Four causes of action are stated in the complaint, although they are not separately set out. As a first cause it is alleged that the deed of trust which was executed by S. H. Fowler to J. O. Baxter, one of the defendants, was void for the reason that the grantor was at the time of its execution without sufficient mental capacity to execute it, and also that it was procured through the fraud and undue influence of Baxter and C. H. Fowler, another one of the defendants. As a second cause of action it is alleged that the defendant Baxter, C. H. Fowler, and J. F. Cowell, another defendant, fraudulently combined to get possession of the property conveyed in the deed of trust, and that they did, after the execution of the deed of trust, fraudulently convert the property to their own use. In the third cause of action it is alleged that the defendant Kennedy fraudulently aided the defendant C. H. Fowler to acquire a part of the real estate conveyed in the deed. And the fourth cause of action sets out that the defendant C. H. Fowler qualified as administrator of S. H. Fowler; that he took possession, as such administrator, of certain property of his intestate not included in the deed of trust; and that he made a false and fraudulent report of his administration. The action was brought by the plaintiffs, who are children and heirs at law of S. H. Fowler, and L. G. Daniels, administrator d. b. n. of S. H. Fowler, to have the deed set aside, and an account taken both as to the matters relating to the trust deed and the administration of the intestate's estate. The plaintiffs introduced evidence tending to show the want of mental capacity of S. H. Fowler to execute the deed, and also to show fraud on the part of Baxter and C. H. Fowler in procuring the execution of the deed. Mrs. Wharton, the sister of the grantor, testified that in the morning, before his death on the following night, he was in an unconscious condition, produced by a stroke of paralysis; that while he was in that condition some gentlemen came in (afterwards shown by other witnesses to have been C. H. Fowler and Mayhew, his attorney, and E. G. Wise), and she was asked out of the room, together with the others who were there when the gentlemen arrived. Church Miller, a deputy clerk of Pamlico superior court, met Fowler, Mayhew, and Wise there, by appointment of

C. H. Fowler, at the same time, and took what purports to be the probate of the deed. He testified that S. H. Fowler was a very sick man; that he thought he did not take notice of anything; that S. H. Fowler did not sign the paper himself, but that Mayhew, the attorney, took hold of his hand and helped him to make his mark, though ordinarily he wrote a very good hand; that he did not think he understood the nature of the transaction, nor what he was doing; that Mayhew told him that it was an assignment or a paper; and that they did not read the paper to him. E. G. Wise testified that Mayhew called Miller and himself, and asked them to go into Fowler's house with him; that he saw Fowler sign the paper; that it was not read to him; that Fowler said nothing; that Mayhew put the pen in Fowler's hand, and helped him make his mark; that he did not think he was conscious. It was admitted that Baxter had been in Fowler's service for 25 years, and that Baxter was insolvent at the time of the execution of the deed. It was also admitted that the stock of goods embraced in the deed of trust was sold by Baxter at private sale to the defendant C. H. Fowler at 60 cents on the dollar, at inventory price, and that the land was sold at auction, and bought by the defendant C. H. Fowler, and that he paid no money at that time, but that the purchase money was credited on C. H. Fowler's debt, and on the amount due C. H. Fowler for money advanced by him in compromising S. H. Fowler's debts. In the defendants' joint answer they admitted that, before this action was brought, the plaintiffs, through their guardian, requested the defendant Fowler to permit him to examine the alleged account of \$9,000 which defendant Fowler claimed that S. H. Fowler owed him, and which was claimed to be secured in the deed of trust, and that Fowler declined to permit the inspection of the account. It was further admitted in the answer that prior to the beginning of this action the guardian of the plaintiff twice requested Baxter, the assignee, to permit him to inspect his inventory of the alleged assigned estate, his itemized account of sales of the real and personal property conveyed in the deed, his vouchers as such assignee, and the papers and books belonging to the alleged assigned estate, and that Baxter refused all of these requests. It was further admitted in the answer that on one occasion, when these requests were made and refused, the defendants Fowler and Baxter were together in the store of Fowler, and that Baxter admitted that all of his books, papers, accounts, and vouchers were then in the store. It was further admitted in the answer that the defendant Baxter, assignee, took into his possession the property mentioned in the deed of trust, and made sales thereof to Fowler. The defendant Fowler admits in his answer that he filed no account of his administration with the estate of S. H. Fowler until after a period of 10 years from his qualification.

The plaintiffs entered a *nol. pros.* as to the cause of action against Kennedy, and it was agreed that only the pleas in bar should be tried. Upon the plaintiffs' evidence, the defendants, under the act of 1897 (chapter 109), moved to dismiss the causes of action set out in the complaint, except those which referred to the assignment alleged to have been made by S. H. Fowler. The motion should have been allowed as to the second cause of action, for there was no evidence introduced tending to sustain it. The motion as to the fourth cause of action was properly disallowed. The plaintiffs alleged that the defendant C. H. Fowler qualified as administrator of F. H. Fowler; that assets came into his hands, and that he made a fraudulent report of the same. The defendant C. H. Fowler denied that his report was fraudulent, but admitted that he had received assets belonging to the estate of his intestate, and that 10 years elapsed after his qualification as administrator before he made a report or filed any account. The plaintiffs were therefore entitled to an account. *Neal v. Becknell*, 85 N. C. 290.

After the motion to dismiss was overruled, evidence was given for the plaintiffs and for the defendants. The plaintiffs offered the books of C. H. Fowler, which contain the account of C. H. Fowler & Co.; S. H. Fowler having been one of the company. The object of this evidence was to show that the amount due by S. H. Fowler to C. H. Fowler for C. H. Fowler's interest in the stock of goods of C. H. Fowler & Co., which S. H. Fowler had bought, and which was the debt claimed in the deed, was not as much as \$9,000, set out in the deed, and that the balances had been forced in order to make up the sum mentioned in the deed. The defendants objected to the testimony of the witness Strong (who, as an expert in bookkeeping and handwriting, was examining these books) in reference to the account of C. H. Fowler & Co. The books were undoubtedly before the court, and they are described in the case on appeal as "the books of C. H. Fowler, containing the C. H. Fowler account"; and the objection, too, seems to be pointed, not to the books, but to the account of C. H. Fowler & Co.,—a part of the books. We think it was competent for the purposes for which it was introduced.

There was also an objection made by the defendants to the introduction of the credit side of the account against S. H. Fowler on the books of C. H. Fowler, to show that the aggregate credits for 10 years did not exceed \$600. We think that evidence was competent as evidence to show that, under the circumstances set out in this case, the debt of \$9,000 claimed by C. H. Fowler against S. H. Fowler was fraudulent. But the testimony of C. H. Fowler himself relieves the case of any trouble, if any existed, in respect to the introduction of testimony concerning the books of C. H. Fowler and the account of C. H. Fowler & Co. He said: "The books show what I have received from S. H. Fowler: as his debt to me

for my interest in the co-partnership. In response to your question [question put by counsel of plaintiffs] as to how much S. H. Fowler had paid me on that debt, I adopt the books as my answer."

The purchase by S. H. Fowler of C. H. Fowler's interest in the goods was made in 1877, and the purchase price was claimed to be between \$6,000 and \$7,000. To prove that that could not have been the true value of the goods, and was a fraudulent claim against S. H. Fowler, the plaintiffs were allowed to introduce the tax list of 1876, which showed that C. H. Fowler & Co. listed only \$1,650 for taxation, and \$525 in 1877. We think the evidence was admissible. In *Cardwell v. Mebane*, 68 N. C. 487, this court held that "tax lists were not competent evidence to show the value of land, as the assessors were not witnesses in the case, sworn and subject to cross-examination in the presence of the jury." But for the purposes for which this evidence was offered the decision in that case has no bearing. If the amount listed for taxation for C. H. Fowler & Co. was all upon the real estate of the firm, then the tax list was evidence that C. H. Fowler & Co. had no stock of goods at the time of the sale of C. H. Fowler's interest to S. H. Fowler; and, if the whole consisted of the goods, then the interest of C. H. Fowler in the same was worth only a few hundreds instead of thousands. The foregoing is based upon the fact that the taxpayers themselves, and not the assessors of real estate, value their personal property under oath. The listing of this property was the valuation which these partners put upon their stock of goods at or about the time of the sale, and is competent between them as admissions as to value,—not conclusive, but still some evidence of value.

Two issues were submitted to the jury: "(1) Did S. H. Fowler have sufficient mental capacity to execute the deed of trust to J. C. Baxter mentioned in the complaint? (2) Was the execution of the said deed of trust procured by the fraud and undue influence of the defendant C. H. Fowler and J. C. Baxter?" The jury responded to the first issue, "Yes," and to the second, "Yes." As to defendant Baxter, we deem it probably just to him to say that the evidence was not conclusive as to him; but there was some evidence, and the weight of it was for the jury. That he was insolvent at the time of the execution of the deed, and that he had been in the employment of C. H. Fowler for 25 years as his clerk, alone, would be no evidence of fraud on his part in procuring the execution of the deed, for he was not present when the deed was made. But, when taken in connection with the further fact that he refused to permit the guardian of the children of the deceased intestate and grantor to examine either or all of the accounts which made up the debt claimed to be secured in the deed, his books and accounts, and his vouchers connected with the sale of the trust property and the disbursement of the proceeds, then the matter became

serious, and they constituted evidence from which the jury might have inferred that he had a hand in procuring the deed to be executed, though he was not present at the time it was done. In his answer, after admitting his conduct, he undertook to justify it by saying that "for a long time prior to said request the plaintiff L. G. Daniels had been publicly charging the defendants with improper conduct with reference to said assignment, and had been threatening to institute suit against defendants, and that, acting under advice of counsel, for the express purpose of compelling the said Daniels to institute the said threatened suit, in order that the matter might be settled by the courts, refused to permit said inspection." This was indeed a lame excuse. If his accounts had been carefully and honestly kept, he should have most willingly submitted them to the inspection of an intelligent man who was interested; and such a course would probably have prevented a lawsuit, instead of provoking one. It may have been that his better judgment suggested that the guardian should have been permitted to examine the books, but that the undue influence of Fowler over him constrained him to deny that right to the plaintiffs' guardian.

The judgment of the court below is affirmed, but the referee, in stating the accounts ordered therein, will not take into his consideration any connection which the defendant Cowell was alleged to have had with any of the matters set out in the complaint. The jury having found that the deed of trust was procured by the fraud and undue influence of Baxter, as well as of C. H. Fowler, and he having admitted that he took into his possession the property conveyed in the deed, and sold the same to the defendant C. H. Fowler, the conversion of the property is thereby established, and the plaintiffs are entitled to the accounts prayed for against both Baxter and C. H. Fowler. With the above explanation, the judgment is affirmed. Affirmed.

(123 N. C. 185)

DURHAM CONSOL. LAND & IMPROVEMENT CO. v. GUTHRIE et al.

(Supreme Court of North Carolina. Nov. 22, 1898.)

JUDGMENT—RES JUDICATA—VENDOR AND PURCHASER.

Plaintiff abandoned a contract to buy land after making certain payments, for which he brought suit. He failed to recover, and was compelled to pay a judgment for waste, which defendant by a counterclaim alleged he had committed. After defendant regained possession he sold a part of the land for more than plaintiff contracted to pay for the whole. *Held*, that plaintiff was estopped to recover the difference between the contract price and the price received by defendant.

Appeal from superior court, Durham county; Robinson, Judge.

Action by the Durham Consolidated Land & Improvement Company against W. A.

Guthrie and others. Judgment for defendants, and plaintiff appeals. Affirmed.

Manning & Foushee, for appellant. Winston & Fuller, Graham & Graham, and Boone & Bryant, for appellees.

FURCHES, J. On and before the 1st of October, 1890, the plaintiff and the defendants were land speculators, buying and selling land for a profit, in and near the town of Durham. As such, the defendants had purchased, but not paid for, one lot in the town of Durham from one Hicks, one tract of land lying near the town of Durham containing about 47 acres from one Ferrell, and another tract of about 26 acres from one Fowler. On the 1st day of October, 1890, the plaintiff and the defendants made and entered into the following contract and agreement as to the above-described lands: "Durham, N. C., Oct. 1, 1890. We will let you take the property at its actual cost to us, and on the same terms we bought it, which are about as follows: Cash payment, \$2,500; \$4,275 in one year from date of purchase; and \$1,600 in 18 months from date of purchase. About \$3,000 of these time payments is at 6% interest; the balance at 8%. You are to be at all expense of advertising and selling the property, and putting it in proper condition for sale to the best advantage, by opening streets, and making whatever improvements are necessary to sell the property in one year from date, and, after deducting the actual expenses only from the proceeds of sale, the remainder of proceeds is to be equally divided between us and yourselves. [Signed] T. S. Morgan, for Guthrie, Carr and Morgan." "Accepted: R. H. Wright, Sec. & Treas." The plaintiff, soon after the date of this contract, of October 1, 1890, entered upon and took possession of these three parcels of land, rented out the town lot, cut and hauled wood from the other tracts, and did other work thereon, which the defendants allege greatly damaged the market value thereof. Not long after the date of the contract of October 1, 1890, the plaintiff corporation, by its president, J. S. Carr, paid the defendants \$2,500, which they say they used in part payment for lands mentioned in said contract. The plaintiff declined to pay anything more, although payment was demanded, and abandoned its contract. And the defendants, some time in February or March, 1892, took possession of said lands, the plaintiff not having sold the same, and, as defendants allege, not having tried to sell them; and the defendants have since sold a part of said lands, and still hold a part of them unsold. The plaintiff, having abandoned said contract, on the 25th of September, 1893, commenced an action against the defendants to recover the \$2,500 and interest so paid by the plaintiff, alleging in its complaint that it was for money loaned to the defendants and paid for their benefit. The defendants answered this com-

plaint, admitting the receipt of the \$2,500, but denied that they borrowed the same, or that it was paid by the plaintiff for them or for their benefit, set up the contract of October 1, 1890, and alleged that the \$2,500 was paid on that contract. The defendants in their answer also claimed damages of the plaintiff for waste and damage to said lands, which they set up by way of counterclaim. To this answer the plaintiff replied, admitting the contract, denying the counterclaim, and alleging that said contract was void for uncertainty of description and by reason of the statute of frauds.

Upon these pleadings the case proceeded to trial at January term, 1895, of Durham superior court, when the following issues were submitted to the jury: (1) Are the defendants indebted to the plaintiff? If so, in what amount? Ans. No. (2) What is the value of the timber and rents received by the plaintiff from the land described? Ans. \$330."

From the judgment pronounced thereon the plaintiff appealed to this court, where the judgment below was affirmed. 116 N. C. 381, 21 S. E. 952. The opinion of this court was certified down, and final judgment entered in the superior court of Durham county at October term, 1895. After the judgment against the plaintiff was affirmed, the plaintiff paid the amount of the defendants' recovery upon their counterclaim, amounting, at the time it was paid, principal and interest, to \$341.93. On the 21st of August, 1895, the plaintiff commenced this action, based upon the said contract of 1890, which is attached to the complaint as Exhibit A and made a part of the complaint. In this action the plaintiff alleges that the defendants, since they took possession of said land, in 1892, have sold one tract thereof for \$453.68 more than they were to pay for the whole of said land, under Exhibit A, and demands judgment for this amount (\$453.68), and for \$341.93 recovered by the defendants in the former action, on defendants' counterclaim, and that defendants be required to convey to them that part of said land still owned and unsold by defendants. To this last action the defendants answer, and, among other things, plead the record and judgment in the former action as an estoppel of record against the plaintiff's right to recover, if it ever had one. And upon the trial the court submitted the case to the jury upon this plea, instructing them that, if they found from the evidence that the parties to this action were the same as those in the former action, terminated in 1895, and that it covered the same matter in dispute between the parties in this action, the plaintiff was estopped thereby to prosecute this action, and they would answer the issue submitted to them, "Yes." The jury answered the issue, "Yes." Judgment for the defendants, and appeal by the plaintiff.

It seems to us that a statement of the facts in this case is an answer to plaintiff's

right of action, and shows that it is not entitled to a judgment in its favor. As the case comes to us, it is only necessary for us to consider the plea of estoppel,—res judicata. And we must admit (and we do it with regret) that our opinions are not in harmony as to what amounts to an estoppel of record,—whether the precise question must have been in issue and decided, or whether it must only appear that it might have been presented and decided. But it is not necessary that we should enter into a discussion of this much-discussed question, and we do not do so, as we find that according to all our decisions, from *Falls v. Gamble*, 66 N. C. 455, to *Wagon Co. v. Byrd*, 119 N. C. 461, 26 S. E. 144, the plaintiff was estopped in this case. There is no error, and the judgment must be affirmed.

(123 N. C. 210)

WILMINGTON & W. R. CO. v. BURNETT et al.

(Supreme Court of North Carolina. Nov. 22 1898.)

CORPORATIONS—MORTGAGES—JUDGMENTS FOR TORTS—PRIORITY.

1. Under Code, § 1255, providing that mortgages of corporations shall not exempt property or earnings from any judgment for torts committed by the corporation, a purchaser at foreclosure sale takes subject to a judgment against the corporation for a tort committed after the making of the mortgage, notwithstanding the judgment was obtained subsequent to the sale.

2. The fact that the property was sold under a decree does not affect the rights of the judgment creditor, where he was not a party to the foreclosure suit.

Appeal from superior court, New Hanover county; Adams, Judge.

Action by the Wilmington & Weldon Railroad Company against T. B. Burnett and another to enjoin the sale under an execution of property purchased by plaintiff's assignor at a foreclosure sale. From a judgment restraining the sale, defendant Burnett appeals. Reversed.

B. S. Martin, George Rountree, T. W. Strange, and Bellamy & Bellamy, for appellant. A. M. Waddell, for appellee.

FURCHES, J. The Wilmington, Newberne & Norfolk Railway Company, a corporation in this state, on the 12th day of January, 1891, executed a trust deed or mortgage to the State Trust Company of New York to secure certain bonds issued by said corporation. Default being made in the payment of said bonds as provided in the mortgage, suit was commenced in the circuit court of the United States at Wilmington, N. C., on the 13th day of March, 1897, for a foreclosure and sale of the mortgaged property. A receiver was appointed, who took possession of the same. A decree of foreclosure was had, and on the 27th day of July, 1897, the road (the mortgaged property) was sold,

and the assignor of the plaintiff became the purchaser. On the 26th day of November, 1894, the defendant Burnett (at that time a passenger on the mortgaged road) was injured by said road, for which he commenced a suit for damages against the mortgaged road in the superior court of New Hanover county on the 9th day of January, 1895. This action continued and pended in said court until September term, 1897, when the defendant Burnett recovered judgment against the Wilmington, Newberne & Norfolk Railway Company, the mortgagor. Upon this judgment the defendant Burnett has caused execution to issue to the sheriff of New Hanover county, and he is seeking to collect the same out of the mortgage property of the Wilmington, Newberne & Norfolk Railway Company, purchased by the plaintiff or its assignor on the 15th day of July, 1897, under the foreclosure sale made under a decree and order of the circuit court of the United States. This action is brought to enjoin the defendant Burnett and the sheriff of New Hanover county from selling said property under said execution. It seems to be conceded by counsel on both sides that the plaintiff's right to the relief demanded depends upon the construction the court puts on section 1255 of the Code. This section has been considered by this court in several recent opinions. But it is contended by the plaintiff that the precise question presented in this case has not been decided, while it is contended by the defendant that it has been decided in favor of the defendant in *Pocahontas Coal Co. v. Henderson Electric Light & Power Co.*, 118 N. C. 232, 24 S. E. 22, and in *Langston v. Improvement Co.*, 120 N. C. 182, 26 S. E. 644. (And we wish, here, to correct an error in this last case, on page 134, 120 N. C., and page 645, 26 S. E. It should be section 1255, and not 685, as it is printed.) The distinction the plaintiff seeks to make is that the mortgaged property had been sold before the defendant recovered his judgment, when it had not, in the other case. But, upon an examination of these cases (*Pocahontas Coal Co. v. Henderson Electric Light & Power Co.* and *Langston v. Improvement Co.*, supra), it will be seen that in both of them the mortgaged property had been sold under the mortgage, and in both of them it was held that this made no difference, as the purchaser took with notice of the plaintiff's claim. So in this case the plaintiff purchased with notice of the defendant's claim, as it was considered by the master or referee to whom the matter was referred by the court making the decree of foreclosure and order of sale, and reported by him as a claim against the mortgagor corporation. So we fail to see the distinction claimed by the plaintiff between this case and *Pocahontas Coal Co. v. Henderson Electric Light & Power Co.* and *Langston v. Improvement Co.*, on the ground of the sale of the mortgaged property. These

opinions are expressly put upon the ground that the mortgages were void as to such claims, and that the property stood, so far as such claims are concerned, just as if no mortgage had been made. If this were not so, this statute would be a false light held out to such claimants to induce them to furnish material and labor, thinking they had a security, when in fact they had none. A party furnishes a corporation with \$500 worth of coal to run the concern. He knows there is a mortgage on the corporate property, but he knows that section 1255 says that this mortgage is not good against such claims. The corporation refuses to pay, and he is compelled to sue; and before he can get his judgment the mortgage is foreclosed, the property sold, and he gets nothing. The legislature could not have intended this, and we so hold. The mortgagee always has the power to protect himself against such claims, if he chooses to do so, by foreclosing the mortgage, or by taking the property into possession, or by having a receiver appointed. And where the mortgagee is getting a part of the earnings, by way of interest or otherwise, and prefers to allow the mortgagor to remain in possession and to run the concern, he must take the risk of such liabilities.

Another ground the plaintiff takes is that the mortgaged property was sold under a decree of the circuit court of the United States, having jurisdiction of the matter, and the power to foreclose the mortgage and to make an order of sale. This is not disputed. But the defendant was not a party to that suit, and no rights that the defendant Burnett had are affected by this decree and order of sale. Therefore the fact that the plaintiff claims under a sale made under a decree of foreclosure and order of court does not affect the rights of the defendant Burnett. The order was based on the mortgage, and conveyed no more than was conveyed by the mortgage. It conveyed no more than would have been conveyed by a foreclosure of the mortgage under a power of sale contained in the mortgage.

We have stated that the mortgagee had notice of the plaintiff's claim, and that the purchaser was affected with this notice, as it was a part of the record in the proceedings under which the purchaser bought. We have done this for the purpose of showing the great similarity between this case and the cases of *Pocahontas Coal Co. v. Henderson Electric Light & Power Co.* and *Langston v. Improvement Co.*, supra. But this notice of the defendant's claim is not involved in the principle upon which this case is decided. The principle underlying this decision, and upon which it is decided, is that under section 1255 of the Code the mortgage conveyed nothing as against this claim, and, as it conveyed nothing as against this claim, the purchaser got nothing, as against this claim, by the mortgage sale. There were

many authorities cited in the well-considered brief of defendant's counsel, but, as the principle upon which the case turns has been so recently decided by our own court, we have not thought it necessary to cite them in this opinion. The plaintiff has also filed a well-considered brief, in which a number of cases are cited to sustain the contention of the plaintiff, which we do not discuss, and will only refer to the case of Railroad Co. v. Verry, 48 Iowa, 458, which was considered by the counsel for plaintiff to be more directly in point than any case cited for plaintiff. That case is distinguishable from this. The statute upon which it is based differs very much from our statute (section 1255). That statute makes the judgment recovered on such claim a lien on the property of the corporation, and such judgment is to have priority to the debts secured in the mortgage. It does not provide, as our statute does, that the mortgage is void as to such debts. But it provides that judgment, when recovered, shall be a lien on the property of the mortgagor. This lien does not attach until there is judgment, and then on the property of the mortgagor. And as this is so, and as there is no provision against mortgaging as to such debts, when the judgment was obtained, the sale having taken place, the mortgagor had no property upon which the lien could attach. To our mind, the distinction between the two statutes and between that case and this is clear.

From the view we have taken of this case, there is error in the judgment appealed from, in continuing the restraining order and in granting the injunction. Error.

(96 Va. 430)

NORFOLK & W. RY. CO. v. GRAHAM.
(Supreme Court of Appeals of Virginia. Nov. 17, 1898.)

MASTER AND SERVANT—NEGLIGENCE—RULES OF MASTER.

1. Where a railroad employé went under a car to replace a brake, knowing that no one on the attached engine or elsewhere had been charged with any particular duty to look out and warn him of approaching danger, his failure to notify the engineer of his going under the car is such negligence as to prevent his recovery for injuries received by the starting of the engine, which was preceded by ringing the bell several times.

2. Failure of a railroad company to enact rules for simple duties, the danger attending the discharge of which is obvious, does not constitute negligence, unless, from the nature of the work in which the employés were engaged, the master, in the exercise of reasonable care, should have foreseen and anticipated the necessity for such rules.

Error to hustings court of Roanoke.

Action by one Graham against the Norfolk & Western Railway Company. There was a judgment for plaintiff, and defendant brings error. Reversed.

Watts, Robertson & Robertson, for plaintiff in error. Moomaw & Woods and S. G. Williams, for defendant in error.

KEITH, P. Graham brought suit in the hustings court of the city of Roanoke to recover damages from the Norfolk & Western Railway Company for injuries received by him while in its service. After the evidence had been introduced, the defendant company demurred. The jury rendered a verdict in favor of the plaintiff for \$4,300, upon which the hustings court entered judgment, and the case is before us upon a writ of error to that judgment.

We shall only consider the third assignment of error, which involves an inquiry into the sufficiency of the evidence to sustain the verdict and the judgment.

Graham at the time of the injury was in the employment of the defendant as helper to the overhauler in the yards of the company at Roanoke. Upon the occasion of the injury of which he complains, Wilson, the foreman of the yard, directed Lowry, who is known as a "hostler," to go with the engine and move a car to a place upon one of the tracks within the yard, at which a number of car wheels which needed repairing had been deposited. There were detailed, to aid him in this task, Graham, the plaintiff, Gilmore, Robinson, and Viar. They were directed to take with them a skid, which is a framework made of strong and heavy timbers, one end of which rests upon the car which is to be loaded, and the other upon the ground, thus forming an inclined plane, up and along which heavy articles are drawn. The engine was attached to the car, with its front or headlight towards it, and in this manner it was moved to the place where the wheels were to be loaded. The skid having been placed in position, chains were attached to the wheels at one end, and to the engine at the other. The method of loading was to back the engine (which had, of course, first been detached from the car), and thus draw the wheels up the inclined plane formed by the skid to the floor of the car. It was discovered that a brake rod which projected above the end of the car next to the wheels which were to be moved was in the way of the workmen, and Wilson, the foreman, directed it to be lowered, which was done by Graham and some of the other employés. The wheels were loaded without accident, and the men were then directed by Wilson to take the skid back to the place from which it had been gotten, and then move the car laden with the wheels to a designated point, and further directed them not to leave the car until the brake rod had been replaced. Wilson then went to another part of the yard, and Lowry, with the engine, accompanied by Robinson, Gilmore, and Graham, proceeded to execute the orders which they had received. Viar took the chains which had been used in loading the car, and carried them back to the place where they belonged. When Lowry reached the point upon the track where the skid was to be unloaded, he stopped, the skid was taken off, and Graham, who understood Wilson's orders to

be that he should replace the brake as soon as the car stopped, went under the car at the end remote from the engine, got down upon the track, and with the assistance of Robinson, who stood upon the car and held the brake rod in an upright position, proceeded to fasten it in its proper place. Lowry knew nothing of Graham's dangerous position, nor did Gilmore, who had also gotten upon the engine. Robinson, who knew that Graham was upon the track, states that he gave no warning to the engineer, because he took it for granted that Graham had gone under the car with the knowledge that it was not to be moved. According to the testimony of Gilmore and Lowry, Gilmore rung the bell, giving it as many as five strokes, whereupon Lowry put the engine in motion. Robinson, knowing Graham's danger, called to Lowry to stop, which he did as promptly as possible, but not in time to avoid inflicting serious and most painful injuries upon Graham.

The employes of the company seem to have been skillful men, and competent for the proper discharge of the duties imposed upon them. Indeed, those duties, so far as this record is concerned with them, were of the simplest nature, and the only part of them which involved any difficulty (the placing of heavy wheels upon the car) had been successfully performed. Graham was a man 21 years of age, of ordinary intelligence, and had been in the employment of the company for more than a year. There was nothing occult or difficult in the duty which he was called upon to perform. The danger attending it was open and obvious, and within the range of the most ordinary capacity. He knew that Wilson, the foreman, who gave the instruction as to what they were to do, had gone to another part of the yard. Viar had gone off with the chains. Robinson was upon the car, aiding him in adjusting the brake. Lowry and Gilmore were upon the engine. All the directions given by Wilson were given in Graham's presence. He understood those directions to require him to replace the brake as soon as the car was stopped for the purpose of unloading the skid. Lowry, who was in charge of the engine, understood that the brake was to be replaced when the car had been taken to its point of destination. Both Lowry and Gilmore testified that the bell was rung before the engine was moved. Graham says (no doubt, truly) that he did not hear it; and Robinson, that, if it was rung, he failed to observe it, as there was a confusion of noises and the ringing of many bells around him.

We have said that Graham knew these things, because a man is presumed to know what takes place in his presence and before his eyes, and in the light of day. He was in a position to see all and to hear all that occurred, and when he went under the car he must have known that he was going into a place of danger, and that no one had been charged with any particular duty to look out and warn him of approaching danger.

To go under a car, under such circumstances, to which an engine was attached, without notifying the engineman of his purpose, was an act of negligence. The facts in proof establish that the peril he incurred in going under the car was such that a man of ordinary intelligence must have seen and understood. This indiscretion on his part was the immediate cause of the injury which he sustained. The evidence fails to disclose negligence upon the part of the defendant company. As we have said, the men employed with Graham seem to have been entirely competent to discharge the duties assigned them. Those duties were simple, and the danger attending the discharge of them was so obvious, and so easily guarded against by the most ordinary care and precaution upon the part of those engaged in them, as not to require rules and regulations for the government of employes while so occupied. It is one of the duties of a railroad company to prescribe proper rules for the conduct of its affairs, but it is impossible to formulate rules with respect to every simple service its employes may be called upon to discharge.

As was said by Judge Buchanan in *Lime Co. v. Richardson*, 95 Va. 336, 28 S. E. 334: "The work was neither complex nor difficult. It is not shown that there was anything in the nature of the work which made it necessary for the defendant to enact rules. Its failure to do so was not proof of negligence, unless it appeared from the nature of the work in which the servants were engaged (and it does not) that the master, in the exercise of reasonable care, should have foreseen and anticipated the necessity for such rules."

Something is necessarily left to the care and discretion of the employes themselves.

Upon the whole case, we are of opinion that the judgment upon the demurrer should have been for the defendant.

CARDWELL, J., absent.

(96 Va. 456)

WOLFE et al. v. PRINGLE et al.

(Supreme Court of Appeals of Virginia. Nov. 17, 1898.)

PARTNERSHIP—FIRM ASSETS—PRIORITIES—DISSOLUTION—CONTRACTS.

1. P. bought his partner's interest in the firm, assuming all indebtedness. He afterwards sold an interest to S., and formed a new firm, and thereafter made an agreement of dissolution with S., who was to wind up the firm, taking the assets and assuming all the debts, after paying which he was to apply P.'s share of the balance to debts with which he was bound with P. S. had no notice that creditors of the old firm claimed any lien on the partnership assets which came into his hands. Held, that the creditors of the first-named firm had no equitable lien on firm property in S.'s hands, since the equities of firm creditors in firm assets in preference to individual creditors can exist only by substitution of the rights of partners inter se.

2. A partner transferred his interest in the firm to his co-partner, who was to wind up the firm and pay its debts, and to apply the former's share in any balance which might be left to pay any debt which on settlement might be found due from the outgoing partner to the other, and any debts or obligations of said outgoing partner for which the other was bound with him, or which the latter might have to pay by reason of any act of the former. The outgoing partner had executed two notes for debts of a former firm, which he assumed. He indorsed the notes in the name of the present firm without the consent of his partner. *Held*, that the payees of the notes were not entitled to payment from the maker's partner under the agreement of dissolution.

Appeal from circuit court, Rockingham county.

Bill by Frank Wolfe & Co. and others against Pringle & Hill. Bill dismissed, and complainants appeal. Affirmed.

Sipe & Harris, for appellants. W. W. Liggett, for appellees.

BUCHANAN, J. Prior to October 1, 1891, J. J. Pringle and S. R. Hill were engaged in the business of selling goods at Elkton, Va., under the firm name of Pringle & Hill. About the 1st day of that month Hill sold his interest in the concern to Pringle, who undertook to pay the debts of the concern. Among those debts were the debts asserted by the appellants. About the 10th of that month, W. S. Southall and Pringle entered into partnership under the style of Pringle & Southall, for the purpose of conducting a mercantile business at the same place. This partnership continued until the 5th day of January, 1892, when it was dissolved. At that time Pringle conveyed all his interest in the assets of the concern of Pringle & Southall to Southall, for the following purposes, as stated in the assignment, viz.:

"(1) To wind up and settle, sell and dispose of, as he may deem best.

"(2) To pay all the debts and liabilities for which said firm of Pringle & Southall is legally bound, including the costs and charges incident to this settlement and the winding up of said business.

"(3) After paying all the debts of the concern of Pringle & Southall, the residue shall be equally divided between the partners, and the share of the said Pringle shall then be applied: (1) To pay any debt which on such settlement may be found due from said Pringle to said Southall, and any debts or obligations of said Pringle for which said Southall is bound with him, or which said Southall may have to pay by reason of any act of said Pringle. (2) The residue, if any, of the funds arising from the sale and collection of said assets, after paying the debts and obligations above recited, shall be paid over to said Pringle."

On the same day Pringle made a deed conveying certain other property to Southall, to protect him from any loss that he might suffer as surety for Pringle, or from Pringle's

conduct and acts while a member of the firm of Pringle & Southall.

In February, 1892, the appellants, who were creditors of Pringle & Hill, filed their original bill, and in April, 1896, filed their amended and supplemental bill, by which they sought to compel payment of their debts out of the property conveyed to Southall—First, upon the ground that the firm of Pringle & Southall had undertaken to pay the debts of Pringle & Hill; second, that the assets of Pringle & Hill, when they came to the hands of Pringle & Southall, were in equity bound for the payment of their debts, and that under the deeds of Pringle to Southall of January 5, 1892, they were entitled to payment.

It clearly appears from the record that the firm of Pringle & Southall did not, when that partnership was formed nor at any other time, assume or undertake to pay the debts of Pringle & Hill. Neither does the record show that the creditors of Pringle & Hill have a lien in equity upon the assets of that firm which came into the hands of Pringle & Southall. The precise terms of the contract between Pringle & Hill, by which the former acquired the interest of the latter in the firm assets, is not shown. It does appear that Pringle assumed the payment of the partnership debts, but there is no proof nor suggestion that those debts were to be paid out of the assets of the concern, or that any lien was reserved thereon to secure their payment.

Partnership creditors, in strictness, have no lien upon the partnership assets for the payment of their debts, but must work out their preference over the creditors of individual members of the partnership through the equities of such members.

In *Shackelford's Adm'r v. Shackelford*, 32 Grat. 481, 508, it was said by Moncure, P., in delivering the opinion of the court: "We know that, ordinarily, a partnership estate is liable to the payment of the debts of the firm, in preference to the individual debts of the partners. This is the right of the partners *inter sese*. The creditors of the partnership have no such right of priority over the creditors of the partners individually, but only by substitution to the rights of the partners *inter sese*. The partners may release this right, and the creditors of the partnership cannot complain, for it is not their right, except subject to the disposition and control of the partners themselves, to whom it belongs.

"When one partner sells to another the former's interest in the partnership estate, the question whether the former has a right, after the sale, to require the partnership estate to be applied to the payment of the partnership debts in his exoneration, depends upon the true intent and meaning of the contract of sale in that respect. It is competent, of course, for a vendor in such a case to release the partnership estate from such a continuing liability. But whether he did so in fact or not is a question which depends upon the in-

tention of the parties in the contract of sale in the particular case." See, also, 2 Lindl. Partn. (Ewell's Ed.) side page 654 et seq.

When Southall entered into partnership with Pringle there was nothing to give notice to him (Southall) that Hill or any one else had a lien or any claim upon the goods or property which Pringle put into the concern. Southall, in his answer and deposition, not only denies that he knew that the firm of Pringle & Hill was indebted when he went into partnership with Pringle, but avers that he was informed by Pringle that it was not. There is no evidence to the contrary, at least none sufficient to overcome Southall's statement. There is nothing to show that the purchase by Pringle of Hill's interest in the partnership assets of Pringle & Hill was not made in good faith; neither is there any evidence that Southall did not act bona fide when he became interested in those assets by entering into partnership with Pringle.

Under the facts and circumstances disclosed by the record, we do not think that the creditors of the firm of Pringle & Hill have a lien in equity upon the assets of the firm of Pringle & Hill in the hands of Southall.

The remaining ground upon which the appellants claim a right to relief in this case is based upon the deeds of Pringle to Southall of date January 5, 1892.

If they have any such right, it is under that provision in the deed of assignment which provides that, after all the debts of the concern of Pringle & Southall shall be paid out of the proceeds of the assets of that firm, the residue shall be divided equally between the partners, and the share of said Pringle shall then be applied "to pay any debt which, on such settlement, may be found due from said Pringle to said Southall, and any debts or obligations of said Pringle for which said Southall is bound with him, or which said Southall may have to pay by reason of any act of said Pringle."

During the existence of the partnership of Pringle & Southall, Pringle executed two negotiable notes to the appellants Witz, Bledier & Co., aggregating the amount of their debt, in the name of Pringle & Hill, upon which he indorsed the name of Pringle & Southall. This indorsement was made without the knowledge or consent of Southall. The notes were given for a debt for which, as we have seen, he was not liable. Pringle not being authorized, either as partner or otherwise, to make such indorsement, it did not create any liability upon Southall. Neither does it appear that he was in any way liable for the debt of appellants Frank Wolfe & Co. Neither of those debts being debts or obligations which Southall was liable for or bound to pay, they do not come within the provisions of the deed of assignment.

The appellants having failed to make good any ground upon which the property conveyed by Pringle to Southall, or its proceeds, or any part thereof, could be subjected to the pay-

ment of their debts in a proceeding like this, their bill was properly dismissed.

CARDWELL and RIELY, JJ., absent.

(96 Va. 461)

PENNYBACKER v. MAUPIN et al.

(Supreme Court of Appeals of Virginia. Nov. 17, 1898.)

SPECIFIC PERFORMANCE—REQUISITES FOR DECREE.

Equity will not decree specific performance of an alleged parol contract to convey land, where the evidence is unsatisfactory as to whether the alleged contract was ever entered into, and where 20 years have elapsed since the contract is said to have been made.

Appeal from circuit court, Rockingham county.

Bill in equity by M. E. Pennybacker against A. L. Maupin and others for specific performance of an alleged contract to convey land. There was a decree for defendants, and plaintiff appeals. Affirmed.

J. B. Stephenson, John E. Roller, and Walton & Walton, for appellant. Sipe & Harris, Winfield Liggett, and G. G. Gratian, for appellees.

HARRISON, J. In March, 1895, the appellee A. L. Maupin conveyed, together with other lands owned by him, his undivided interest in remainder in a tract of land derived under the will of his grandfather, to George E. Sipe, trustee, to secure certain creditors of said appellee. Soon thereafter, in the same year, appellant, who was the mother of the appellee, filed her bill, alleging that she owned the life estate in the entire tract in question, containing about 200 acres, and a fee-simple interest in the remainder, amounting to $\frac{1}{16}$, derived from her father; and further alleging that, by virtue of a parol contract entered into with her son A. L. Maupin, the appellee, in the year 1876, she had become the owner of his interest in the remainder, amounting to $\frac{12}{32}$ of the whole tract. The bill alleges that the consideration for this purchase was the transfer to her son of two bonds of D. Pennybacker, for \$500 each, executed on the 1st day of February, 1852, amounting on the 1st day of April, 1874, to the sum of \$2,023, and that the bonds so assigned were used by her son in part payment for a farm upon which he resided, in the county of Rockingham.

The bill further alleges that the attempted conveyance by appellee of his interest in the land to Sipe, trustee, for the benefit of his creditors, was in violation of the rights of appellant, and the prayer is that the undivided interest of appellee in the land may be conveyed to appellant, or that, in any event, she may have a decree for the amount of the bonds assigned to appellee, with interest, "in case the court cannot compel him to convey his interest in the land."

The appellee filed his demurrer and answer

to the bill, admitting the transfer of the bonds as charged, but alleging that the bonds were transferred to him as a gift by his mother, and that there never was any money consideration thought of or involved in the transaction. Appellee further says that, even though the court should determine that the bonds were not transferred as a gift, then the only cause of action his mother ever had against him was for the value of said bonds under an implied contract, which has long since been barred by the statute of limitations, the benefit of which appellee claims and pleads.

Upon the issue thus presented, the circuit court held that the appellant had failed to make a case, upon the law or evidence, entitling her to a specific execution of the alleged contract, and that, if the bonds were not a gift or advancement, their value could not be recovered, because barred by the statute of limitations.

In order that a court of equity shall exercise its power to decree a specific execution, where there has been a part performance, the contract itself must be clear, certain, and unambiguous in its terms, and must either be admitted by the pleadings, or proved with a reasonable degree of certainty, to the satisfaction of the court. If, therefore, upon all the evidence given by both parties, the court is left in doubt as to the entire contract, or even as to any of its material terms, it will not grant the remedy, although a partial performance of something has been sufficiently proved. Pom. Spec. Perf. § 136.

Every application for the specific performance of a contract is addressed to the sound judicial discretion of the court, regulated by established principles. The contract must be distinctly proven, and its terms clearly ascertained. It must be reasonable, certain, legal, mutual, based upon a valuable consideration, and the party seeking performance must not have been backward in enforcing his rights, but ready, desirous, prompt, and eager. *Darling v. Cumming's Ex'r*, 92 Va. 521, 23 S. E. 880.

Guided by these well-settled principles, the conclusion is easily reached that the contract alleged in the bill has not been proved with sufficient clearness to justify a court of equity in decreeing its specific performance. There is evidence tending strongly, as stated in the decree appealed from, to show that the transfer of the bonds in question was a gift by the appellant to her son. There is also evidence tending to show that it was a loan, and there is some evidence tending to show that it was a purchase, as alleged in the bill. Upon the whole, the evidence is unsatisfactory, and leaves the mind in a state of doubt and uncertainty whether the contract alleged was ever entered into. Nearly 20 years elapsed, after the contract is said to have been made, without any step being taken to enforce it, and no sufficient explanation for this great delay in asking a specific performance is either alleged or proven. Such backwardness

and lack of promptness in enforcing her rights is a very strong circumstance against the claim now asserted by appellant.

The alternative prayer of the bill, that the court, if it found itself unable to decree specific performance, would decree the amount of the bonds, cannot be granted, for the reason that no contract, either express or implied, is established creating the relation of debtor and creditor between appellant and appellee in respect to said bonds, and for the further reason that, if such a contract had been proven, the plea of the statute of limitations which has been interposed by the appellee is a complete bar to its recovery.

For these reasons the decree appealed from must be affirmed.

RILEY and CARDWELL, JJ., absent.

(96 Va. 455)

RAMSBURG v. KLINE et al.

(Supreme Court of Appeals of Virginia. Nov. 17, 1898.)

JUDGMENT—EQUITABLE RELIEF—PROCESS—FALSE RETURN—EVIDENCE—INTEREST—MOTIONS.

1. Evidence tending to falsify and contradict the return of an officer showing that a summons has been duly executed is inadmissible, unless such false return was procured or induced by plaintiff.

2. Adjudging interest on notes from the date they were due, instead of the last day of grace is not such error as warrants setting aside the judgment, the amount being small.

3. A motion to set aside a judgment on a note, rendered against two of three persons jointly and severally liable, because the judgment could not be rendered against the two, unless the third was joined in the action, is unavailing, since it only presents matter of defense to a new judgment.

Error to circuit court, Rockingham county.

Action by one Ramsburg against C. G. Kline and others. There was a judgment for plaintiff, which defendants moved to set aside. From an order granting the motion, plaintiff brings error. Reversed, and motion dismissed.

Sipe & Harris, for plaintiff in error. John E. Roller, for defendants in error.

HARRISON, J. The defendants in error gave notice that on the 11th day of October, 1897, they would move the circuit court of Rockingham county to reverse and set aside a judgment for \$651, with interest and costs, in favor of the plaintiff in error, which had been rendered at the April term, 1897, of said court, upon the following grounds:

(1) That the writ in said cause was never served on Catherine M. Kline, one of the defendants in error.

(2) That the judgment was for interest on \$300, part thereof from September 1, 1895, instead of September 4, 1895, and on \$351, the remainder thereof, from December 1, 1895, instead of December 4, 1895.

(3) That the notes upon which the judgment was obtained were joint and several

executed by C. G. Kline, J. S. Kline, and Catherine M. Kline, and that no separate action could be maintained thereon against the defendants in error, leaving out the said C. G. Kline.

Upon the hearing of this motion the judgment of the previous April term was set aside, the court reciting in its order each of the three foregoing grounds, set forth in the notice, as the base of its action.

Each of the grounds upon which the court rests its conclusion is assigned as error.

The first ground upon which the court rests its judgment raises a question that has been very recently determined by this court. In the case of *Preston v. Kindrick*, 94 Va. 760, 27 S. E. 588, the principle is announced that, unless the false return was procured or induced by the plaintiff, or he can in some way be connected with the deception, it is error to admit evidence tending to falsify and contradict the return of an officer showing that a summons has been duly executed. It is not necessary to repeat here the reasoning in that case which led to the adoption of this rule, as the better doctrine. The record shows that the summons was duly served upon Catherine M. Kline, and this fact is affirmed by the court on the face of the judgment sought to be set aside. There would be no end to litigation, and little security for the titles to property, if the final judgments of courts, which should import uncontrollable verity and credit, could be thus lightly dealt with. It is true, hard cases may arise under the most satisfactory general rule that can be adopted; but, all things considered, harm is less likely to result from enforcing the rule laid down in *Preston v. Kindrick* than would occur if interested parties were permitted to contradict the duly-executed official return of an officer, and thus destroy the judgment which was based thereon.

The case at bar affords an illustration of the wisdom of the rule, where a father, mother, and son, the judgment debtors, and makers of the notes sued on, come forward, without any pretense of defense upon the merits, to deny that there was personal service on the mother, in the face of the duly-executed return of the sheriff, the affirmance by the court in its judgment that the summons was duly executed, and the sworn testimony of the sheriff in rebuttal that it was served in person.

There is no ground for the contention that a distinction is to be drawn between the case at bar and that cited. The proceeding in each is a direct attack upon the sheriff's return, with the sole object of setting aside the judgment based upon that return, and there can be no valid reason for having one rule touching the sanctity of an officer's return in a chancery cause and another in a common-law case.

We are further of opinion that it was error to set the judgment set aside because interest had been adjudged thereon from the day the notes sued on were due, instead of the last day

of grace. This error amounted to 33 cents, which the plaintiff offered to release of record, and was refused. The amount involved was too small to be regarded, and the maxim, "*De minimis lex non curat*," should have been applied.

We are further of opinion that it was error to set the judgment aside upon the ground that the plaintiff had no right of action against Catherine M. and J. S. Kline unless sued with C. G. Kline. Whether this be true or not, it furnished no independent ground for the court's action. No evidence could be introduced on this subject until the judgment had been set aside, and hence the error, if any, could not be availed of as ground for declaring the judgment null and void, but could only be resorted to as matter of defense to a new judgment after the first had been set aside.

For these reasons the judgment complained of must be reversed, and an order entered here dismissing the motion of the defendant in error to set aside the judgment of the April term, 1897.

CARDWELL and RIELY, JJ., absent.

(96 Va. 442)

MONGER v. ROCKINGHAM HOME MUT. FIRE INS. CO.

(Supreme Court of Appeals of Virginia. Nov. 17, 1898.)

MUTUAL FIRE INSURANCE—CONSTITUTIONS—ORIGINAL CERTIFICATES—PAYMENT OF ASSESSMENTS—WAIVER.

1. The constitution of a mutual fire insurance company provided that one could become a member by signing the constitution, or as heir to a deceased member, or by acquisition of the property by purchase, in which latter case the insurance would be canceled, if no notice was given within 10 days after the purchase. Certificates were issued as evidence of membership, on which were a description and valuation of the property, with the name of the insured, the date of the insurance, and the time it was to remain in force. In case of transfers because of death or purchase, the words "Transferred to," followed by the name of the transferee, were written on the certificate. In the case at bar, one who had been devised a life estate in property insured it in her own name. After her death the property stood insured in the name of her husband, and assessments made out against him were paid by him. Thereafter he turned over the control of the property to the owner in fee, whose rights had accrued on the death of the life tenant, but who had permitted the husband to control the property in the meantime; and a certificate was issued to her, embracing all the property before insured, and several other items, which increased the amount of the insurance. Shortly prior to such transfer, assessments were made against said husband, who failed to pay them within 60 days, which was a cause of cancellation of the insurance, under the constitution. *Held*, that the owner must be regarded as an original member of the association, and not as a transferee, especially since the association made two demands on the husband for the payment of said assessments after the issuance of the certificate to the owner, and was not liable for the failure of said husband to pay such assessments.

2. The payment of assessments, some of which are received by the company without condition, after knowledge on the part of the latter of a cause of forfeiture of the policy, is evidence of a waiver of such forfeiture sufficient to require its submission to the jury.

Appeal from circuit court, Rockingham county.

Action by C. V. Monger against the Rockingham Home Mutual Fire Insurance Company. There was a judgment for defendant, and plaintiff appeals. Reversed.

O. B. Roller and Martz, Sipe & Harris, for appellant. W. Liggett, for appellee.

KEITH, P. The case is before us upon exceptions taken by C. V. Monger during the progress of the trial of an action brought by her in the circuit court of Rockingham county against the Rockingham Home Mutual Fire Insurance Company, in which judgment was rendered for the defendant.

The mother of Mrs. Monger, who was Mrs. J. J. Showalter, was devisee for life, under her father's will, of certain real estate in the county of Rockingham, with the remainder to her daughter, Mrs. C. V. Monger. After the death of Mrs. Showalter the petitioner's father, J. J. Showalter, remained in the possession and control of the property of his daughter; they continuing after the daughter's marriage to reside together, and constitute one family. The buildings upon this property were during the lifetime of Mrs. Showalter insured in the Rockingham Home Mutual Fire Insurance Company. According to the laws of that company, property insured in it is subject to revaluation at intervals of five years.

The charter of the company provides, among other things, that "all persons subscribing to this charter of incorporation, and pledging themselves to be governed by any constitution, by-laws, regulations, or requirements adopted by said company in pursuance thereof, their executors, administrators, and assigns, and vendees, continuing to be insured therewith, shall thereby become members of said company during the time they shall remain insured therein, or until they shall withdraw from the company in accordance with its prescribed regulations."

By section 4, art. 3, of the constitution, it is provided that, "whenever a member of the company dies, his widow or other legal representatives shall be considered as holding the same relation to the company as that held by the deceased member, unless proper notice is given in thirty days that she or they wish to withdraw from the company. Then the property shall be stricken from the books, provided there are no charges against it."

By section 5, art. 3, of the constitution it is provided that "whenever a member of this company sells, trades, or otherwise disposes of his property, the party buying, trading for, or otherwise obtaining said property shall notify the secretary in ten days thereafter that he wishes the insurance on said property con-

tinued in his name; otherwise it shall be stricken from the books. In the meantime the company will not be responsible for said property until it is properly transferred in the new owner's name."

The constitution also provides that whenever a member's property is burned the president shall, as soon as he is appraised of the fact, call the board of directors together, and, upon proof of loss, levy a tax upon each member in proportion to the amount of his property insured in the company, to meet such loss; and as soon as the assessment is fixed, it is the duty of the secretary to notify members, who are then required to pay promptly to the treasurer, who in turn pays it over to the member sustaining the loss. Upon joining the company, every person is required to waive the benefit of the homestead, bankrupt, and all exemption laws, as to any such assessment upon his property.

By section 3, art. 5, it is provided "that any member failing to pay over the amount of his or her assessment in 60 days after proper notification shall have 50 per cent. added thereto; it shall then be placed in an officer's hands for collection, and, when collected, the name of the delinquent member shall be stricken from the books; and, further, should the property of any member burn whilst he or she is delinquent, neither he nor she shall receive pay therefor."

A person became a member of the company by signing the constitution, and pledging himself to be governed by it, or as heir of a deceased member, or by acquisition of the property by purchase, exchange, or otherwise, and giving proper notice as required by sections 4 and 5 of article 3, above quoted. In no other mode could membership be acquired in this company.

As evidence of membership, a certificate was issued, upon which a description and valuation of the property insured appear, with the name of the insured, the date of insurance, and the time during which it is to remain in force. In the case of the death of a member, or the sale or other disposition of the property insured, the company, upon notice that the heir or transferee wished to continue insured, wrote upon the certificate the words "Transferred to," naming the person who was thereafter to be the beneficiary of the insurance.

Now in this case the property belonged to Mrs. Showalter for life, and was first insured in her name. After her death it stood insured in the name of J. J. Showalter, and the assessments were made out against and paid by him; but on the 23d of August, 1894, the control of the property was turned over to Mrs. C. V. Monger, who had the title thereto after the death of her mother, under the will of her grandfather; and thereupon a certificate (No. 381) was issued to her. The valuation of the property, as stated therein (\$3,465), and a descriptive list of it, appear upon the certificate. It embraces all

property that had been theretofore insured, and other items which at the revaluation made in July increased the amount of insurance from \$3,100, as stated in the certificate issued to J. J. Showalter, to \$3,465.

Prior to the 23d of August, 1894, assessments had been made against J. J. Showalter for two losses on account of the destruction of property belonging to Rodeffer and Carpenter. The assessments amounted to \$1.55, which sum was demanded of J. J. Showalter in a notice dated October 4, 1894, and again in a notice dated March 8, 1895.

In May, 1895, there was a meeting of the members of the company, at which a list of delinquents was read, and upon that list the name of Mrs. C. V. Monger appears as delinquent with respect to the Rodeffer and Carpenter losses; and thereupon C. V. Monger, her husband, who was present at the meeting, stated that he would pay them. It seems, also, that Mrs. Monger, while not actually in the meeting, was near at hand, and was informed that the company held her responsible for the \$1.55; and it was after this that the notice of the assessment of June 19, 1895, was sent to her, which embraced \$1.55 as due on the Rodeffer and Carpenter losses, and \$1.39 on the Wagner loss, aggregating \$2.94 of past-due assessments.

It is conceded that Mrs. Monger has paid all of the assessments against her made since the 23d of August, 1894.

In June, 1897, her barn, valued at \$1,100, was destroyed by fire; and, the company refusing to pay the loss, this suit was brought to recover \$733.33, being two-thirds of the appraised value of the property destroyed.

The company defended upon the ground that at the date of the loss the plaintiff was delinquent in the payment of the Rodeffer and Carpenter assessments, which, as the defendant claimed, had been properly levied against her.

The plaintiff contended before the jury (1) that she had paid all assessments; (2) that the controverted assessments were not due by her; (3) that the company by its conduct waived any forfeiture that had accrued by reason of the failure to pay the controverted assessments.

There was some conflict of evidence as to whether or not the \$1.55 in controversy had been paid to the company, but the verdict of the jury must be considered as having decided that question of fact in favor of the defendant. It therefore remains for us to inquire: First, whether Mrs. Monger was ever liable for that assessment; secondly, whether, if liable, the company had waived its right to enforce a forfeiture on account of it.

The liability of Mrs. Monger for assessments was purely personal. The assessments constituted no charge or lien upon the property insured. It is claimed, however, on behalf of the company, that she is lia-

ble by virtue of her succession to the benefit of the policy taken in the name of J. J. Showalter, her father. She does not claim as heir at law of J. J. Showalter, nor as the purchaser from him, nor as having derived any right, title, or interest in the property insured by or through him. She does not stand upon the certificate originally issued to him, and by the company, after due notice, in accordance with its charter and constitution, transferred to his successor; but she appears before the court standing upon her rights as shown by a certificate of membership issued to her, not as transferee, but as an original member of the association. It is true that upon what is known as the "Property Book" of the company, in which the names of the members of the association and a list of their property appear, it is stated that on August 23, 1894, the insurance theretofore standing in the name of J. J. Showalter had been transferred to Mrs. C. V. Monger; but the evidence of her membership is to be found in the certificate issued to her on that date. The fact that the company on October 4, 1894, and on March 8, 1895, demanded payment of the Rodeffer and Carpenter losses of John J. Showalter is strongly persuasive that it at that time regarded Mrs. Monger as an original member, and not as successor to the rights of J. J. Showalter under the certificate issued to him, and as liable for assessments made against him.

We are of opinion that Mrs. Monger was not liable to the company for the Rodeffer and Carpenter assessments.

This conclusion is decisive of the case, but we are also of opinion that there is evidence tending, and strongly tending, to show a waiver upon the part of the company of its right to the forfeiture on account of the delinquency of Mrs. Monger in the payment of the Rodeffer and Carpenter assessments, assuming that she was liable for them. Those losses occurred prior to the 23d of August, 1894. On that date a certificate was issued in her name recognizing her as a member of the defendant company, and insuring her property. At intervals from that time until the destruction of her property, assessments were made against her as losses occurred, which she paid and the company received. These facts are evidence tending to show a waiver of the forfeiture relied upon, which should have been submitted to the jury under proper instructions.

The case of *Rice v. Aid Soc. (Mass.)* 15 N. E. 624, is in point. Rice had insurance upon his life. He was in default as to the payment of an assessment. The company had a right to declare a forfeiture, but subsequently received the assessment, with the condition stamped on the certificate, "Received on condition that member is in good health." Nothing was said by Rice as to his health, nor any inquiries made by the company as to it, at that time; and afterwards the company levied and received unconditionally six assess-

ments, when Rice died. It appeared that, at the date of the receipt of the first premium with respect to which he was in default, Rice was not in good health; and it was contended by the company "that the condition of the former acceptance reaches forward, and applies also to the later payments, and that it is not bound by later assessments which it made, and later payments which it received, in ignorance that the assured was in ill health at the time of the former payment." But said the court: "The company cannot be allowed in this way to imply a condition in favor of a forfeiture. It had knowledge on the former occasion the payment had been made too late, and that the money had been accepted with a condition annexed. If, before levying a new assessment, the company wished to know the particulars as to Mr. Rice's health, and thus to determine whether that payment was valid or not, it was incumbent on it to make inquiry. Instead of doing so; instead of notifying him that it wished for some positive evidence or statement upon the subject; instead of imposing a further condition, relating back to the time of the former payment,—the company made an unconditional call upon him for the payment of the new assessment. * * * Suppose the payment of the former assessment had never been made at all, and the company, without insisting upon the nonpayment as a ground of forfeiture, had levied new assessments upon the assured, which were all duly paid and accepted without condition; could it be contended that there was no waiver? An unconditional acceptance of an assessment waives all former known grounds of forfeiture."

In the case of *Rowswell v. Aid Union*, 13 Fed. 840, the assured had neglected to pay the sum required to be paid within 30 days after the presentation of his application, which was dated April 10, 1880; but the benefit certificate was delivered to the assured on the 12th of May, 1880,—more than 30 days having passed,—and it appears that it was issued with full knowledge of the default. The certificate recites that the party to whom it was issued "is a beneficiary member of Pioneer Union, No. 46, E. A. U., in good standing"; and subsequently he was recognized as a member, by two assessments being levied upon him. Says the court: "These acts waived the default. Having formally and deliberately declared the assured to be a member in good standing, and having twice demanded his money as such member, it is too late after his death to assert the contrary. Carried to its logical conclusion, the doctrine contended for would enable the defendant to nullify a certificate after it had for years recognized the holder as a member, and assessed him as such. It is unreasonable to argue that the assured could be a member for the purpose of making contributions to others, but not a member when advantage to him or his beneficiary accrued,—a member not to receive, but only to give."

Now in this case it may be contended that there was, as to Mrs. Monger, no unconditional acceptance, because the \$1.55 is demanded as late as the 22d of May, 1897, on what is known as the "Heatwole Loss," and notification was given that failure to pay would be attended by forfeiture; but after she became a member there is evidence that she made payments as to which no conditions were attached,—as, for instance, the Boyer loss. She was notified of this loss, and that it had not been paid. Upon the notice there is not one word with respect to the Rodeffer and Carpenter losses. That this is evidence tending to show waiver of forfeiture is plain, and the right to forfeiture once waived was, of course, extinguished, and could not be revived.

The judgment of the circuit court must be reversed, and a new trial awarded, to be proceeded with in accordance with the principles herein enunciated.

CARDWELL and RIELY, JJ., absent.

(96 Va. 451)

BEATY v. DOWNING et al.

(Supreme Court of Appeals of Virginia. Nov. 17, 1898.)

ADMINISTRATORS—ACTIONS BY DEVISEES—JOINED AS ADMINISTRATOR AND DEBTOR—
SETTLING ACCOUNTS.

1. A sole legatee and devisee cannot join as defendants the administrator and an alleged debtor of the estate, on the ground of collusion between them, in a suit to compel a discovery of assets claimed to be held by the debtor in the shape of insurance on decedent's life, where the bill does not allege that the administrator knew that the debtor had the policy, or that complainant had ever mentioned it to him or asked him to ascertain under what circumstances the debtor held it, or that, having knowledge of it, he refused to inquire into the matter, or to sue to recover it, or such part of it as the estate might be entitled to.

2. Where a suit to settle an administrator's account is pending, and a bill in the same court by the sole devisee to compel a third person to discover assets in the shape of insurance on the decedent's life, and to compel the administrator to account for his failure to assert the rights of the estate to such insurance, was properly dismissed as to the third person, it was proper to also dismiss the suit as to the administrator, since the liability of the administrator for negligence in not attending to the rights of the estate in such insurance could be fully adjudged, under the same rules, in the pending suit.

Appeal from circuit court, Warren county.

Bill in equity by Kate R. Beaty against Henry H. Downing and another to compel discovery and an accounting from an administrator as to why he had not collected certain assets of the estate. From a decree dismissing the bill, complainant appeals. Affirmed.

J. A. D. Richards, L. A. Bailey, and J. M. Johnson, for appellant. John J. Williams, for appellee Downing.

BUCHANAN, J. This suit was brought by the appellant against Charles H. Yohe, administrator of the estate of Charles F. Beaty, deceased, with the will annexed, and Henry H. Downing, alleged to be a debtor of that estate.

The complainant in her bill charges that she is the widow and sole legatee and devisee of Charles F. Beaty, who died on December 9, 1891; that Charles H. Yohe qualified as administrator with the will annexed, and gave bond as such in the penalty of \$10,000, with Lewis C. Barley as his surety; that the testator at the time of his death resided in Warren county, where his property interests were situated; that Yohe, who was a resident of Alexandria, and then barely 21 years of age, was, for some purpose, brought from that city to the county of Warren to qualify as administrator; that Barley, who was also a citizen of Alexandria, and had been prior thereto a ward of Downing's, became his surety. She alleges, further, that she was informed, and so charges, that at the time of Beaty's death Downing had a contract or policy of insurance on his life, but for what consideration, or what insurable interest Downing had in his life, she had never been informed or advised; that it seems strange that no report had ever been made of that insurance when collected by Downing, considering the relationship of the parties, as before mentioned; that Yohe, as such administrator, should have ascertained why Downing had the insurance, what consideration existed therefor, and what insurable interest Downing had in the life of Beaty, all of which he (Yohe) had refused or neglected to do, and that she is therefore compelled to file the bill to discover from Downing what insurance he had on Beaty's life, what insurable interest he had, how much he had collected, and from what company. She further charged that, if Downing had any indebtedness against Beaty at the time of his death, it was not as much as the amount of insurance which he had collected, and that the residue should become and is a part of the assets of Beaty's estate; that it was the duty of Yohe, as administrator, to have compelled Downing to have made such discovery, and had a settlement with him, but that his relations to Beaty and Downing (or Barley and Downing) were such that he has not made, nor attempted to make, the discovery and settlement, and that she believes and charges that Yohe will never take any action or proceedings, at law or otherwise, to compel such settlement; that she is the owner, under the will of Beaty, of all his property, and that it is her duty and to her interest to invoke the aid of the court, in order that she may have her rights ascertained, and get the benefit of the property devised and bequeathed to her. She prays that Yohe, administrator, and Downing, be made parties defendant to the bill; that Downing be required to answer the allegations of the bill as to the contract or

policy of insurance; that Yohe be required to disclose any knowledge that he may have of the insurance, whether he ever signed any receipts or vouchers for the same, and why he has not asserted his rights as administrator to the insurance; that the amount of such insurance be paid into court, and held subject to its further orders; and for general relief.

Downing demurred to the bill, and both he and Yohe, administrator, answered it. Upon a hearing the court dismissed the bill, and from that decree this appeal was taken.

The first question to be considered is the demurrer of Downing to the bill, which is based upon the ground that there is no privity between him and the appellant, and that no such allegations are made in the bill as would authorize her to join him (Downing) as defendant with Yohe, the administrator of her testator's estate.

It is well settled that a legatee or creditor of a decedent's estate cannot maintain a suit against the personal representative of the decedent and another who is a debtor to the estate, except under special circumstances. What constitute such special circumstances as will justify such a joinder have never been limited by any precise and rigid rule. *Hagan v. Walker*, 14 How. 29, 34.

The circumstances usually relied on, and which have been held sufficient to authorize such joinder, are the insolvency of the personal representative; collusion between him and the debtor; the fact that the debtor was a partner of the decedent, or a trustee holding property for, or an agent of, the decedent. *Mitford & T. Pl. & Prac.* p. 251; *Story, Eq. Pl. § 514*; *Long v. Majestre*, 1 Johns. Ch. 305; *Hagan v. Walker*, supra. See, also, *Wilson v. Wilson*, 93 Va. 546, 25 S. E. 596, as such joinder.

The bill does not charge any of those things, nor does it charge such other special circumstances as would take the case out of the general rule. There is no allegation in the bill that the administrator knew that Downing had the insurance policy, or that the complainant had ever mentioned it to him, or asked him to ascertain under what circumstances Downing held it, or that, having knowledge of it, he refused to inquire into the matter, or to sue to recover it, or such part of it, as his testator's estate might be entitled to, even if such allegations would have been sufficient. The statements of the bill, if true,—and upon demurrer they must be taken as true, so far as they are well pleaded,—show that the administrator was grossly negligent in the performance of his duties, and were sufficient to authorize the court to require a settlement of his accounts, and to charge him with all debts lost by his failure to perform his duty, and for any devastavit committed by him. If Downing held a policy of insurance upon the life of the testator at the time of his death, and collected and retained more on account of it

than he was entitled to under the law, the administrator ought to have required him to account for the excess, and, if any loss has resulted to the estate for his failure to do so, the administrator should be charged with such loss in his administration account.

The bill not showing such special circumstances as would take the case out of the general rule, the demurrer was properly sustained, and the bill dismissed as to Downing.

Upon the bill and the answer of the administrator, the court ought, and doubtless would, have ordered an account of the administrator's actings and doings, but for the fact, as recited in the decree appealed from, that the complainant had brought a suit against the administrator for the purpose of settling his accounts in the same court, and to the same rules, as this suit was brought. There was no necessity or propriety in allowing this suit to be prosecuted for that purpose, when there was another suit pending for the same object, and in which all the relief could be had that could be obtained in this suit. The bill in this case was therefore properly dismissed, but the decree dismissing it ought to have shown clearly that it was done without prejudice to the right of the complainant to have the administrator charged with any sum which it was his duty to collect, but which he had failed to collect, from Downing, on account of the policy of insurance held by him.

This court will so amend the decree appealed from, and, as amended, affirm it.

CARDWELL and RIELY, JJ., absent.

(96 Va. 416)

RUSSELL CREEK COAL CO. v. WELLS.
(Supreme Court of Appeals of Virginia. Nov. 17, 1898.)

APPEAL—BILL OF EXCEPTIONS—RULING ON DEMURRER—INJURY TO SERVANT—DANGEROUS PREMISES—ASSUMPTION OF RISK—NEGLIGENCE OF FELLOW SERVANT.

1. A bill of exceptions is unnecessary where the lower court overruled defendant's demurrer to the declaration, inasmuch as the judgment on the demurrer could be reviewed on a writ of error.

2. The appellate court cannot look to the evidence in determining whether a ruling on the demurrer to declaration was erroneous or not.

3. In an action for damages for injuries received in a coal mine by the falling of a piece of slate from the roof wherein plaintiff was at work, it is necessary to show that the injury was "directly" caused by the failure of defendant to keep the room in a reasonably safe condition in that nature of business.

4. An instruction that if, under the rules of the defendant company, it was the duty of its mine boss to make daily visits to the room in which the miners were at work, to see whether the rooms were in safe condition for the miners, and if the mine boss neglected to do so, or if he failed to discover any threatening danger which was discoverable by use of ordinary diligence, then defendant was guilty of negligence, is not misleading, where other instructions were given that if plaintiff loosened the piece of slate which injured him, and so

caused the accident, or if plaintiff could have avoided it by ordinary prudence, then plaintiff could not recover.

5. An instruction which assumes that a mine boss is a fellow servant of a miner is erroneous, in that it fails to discriminate between the duties imposed on him which were not assignable and those affecting the mere administration of the work to be done in the mine.

6. If the place wherein a miner works was in the first instance reasonably safe, and was afterwards rendered unsafe by the negligent manner in which the mining company's mine boss directed the work therein, and the miner was injured thereby, the company is not liable, inasmuch as the mine boss and miner were fellow servants.

7. Where, from the nature of the work, the condition of the place wherein a miner worked was constantly changing, and the duty of keeping it in a safe condition in the prosecution of the work devolved on the miner and the mine boss, the miner will be deemed to have assumed the risk.

8. A servant is bound to exercise as much care for his own safety from such dangers as are known to him or are discernible by ordinary care on his part as the master is bound to exercise on his behalf, and negligence on the part of a master does not excuse the servant from a failure to exercise such care, where such failure of the servant was the cause of his injuries.

9. A coal miner of seven years' experience knew that the room in which he worked was in an unsafe condition, and promised the mine boss that he would set a prop under a piece of slate which seemed to be loose, but he did not do so. It was the duty of the miner to watch the roof all over the room, and to prop it when propping was necessary. Immediately after sending off a blast, which the miner knew might have loosened the slate, he went into the room, and started to put up his pick to see if the roof was safe, but before he touched the roof with his pick the slate fell, injuring him. *Held*, that the miner could not recover, as he had not only assumed the risks of the service, but such as became known to him in the progress of the work by ordinary care.

Error to circuit court, Wise county.

Action by R. A. Wells against the Russell Creek Coal Company. There was a verdict in favor of plaintiff, and from a denial of a motion to set aside the verdict and judgment rendered thereon, and award a new trial, defendant brings error. Reversed.

Fulton & McDowell, for plaintiff in error.
Bullitt & Kelly and O. M. Vickers, for defendant in error.

CARDWELL, J. The defendant in error (plaintiff in the court below) received injuries by the falling of a piece of slate from the roof of the coal mine of the defendant company in which he was working, and brought this suit in the circuit court of Wise county to recover damages therefor, and upon the trial judgment was rendered against the defendant company for \$2,000.

A bill of exceptions was taken to the action of the lower court in overruling the demurrer to the plaintiff's declaration. This was unnecessary, as the judgment upon the demurrer was sufficient to bring this ruling under review by this court upon a writ of error.

The declaration states a good cause of ac-

tion, and the demurrer was properly overruled. *Locomotive Works v. Ford*, 94 Va. 640, 27 S. E. 509; *Jones v. Cotton Mills*, 82 Va. 140, 147, 148; 4 Minor, Inst. 690; Code Va. § 3246.

Whether the allegata and probata correspond is another question, but this court cannot look to the evidence in determining whether or not the ruling of the court below upon the demurrer is erroneous.

The next assignment of error is to the refusal of the court to exclude evidence tending to show an accident happening away from the place where plaintiff was actually working, the grounds upon which the motion was made being that the defendant company had no notice that such proof would be offered. It is unnecessary, however, to consider this assignment of error, as the judgment complained of must be reversed for other errors, and the question is not likely to arise at the next trial.

The third assignment of error is to the refusal of the court to grant the defendant company a continuance after all the evidence had gone to the jury. This is without merit, but, for the same reason, need not be discussed.

At the trial the court gave five instructions to the jury at the instance of the plaintiff, and to the first and third the defendant company objected. They are as follows:

"No. 1. The court tells the jury that it was the duty of the defendant, except in so far as it may have been excused therefrom by the duty of the plaintiff, under the evidence, to use ordinary care and skill in the management of that kind of business for the protection of the plaintiff; and if they believe from the evidence that the defendant failed to do what, under the evidence, the jury may believe was incumbent on its part to do, in order to keep the room in which plaintiff worked in a reasonably safe condition in that nature of business, and that the injury to the plaintiff was caused by such failure, if there was any, then they should find for the plaintiff."

"No. 3. The court tells the jury that if they believe from the evidence that, under and by the rules of the defendant company, it was the duty of the bank or mine boss of said company to make daily visits to the room in which the miners were at work, for the purpose of seeing whether or not said rooms were in safe condition for the miners to continue their work, and if they further believe from the evidence that the mine boss of the defendant failed or neglected to visit the room in which the said plaintiff was at work, or failed, if he made such visit, to discover the danger which threatened the plaintiff if he continued his work in said room, if they believe such danger was threatening, and could have been discovered by the use of ordinary diligence on the part of said boss, then said company was guilty of negligence."

The objection to the first is that it does not distinguish between the proximate and remote cause of the accident complained of, and that it was calculated to mislead the jury into finding for the plaintiff, in disregard of the evidence tending to show, at least, that the proximate cause of the injury was the "shot" or "blast" made by the plaintiff shortly preceding the accident; the contention of the defendant company being that the instruction should have been so amended as to distinguish between the proximate and remote cause by inserting the word "directly" after the word "was" in next to the last line of the instruction, whereby the concluding sentence of the instruction would have read, "and that the injury to the plaintiff was directly caused by such failure," etc., i. e. the failure of the defendant company to keep the room in which the plaintiff worked in a reasonably safe condition in that nature of business, etc.

The instruction should have been so amended, and this will more fully appear when we come to discuss the evidence in the case.

The third instruction, standing alone, might have misled the jury, but the objection thereto, if any, was removed by the fifth and sixth instructions given for the defendant company.

Defendant's fifth instruction told the jury that if they believed from the evidence that the plaintiff himself loosened the piece of slate which fell upon him by picking or pulling at it, and so caused the accident, or if they believed plaintiff pulled the slate down upon himself, then they should find for the defendant; and the sixth told them that, if the plaintiff could have avoided the accident by the exercise of ordinary prudence and care, then they should find for the defendant; and that, in an employment which is hazardous, the prudence and care exercised must measure up to the dangers of the employment.

With these instructions before the jury, it is difficult to perceive how they could have been misled by the plaintiff's instruction No. 3.

The next assignment of error is to the refusal of the court to give instructions numbered 3, 7, and 9, asked for by the defendant company. No. 3 is as follows:

"The court tells the jury that, if they believe from the evidence that the accident was due to the negligence of the mine boss, then the negligence was the negligence of a fellow servant, and the plaintiff cannot recover."

This instruction proceeds upon the idea that the mine boss was, under all circumstances, to be considered as the fellow servant of the plaintiff, for whose negligence the defendant was not responsible. It should have discriminated between the duties imposed upon the mine boss which were not assignable, and with respect to which the defendant company could not relieve itself from liability, and his duties affecting the mere administration of the work, with respect to which he might properly be regarded as fellow servant of the plaintiff.

"It is the duty of the master to furnish and

maintain a reasonably safe place in which the servant is to work, and this duty is personal to the master. But if the place is reasonably safe in the first instance, and is afterwards rendered unsafe by the negligent manner in which the boss or foreman of a gang of hands directs the work to be done, in doing which an injury is inflicted, the master is not liable for such injury." *Locomotive Works v. Ford*, supra.

While it was the duty of the defendant company to provide a reasonably safe place in which the plaintiff was to work, and this duty it could not assign to another, yet if it was in the first instance in a reasonably safe condition, and afterwards rendered unsafe by the negligent manner in which its mine boss directed the work to be done, or the needed precautions taken, whereby the plaintiff was injured, the mine boss would be properly held a fellow servant of the plaintiff, or that this was one of the risks assumed by the plaintiff when he entered the employ, or when apprised of the danger and continued his work, especially if the evidence showed that, from the nature of the work, the condition of the place was constantly changing, and the duty of keeping it in a safe condition, in the prosecution of the work, devolved both upon the plaintiff and the mine boss. This instruction was calculated to mislead or confuse the jury, and therefore was properly refused.

The seventh instruction asked for by the defendant company, and refused, told the jury that the plaintiff in this case was bound to exercise as much care in his own behalf as the defendant was required to exercise in his behalf, and negligence on the part of the defendant did not excuse the plaintiff from a failure to exercise such care, if such failure was the cause of the accident.

"It is the duty of the servant to exercise care to avoid injuries to himself. He is under as great obligation to provide for his own safety from such dangers as are known to him, or are discernible by ordinary care on his part, as the master is to provide for him. He must take ordinary care to learn the dangers which are likely to beset him in the service. He must not go blindly to his work, where there is danger. He must inform himself. This is the law everywhere."

In other words, he (the servant) is under as great obligation to provide for his own safety from such dangers as are known to him, or are discernible by ordinary care on his part, as the master is to provide for him. *Bailey, Mast. Liab.* p. 159; *Wormell v. Railroad Co.*, 79 Me. 397, 10 Atl. 49; *McDonald's Adm'r v. Railroad Co.*, 95 Va. 105, 27 S. E. 821; *Zinc Co. v. Martin's Adm'r*, 93 Va. 791, 22 S. E. 869; and *Robinson's Adm'r v. Dinlany* (Va.) 30 S. E. 442.

Instruction No. 7 correctly expounded the law applicable to this case, and should have been given.

Instruction No. 8, asked for by the defendant company, was properly refused.

This brings us to the consideration of the remaining question, whether or not the evidence in the case sustains the verdict of the jury.

The plaintiff testified as follows: "I have been engaged in mining about seven years. At the time the accident happened, which was in November, 1894, * * * I had been working as a miner for the Russell Creek Coal Company only a few days. I was working in a room at the time I was hurt. I had an empty car on the track. I put a shot [blast], and then went outside in the main entry while it went off, and then went back into the room, in about twenty minutes. When I went back, I started to put up my pick to see if the roof was safe, but before I got the pick up, and before I touched the roof, the slate fell on me. It is always the custom to examine the roof after a shot. It was the miner's duty to prop the room where he was working on the gob side, but not on the track side, except within seven feet of the face of the coal. It is the company's duty to take care of the roof over the track, except within seven feet of the face of the coal. I understood it was the company's duty to look after the roof of the room on the track side or over the gangway, back of the seven-foot line. My butt, or partner, Wm. Collins, told me before the accident happened that it was the company's duty to take care of the roof over the trackway." Here follows a description of his injuries, and the witness then says: "The accident could only have been prevented by putting in a collar or cross timber, to hold up the slate which fell, and I understood it was the company's business to put in these collars or cross timbers. A collar or cross timber is timber put across from the rib of the room to the pillar on the gob side. A prop would not have prevented the slate from falling. The slate first broke loose from the rib side. The point where I was injured was about 12 feet from the face of the coal, and about 50 feet from the entrance to the room, from the main track. I fell on the trackway or gangway. The slate that fell on me was right over the trackway. The mine boss did not come into the room the morning the accident happened. I made no contract whatever with the company releasing it from taking care of the room."

Upon cross-examination, the witness, after stating his experience as a miner, says: "I have never seen any collars or cross timbers set in the Russell Creek Mine over the gangway or track in a room. As a rule, they are not necessary. It was only occasionally they had to be set. If there was loose slate over the trackway, it was necessary to either pull the slate down or to set cross timbers or collars. If there was loose slate, and the miner knew it, he would take it down if he could. The day before the accident happened, Collins, my butt [partner], had been pulling

with his pick at a piece of slate, which was in the roof about at the point where I was struck. I cannot say whether it was the same piece that fell upon me or not, but it was about the same place. Collins tried to get this piece down, but could not do it, and he told me that it was safe. I so understood him. I considered it safe. Collins was not in the room at the time the accident happened. The shot I fired might have loosened the slate which fell. I do not know whether it was loose before that or not. It might perhaps have been the shot that loosened it. After a shot is fired, it is the miner's duty to examine the room for loose slate, and, if a piece of slate falls while he is examining the roof, I suppose it is a pure accident. The miner cannot prevent it. * * * When slate or other obstructions fall on the track, the mine boss has it moved by others, or employs the miner to move it, and pays him extra for it. * * * When the miner wanted props, he went outside and sawed them the right length, and the company would have them sent in."

This is all the evidence as to how the accident happened. A witness for plaintiff, who was working in an adjoining room when the accident happened to plaintiff, after describing the slate that fell, says: "I cannot just say whether it was the duty of the company to look after the roof over the track or gangway in the room or not. I worked mostly in the entry when I worked there, and whenever I put in a collar they paid me extra for it. * * * I was never called on to put a collar across the trackway in a room, and never knew of any other miner to be. No collar was ever set in my room."

Other witnesses for the plaintiff say that no collars were ever put up in the rooms in which they worked for the defendant company, while one says that it was the duty of the miner to do his own propping in the room, except over the trackway; that the company paid the miner to move slate that fell upon the trackway; and that the witness had put collars across the trackway for which the company paid him extra, and that his understanding was that the miner and mine boss both were to watch the roof all over the room, and, if the miner found anything wrong, he would make it safe if it was on the gob side, and if it was on the track side he would call the mine boss' attention to it, and the mine boss would direct some one to fix it.

Snyder, the defendant company's mine boss at the time the plaintiff was injured, examined as a witness for the defense, says: "All collars and timbers which have been set in rooms, in the mine of Russell Creek Coal Company, have been set by the miners themselves. They are paid five cents more per car for doing their own propping and timbering. I went into Wells' [plaintiff's] room the day the accident happened, and before it occurred. He pointed out to me a piece of slate, which af-

terwards fell, and told me it was loose. I told him to set a prop on the gob side, with a cap on it, and he said he would. I then went out. He never did set any prop or timber."

This statement of Snyder is wholly uncontradicted, except as to his being in plaintiff's room the morning of the accident, although the plaintiff was recalled as a witness in his own behalf. He only attempts to excuse himself from a failure to do what Snyder states he told him to do, and what he promised to do, by showing that in his and the opinion of other witnesses, introduced in rebuttal, if he had done what the mine boss directed him to do it would not have prevented the accident. This did not meet the issue, and, subjecting the evidence to the rule governing where a case is before us as upon a demurrer to evidence, the testimony of Snyder, in so far as it is uncontradicted, is entitled to consideration, and it therefore appears that the verdict of the jury is not sustained by the evidence. It is thereby shown that if the room in which plaintiff was at work was, before he sent off the shot, just preceding the accident, in an unsafe condition, he knew it, and promised to set a prop under the piece of slate which he said was loose; but did not do it, and the evidence of the plaintiff, as well as that of Snyder, shows that it was the duty of plaintiff to watch the roof all over the room, including the trackway where stood the car he was loading, and that, if it needed propping over the trackway, it was the rule and custom in the mine for the miner to prop it, for which he received extra pay, and that the only distinction between the miner's duty as to the roof over the trackway and elsewhere in the room was that he received extra pay for removing slate off the trackway or timbering the roof over it. The plaintiff not only neglected to do as he was instructed by the mine boss and promised to do, but went almost immediately, after sending off a "shot" in the mine,—which might have, as he admits, loosened the slate which fell on him,—upon the trackway, and under the piece of slate, to see if it was loose. He says this was his duty, and it does not appear that it was the duty of the mine boss to inspect the mine after every shot, which would have been a most unreasonable requirement. Why should he have gone so directly to see if this piece of slate was not loosened by the shot he sent off if he did not know that it was loose, and that he had neglected to prop it, as he had promised, or that the shot or blast had probably loosened it, or when he knew, as he contends, that the mine boss had not inspected the mine that day? The evidence does not show that the accident was due to the neglect of defendant company to inspect the mine, but that it occurred when plaintiff was on his tour of inspection, which was a part of his duty, after each shot sent off by him. It occurred under circumstances which he says would have made it "a pure accident." He assumed the risk, and must have known the danger, as he

was not a stranger to such work. He was a miner of seven years' experience, familiar with the processes and forces used in operating the mine.

Knowing the unsafe condition of the place in which he was working, the plaintiff was not compelled to continue the work, and, if he continued the work without exercising ordinary prudence and care for his own safety, he must be held to have assumed, not only the risks ordinarily incident to the service when he entered upon it, but such as became known to him in the progress of the work, or which were readily discernible by a person of his age and capacity, in the exercise of ordinary care. *Robinson's Adm'r v. Dinlenny*, supra.

We are of opinion that the motion of the defendant company to set aside the verdict of the jury, and award it a new trial, should have been sustained. The judgment of the circuit court is therefore reversed and annulled, and the cause remanded for a new trial, to be had in accordance with this opinion.

(105 Ga. 550)

**TALMADGE et al. v. INTERSTATE
BUILDING & LOAN ASS'N.**

(Supreme Court of Georgia. Oct. 17, 1898.)

BONA FIDE PURCHASER—RECORDED DEED—DESCRIPTION.

A registered security deed reciting, as matter of description, that the land thereby conveyed is situated in a named city, county, and state, and is "known and described in Wheeler's survey of the land of the [grantor] as lot No. 3, section 22, for more particular description of which lot the application for loan made by said [grantor] on [a day stated] is hereby referred to," is sufficient to put a subsequent purchaser of this lot from the same grantor on notice as to what land was in fact conveyed by such deed.

(Syllabus by the Court.)

Error from superior court, Clarke county; N. L. Hutchins, Judge.

Action between Talmadge Bros. & Co. and the Interstate Building & Loan Association. From the judgment, Talmadge Bros. & Co. bring error. Affirmed.

J. J. Strickland and Shackelford & Shackelford, for plaintiffs in error. S. N. Evans, for defendant in error.

LITTLE, J. The statement of the case shows that on June 15, 1893, the Athens Park & Improvement Company conveyed to the Tontine Association, the predecessor in title of the defendant in error, a certain tract of land "in the city of Athens, county of Clarke, and state of Georgia, and known and described in Wheeler's survey of the lands of the Athens Park & Improvement Company as lot No. 3, section 22, for more particular description of which lot the application for loan made by said Athens Park & Improvement Company on April 22, 1893, is hereby referred to"; and that the same company, on April 19, 1894, con-

veyed to Cheatham, who subsequently conveyed to the plaintiffs in error, "all that tract and parcel of land lying and being in Clarke county, Georgia, in the city of Athens, near its western limits, containing one-half acre, more or less, and more particularly described as follows,"—then giving a detailed description of the land conveyed in this deed by metes and bounds. These instruments were duly recorded, and it was admitted that the same lot of land was conveyed in each instrument, and the only question which arose: Does the record of an older conveyance from the same grantor, who, after designating the state, city, and county in which the land lies, only further describes it by reference to a designated map and other papers, put upon the second purchaser notice as to what land was conveyed by the first instrument, under the rule of the statute that, as to subsequent purchasers, prior conveyances are notice from the time they are filed for record? Civ. Code, § 2778. Our Civil Code (section 3933) declares that notice sufficient to excite attention and put a party on inquiry is notice of everything to which it is afterwards found such inquiry might have led. Ignorance of a fact due to negligence is equivalent to knowledge in fixing the rights of the parties. In the case of *Bank v. Delano*, 48 N. Y. 326, it was held: "Where a purchaser has knowledge of any fact sufficient to put a prudent man upon an inquiry which, if prosecuted with ordinary diligence, would lead to actual notice of some right or title in conflict with that he is about to purchase, it is his duty to make the inquiry; and, if he does not make it, he is guilty of bad faith or negligence to such extent that the law will presume that he made it, and will charge him with the actual notice he would have received if he had made it." And this doctrine is supported by numerous authorities. *Wade*, Notice, § 17, and authorities cited. Where a deed is recorded, the record is not only constructive notice of the recorded deed and its contents, but it will also be notice of all other deeds and their contents to which reference is made in the recorded deed. *Tied*. Real Prop. § 817b, and authorities cited.

In order to bind a subsequent purchaser with notice, he must have actual notice of the deed, or knowledge of such facts which would set a prudent man upon inquiry; and, as a deduction from this rule, the law imputes to a purchaser a knowledge of every fact which appears upon the muniments of title, or which one should inquire after in the investigation of the title. Thus, a deed in the chain of title discovered by the investigator is constructive notice of all other deeds which were referred to in the deed discovered. *Tied*. Real Prop. § 819, and authorities cited. It is presumed that a purchaser has examined every deed and instrument affecting the title. He is charged with notice of every other fact shown by the records, and is presumed to know every other fact which an examination suggested by the records would have disclosed. 2 Devl. Deeds,

§ 710a. A deed, for a description of the land conveyed, may refer to another deed or to a map, and the deed or map to which reference is thus made is considered as incorporated in the deed itself. Where the description is by courses and monuments and boundary lines of other tracts of land, and then the deed declares that the description already made is to be according to a survey previously made by a certain person, the survey by such reference is incorporated into the deed. 2 Devl. Deeds, § 1020. See a very large number of cases cited in note 2. The object of the registry acts is to enable purchasers to obtain accurate information respecting the title of any particular piece of land; and, to accomplish this purpose, it is essential that the description of the land in the conveyance should be reasonably certain and sufficient, to enable subsequent purchasers to identify the premises intended to be conveyed; but, while the description may be inaccurate, meager, or erroneous, yet if it is expressed in such a manner or connected with such attendant circumstances as that a purchaser should be deemed to be put upon inquiry, he is chargeable with all the notice he might have obtained had he done so. 2 Devl. Deeds, § 650. Where one has sufficient information to lead him to a fact, he shall be deemed cognizant of it. *Hunt v. Dunn*, 74 Ga. 120; *Jordan v. Pollock*, 14 Ga. 157; *Urquhart v. Leverett*, 69 Ga. 92; *Johnson v. Dooly*, 72 Ga. 297; *Schmidt v. Block*, 76 Ga. 825.

The plaintiffs in error requested the court to charge the jury that, under the law, Cheatham, who was the grantee in the second conveyance, was charged with such notice only as appeared on the records under the evidence, and that the plat referred to in the deed to the association, not being recorded at the time Cheatham's deed was executed, was not notice to Cheatham, and he got a good title to the lot by his deed as against the plaintiffs. We see no error in the refusal of the court to so charge. Whether the deed to the association was or was not recorded was not necessarily material, as affording notice to Cheatham. The reference in the deed to the association to the map for description of the land conveyed made such map a part of the description, and put subsequent purchasers upon inquiry to ascertain what was the description in such map. Record of that map was not necessary to charge him with notice, but the reference to it in the deed of conveyance was sufficient to put him on inquiry as to what land was conveyed.

It is further complained that the court erred in admitting in evidence, over the objection for claimants, the fl. fa. of the association against the Athens Park & Improvement Company, on the ground that the description of the property was insufficient in law, and because the court erred in admitting in evidence over objection the plat of the lands of the Athens Park & Improvement Company, on the ground that the same was not recorded until after the execution of the deed to Cheatham. It being ad-

mitted that the lot of land described in the deed to Cheatham and that in the deed to the association was in fact the same land, and the issue in the case being whether the grantee in the second conveyance was charged with notice of the description of the land as set out in the conveyance to the association, we do not think there was any error in the ruling of the court for the causes assigned by these exceptions, and the judgment of the court below is affirmed. All the justices concurring, except LEWIS, J., disqualified.

(104 Ga. 727)

WEST v. SANDERS.

(Supreme Court of Georgia. July 18, 1898.)

INSURANCE—WAGERING POLICY—DIRECTING VERDICT.

A contract was entered into between A. and B. whereby it was stipulated that B. should take out two policies of insurance on his life,—one payable to his wife, and the other to A., who had no insurable interest in B.'s life,—and that A. should pay all the premiums on both policies until the death of B., and should receive the entire insurance on the policy in which he was the beneficiary, and one-half of the insurance collected on the wife's policy. The two policies were accordingly issued by an insurance company, and the wife of B., in writing, ratified the contract between A. and B. *Held*: (1) Such a contract is a wagering contract, contrary to public policy, and is therefore null and void. (2) In a suit by A. against the wife, or the representative of her estate, to recover one-half of the money collected by her on her policy upon the life of her deceased husband, it was not error in the court to direct a verdict for the defendant, when the testimony disclosed such a contract as the basis of the action.

(Syllabus by the Court.)

Error from superior court, Polk county; W. M. Henry, Judge.

Action by J. T. West against J. H. Sanders, administrator. Judgment for defendant, and plaintiff brings error. Affirmed.

Irwin & Bunn, for plaintiff in error. Sanders & Davis, for defendant in error.

LEWIS, J. This case is controlled by the decision this day rendered in the case of *Bank v. Loh*, 31 S. E. 459. The questions involved are so fully discussed in the opinion delivered by Presiding Justice LUMPKIN that no further elaboration of them is now necessary. Judgment affirmed.

(106 Ga. 358)

L. B. PRICE CO. et al. v. CITY OF ATLANTA.

(Supreme Court of Georgia. July 20, 1898.)

INJUNCTION—LICENSE—INTERSTATE COMMERCE—TRAVELING SALESMAN.

1. When one sought to be taxed, under a municipal ordinance, for carrying on a particular business in a named city, seeks to set aside its provisions, as to him, because of the alleged unconstitutionality of such ordinance when applied to the business in which he is engaged, the burden is on him to show clearly and un-

mistakably the nature and character of his business, as well as his exemption from the tax imposed, before he will be entitled to an injunction to restrain its enforcement.

2. When the record contains evidence fairly warranting a finding that goods manufactured in another state were shipped in large quantities to a warehouse located in this state, and at that point divided and distributed among a number of customers, who, after such shipment, had purchased different articles of these goods from a person going from house to house in a given city in this state, exhibiting samples and taking orders, which were then filled from such warehouse or distributing point, the sales so made did not in any sense constitute interstate commerce; and the person so selling became liable to a license tax, as a canvasser, imposed by the municipality.

3. A canvasser thus engaged is not a "traveling salesman," within the meaning of the act of December 14, 1896, prohibiting "the municipal authorities of any incorporated town from levying or collecting any tax or license on any traveling salesman engaged in taking orders for the sale of goods, where no delivery of goods is made at the time of taking such orders."

(Syllabus by the Court.)

Error from superior court, Fulton county; J. H. Lumpkin, Judge.

Action by the L. B. Price Company and Wilfred Paley against the city of Atlanta. Judgment for defendant, and plaintiffs bring error. Affirmed.

Lewis W. Thomas, for plaintiffs in error. J. A. Anderson and J. T. Pendleton, for defendant in error.

LITTLE, J. The L. B. Price Company and Wilfred Paley exhibited their petition to the judge of the superior court of the Atlanta circuit, making the following allegations: The Price Company are dealers in Bibles, albums, clocks, lace curtains, chenille draperies, silverware, and other household furnishings, and do business in Kansas City, Mo. Their manner of doing business is, that they employ agents, who solicit orders for the goods in which they deal, in the state of Georgia as well as in other states, by going personally to the residences of the citizens, exhibiting samples of their goods, and going from house to house and taking orders for such goods, to be thereafter delivered. The sales are made through samples shown to the customers, which samples are never sold. The salesmen receiving the orders for goods send or take them to the distributing office of the firm, to be filled and shipped either to such salesmen or to others, who, when the goods are received, deliver them to the customers from whom orders have been previously taken. In order to facilitate their business, the company has in Atlanta a warehouse or distributing point, to which goods are shipped from the Kansas City house for the purpose of filling orders taken by salesmen in Georgia. No goods are sold from this warehouse, and, when orders are brought or sent in by those taking them, said orders are filled from this warehouse or distributing point. On the 24th of January, 1898, Paley

was their agent to solicit orders in the city of Atlanta; his compensation being a certain commission on amount of sales. On that day Paley had with him samples, and was soliciting orders for the company, but did not sell or attempt to sell any of the samples. On said 24th day of January, 1898, there was in effect an ordinance of the city of Atlanta requiring persons who do business in said city for which a license is required to apply to the proper officer and procure the same before commencing business; and a penalty was provided for the infraction of the ordinance. Neither the company nor Paley had registered, nor paid any license. The ordinance imposed a tax of \$25 on canvassers in the city of Atlanta, and the petition alleged that the clerk of the council of said city had issued a *fi. fa.* for this license tax, which had been levied on the goods of the company, and on the personal effects of Paley, in order to collect the amount thereof, and that the authorities of the city of Atlanta threatened to issue other *fi. fas.*, and have the same levied, if petitioners continued to canvass for their goods in the city of Atlanta without paying the license; that Paley had been arrested and brought before the recorder for a violation of the ordinance, and his case was then pending, and the police authorities of the city threaten to arrest him and make new cases against him under the ordinance, if he continues to do business, and said authorities have threatened to arrest other agents, if they continue to canvass for orders in the city of Atlanta without paying such license. Petitioners allege that the ordinance is unconstitutional, because it is repugnant to article 1, § 8, par. 3, of the constitution of the United States, and is also repugnant to the act of 1896 of the state of Georgia, which prohibits any municipal authority from levying or collecting a tax from any traveling salesman engaged in taking orders for the sale of goods, where no delivery of such goods is made at the time the order is taken. The petitioners pray for an injunction against the city of Atlanta and the tax officers of said city, restraining them from collecting the license tax, and from arresting Paley or any other agents of the company for a violation of the tax ordinance. The defendants answered, in effect basing their defense on the averment that the property of the Price Company in Georgia is subject to taxation; that the plaintiffs do a local business, which is not interstate commerce, nor done by traveling salesmen, within the meaning of the act of 1896. They further averred that the defendants are not trying to enforce any liability of the plaintiffs to the city of Atlanta, to register their business as canvassers, or to pay registration tax as canvassers; but they aver that Paley is a canvasser, and doing business as such in the city of Atlanta, and is subject to register his business, and is therefore liable. They do not claim the right to proceed, either by execution or other-

wise, against the Price Company or their goods, for Paley's default in the matter of registration tax. On the hearing, the city introduced George H. Saxe, who swore that he was employed by the city of Atlanta in connection with the tax committee; that he was familiar with the storehouse or warehouse kept by the Price Company on Forsyth street; that said company received large shipments of goods at said place in boxes, and the boxes were opened, and the goods taken out and put upon shelves in the store; that the company had a bookkeeper, an office, and a typewriter in the store, and kept the doors of the same open; that the usual stock carried by the company amounts to \$1,200. The city further proved by Saxe and Hunter that on the day they made affidavit they were in the store or warehouse of the Price Company at No. 112 Forsyth street; that in that store there are about 20 clocks fastened or hung to the walls; that there are about a half dozen rugs in the front window of the store, and arranged so as to display them; that such rugs, or similar ones, have been in the store for a month past; that there are a good many white lace curtains, or imitation lace curtains, which are not in boxes, but are folded and put on the shelves; that the clocks now on the walls, or others like them, have been there three or four months. On the part of the company and Paley an affidavit of W. F. Crall, one of the firm of the Price Company, was introduced. This witness swore to the truth of the statements in the petition. He further stated that large shipments of goods to the warehouse or distributing house of the company at No. 112 Forsyth street were made by the Kansas City house for the purpose of filling orders for goods taken by their traveling salesmen; that sometimes the goods came in large packages; that when such was the case the several orders were taken out and laid on the shelves for the purpose of filling orders; that the goods were not put on the shelves for the purpose of selling them directly to the customers, but they were put there for convenience, awaiting shipment. He further stated that the firm kept a bookkeeper and a typewriter in the store or warehouse, but they were not used to carry on any daily retail business, but for the purpose of keeping the run of the orders sent in by their traveling salesmen, and of the goods shipped by the Kansas City house to the Atlanta warehouse for the purpose of filling orders; that the doors of this warehouse were kept open in order to receive goods and to ship the same out, and that the stock of goods on hand was not for the purpose of carrying on a retail business in the city, but they were stored there for the purpose of filling orders; that the clocks and rugs and white lace curtains are goods which have been heretofore sold on orders by salesmen, and which were refused by the customers and returned to the warehouse; and that said goods consisted

partly of goods which are kept there by the Kansas City firm as samples for traveling salesmen. After hearing argument, the court denied the injunction as to Paley.

1. The principle of law announced in the first headnote need not be elaborated at any length. It is elementary that taxation is the rule, and exemption from taxation the exception, and that one claiming to be exempt must be able to show such exemption by the clear and express provisions of some law. It is also true that one who attacks an act of a governmental body, in whom the right of taxation has been vested, on the ground of the unconstitutionality of such act, must make its invalidity clearly and unequivocally appear. The conflict between the act and the fundamental law must be clear and palpable, to warrant the courts in declaring the act unconstitutional. *Wellborn v. Estes*, 70 Ga. 390; *Howell v. State*, 71 Ga. 224. And any doubt on this point will be resolved in favor of the constitutionality of the enactment. *Scoville v. Calhoun*, 76 Ga. 263. The petition and evidence in the record of the case under consideration do not show that the orders taken by the salesmen were forwarded to the Price Company at their place of business in the state of Missouri, nor do they show that such orders were filled in the state of Missouri and shipped to Atlanta for delivery to the respective purchasers. It may be that such is implied from the language used by the member of the firm who testified on the hearing. In the petition it is stated that the orders are sent or taken to the distributing office of the firm, to be filled and shipped to the salesmen, or others, who deliver the goods, when received, to the customers from whom orders have been previously taken; that in order to facilitate the business the firm has in the city of Atlanta a warehouse or distributing point, to which goods are shipped from the Kansas City house for the purpose of filling orders taken by the salesmen in the state of Georgia; that, when orders are brought or sent in by those taking them, they are filled from this warehouse or distributing point. The evidence introduced by the city of Atlanta tended to show that the firm had a store on Forsyth street in which were placed a stock of goods of the value of \$1,200, and that the doors of the store were kept open, and a display of the goods made in the window. It was peculiarly within the province of the member of the firm who testified to clearly and unmistakably show the nature and character of the business in which said firm was engaged in the city of Atlanta. If it be true that, when orders were taken by canvassers, such orders were sent to the Kansas City house, and, being filled there, were shipped to the warehouse in the city of Atlanta for distribution, a simple statement of that fact would have obviated the necessity of any construction of the language used by the witness. If it be true that orders sent in by

salesmen were not sent direct to, and filled from the goods on hand in, the Atlanta warehouse, a statement of that fact, clearly and explicitly made, would also have obviated the necessity of any construction of language to ascertain what the witness meant. These plaintiffs in error sought an injunction against the city because, as they alleged, the tax ordinance, as to them, was unconstitutional. Whether constitutional or not depended upon the nature and manner in which they conducted their business; and if the petitioners failed to show that their business was conducted in a manner which made them exempt from this tax, when in fact they were exempt, the fault is attributable to them alone. Certainly they were not entitled to an injunction restraining the enforcement of the tax ordinance against them, unless they made it clearly appear that they were exempt from its operation.

2. Neither the petition nor the evidence in the record shows that the orders taken by the salesmen are forwarded to be filled by the Price Company at their place of business in Kansas City, Mo., nor that such orders were in fact filled at that point, and shipped to Atlanta for delivery to the respective purchasers. Neither does the record show that goods are shipped to Atlanta by the firm from Kansas City only after orders from customers have been there received. In the petition it is stated that the orders are sent or taken to the distributing office of the firm, to be filled and shipped to the salesmen, or others, who deliver the goods, when received, to the customers from whom orders have been previously taken; that in order to facilitate the business the firm has in the city of Atlanta a warehouse or distributing point, to which goods are shipped from the Kansas City house for the purpose of filling orders taken by the salesmen in the state of Georgia; that no goods are sold from this warehouse, *but, when orders are brought in or sent in by those taking them, they are filled from this warehouse, or distributing point.* The language italicized is susceptible of no other construction than that goods are lodged in the warehouse in Atlanta in advance of any orders being procured therefor, and that orders, when taken in Georgia, are brought or carried directly to this local warehouse, and filled from goods, belonging to the firm, previously shipped. Indeed, the petition alleges that the orders are taken or sent to the distributing office of the firm to be filled, and then designates the warehouse in Atlanta as a distributing point for Georgia. The evidence for the complainants tended to show that all of the statements made in the petition were true; that large shipments of goods were received at the warehouse in Atlanta from the Kansas City house, —not for the purpose of selling them directly to customers, nor for carrying on any daily retail business, but for the purpose of filling orders taken by their traveling salesmen.

Sometimes goods came in large packages, in which event separate orders were taken out and laid on the shelves, and anywhere else in the warehouse, for the purpose of filling orders. The bookkeeper and typewriter who stay in the warehouse are not used for the purpose of carrying on any daily retail business, but for the purpose of keeping the run of the orders sent in by their traveling salesmen, and of the goods shipped by the Kansas City house to the Atlanta warehouse for the purpose of filling orders. The petition and evidence clearly mean that goods are stored in the warehouse in Atlanta; that no retail business is done from the counters, but that soliciting agents go from house to house, take orders, and carry or send them in to the warehouse in Atlanta, where the orders are filled from the stock of goods therein contained. If it appeared that all orders were first sent to the Kansas City house, filled there, consolidated into one shipment, and sent in to Atlanta, the package there broken, and the separate orders, so prepared and filled in Kansas City, stored in the warehouse, awaiting delivery, a different question might arise. But that is not this case. The goods are sent into this state,—not sold, but for the purpose of being sold. While it is exclusively the province of the United States congress to regulate commerce between the states, and to protect such commerce from hostile or interfering state legislation, yet, when products are shipped from one state and lodged in another state, there to be offered for sale in open market, such products lose the character of interstate commerce, and assume a domestic character, merging and sinking into, and becoming intermingled with, the general mass of property in such state, and are subject to the laws of taxation which there exist, and the business of selling such products is alike taxable. *Manufacturing Co. v. Wright*, 97 Ga. 114, 25 S. E. 249; *Same v. Thomas, Id.*,—citing *Brown v. Houston*, 114 U. S. 622, 5 Sup. Ct. 1091. In support of the contention that Paley was engaged in soliciting orders for goods which should be regarded and treated as interstate commerce, counsel for plaintiff in error cites, among others, the case of *Range Co. v. Johnson*, 84 Ga. 754, 11 S. E. 233. In that case it appeared that the agent of the company was provided with a sample stove; that he traveled over certain territory allotted to him, exhibited the sample, took orders for the company for the purchase of such stoves from persons desiring to buy, transmitted the orders to the superintendent of the company, at his headquarters (which were sometimes in such territory and sometimes in another state), and the company thereupon, from its office and place of business (which was in St. Louis, Mo.), filled the orders, through the superintendent, and delivered the ranges as the orders were taken. But in no case did the agent sell or deliver the sample ranges intrusted to him. The company had no place

of business in Georgia, but ranges were sometimes stored in warehouses, after they were sold by sample, until delivered to the purchasers. Under this state of facts, it was held that an agent who took such orders in Floyd county, Ga., though a peddler, within the meaning of the Code of this state, was protected by the interstate commerce clause of the federal constitution against the provisions of the Code requiring a license to peddle, etc. The decision made was based upon adjudications of the supreme court of the United States. It is not necessary, and would not be proper, for us, in an informal way, to question the correctness of the decision rendered; but, for myself, I take the opportunity of saying that the principle which it rules has been at least carried to its extreme limit. The present case, however, is quite dissimilar in its facts, and the principle announced as correct in that case cannot apply here. It must follow that the license tax imposed in this case was not in conflict with the provisions of the federal constitution before referred to, and accordingly there was no error in refusing to grant the injunction on this ground.

3. The plaintiffs in error insist that Paley was a traveling salesman, and for that reason protected against the license tax imposed, by the provisions of the act of the legislature of this state approved December 14, 1896 (Acts 1896, p. 36), entitled "An act to prohibit the municipal authorities of any incorporated town from levying or collecting any tax or income license on any traveling salesman engaged in taking orders for the sale of goods, where no delivery of goods is made at the time of taking such orders." In the body of the act it is declared that it shall not be lawful for the municipal authorities of any incorporated town to levy or collect any tax or license from any traveling salesman engaged in taking orders for the sale of goods, where no delivery of goods is made at the time of taking such orders. The term "travel" has no precise or technical meaning when used without limitation. Its primary and general import is, to pass from one place to another, whether for pleasure, instruction, business, or health. *Lockett v. State*, 47 Ala. 45. Webster defines a "traveler" as one who travels in any way. Distance is not material. Black, in his *Law Dictionary* (tit. "Travel"), defines the term to mean: "To go from one place to another at a distance; to journey," etc. "Canvass" is defined in the *Standard Dictionary* of the English Language to mean: "To go about (a region or district) to solicit votes, orders, subscriptions, or the like; traverse (a district or region) for inquiry, or in the effort to obtain something; * * * to canvass a territory for a subscription book," etc. As has been said, the word "travel" has no precise or technical meaning when used without limitation. "In construing statutes, the ordinary signification shall be applied to all words, except words of art, or connected

with a particular trade or subject-matter," etc.; "and in all interpretations the court shall look diligently for the intention of the general assembly, keeping in view at all times the old law, the evil and the remedy." Pol. Code, § 4, pars. 1, 9. The subject-matter of the act frequently has quite a material bearing upon the signification of words or terms used therein. For instance, under statutes relating to the rights of travelers upon highways or streets, a resident of the county, district, or town, passing over such highway or street, even though for a short distance, or going to and from his home or business, might as well be regarded as a traveler, as a nonresident journeying through the county. So, under a statute relating to the rights of travelers or guests at hotels, a townsman or neighbor may be a traveler, and therefore a guest at an inn, as well as he who comes from a distance or from a foreign country. *Walling v. Potter*, 35 Conn. 183. The provisions of the act of 1896 apply to all the incorporated towns in this state. The term "traveling salesmen," used in that act, means to include only that class of persons engaged in selling goods, either by sample or otherwise, who travel on this business from city to city and from town to town, and whose business relations are connected with those who, in such cities or towns, are likewise engaged in business which contemplates a resale of the goods sold, or consumption in large quantities. The provisions of that act do not contemplate another and entirely different class of persons, who, in a given town or city or county, go from house to house in their efforts to take orders for goods. The latter are canvassers, not traveling salesmen, and are not embraced within the terms of the act of 1896. The court committed no error in denying the injunction, and the judgment is affirmed. All the justices concurring.

(105 Ga. 694)

KIMMEL v. MAYOR, ETC., OF CITY OF AMERICUS.

(Supreme Court of Georgia. Oct. 17, 1898.)

PEDDLER'S LICENSE—WHO LIABLE.

1. Where a municipal ordinance in one section provides that "peddlers engaged in selling any kind of merchandise, shall pay per year \$500.00," and in another section provides that "transient traders or dealers, who shall take orders for any of the following named articles at retail, shall, before offering the same for sale, or soliciting orders, take out a license to be fixed by the mayor, viz.: Clocks, watches, clothes, shirts, dry-goods, boots, shoes, hats, caps, hardware, jewelry, spectacles, silver and plated ware, fancy goods, groceries or furniture,"—an agent engaged in going from house to house, carrying samples of curtains and rugs, and taking orders for such goods, which orders are filled by his principal, is not a peddler, within the meaning of the ordinance.

2. Though such agent may in a single instance offer to sell, or even actually sell, one of the samples which he carries with him, this fact alone would not render him liable to pay the license imposed upon peddlers.

3. An agent of a firm or corporation, who goes from town to town in this state exhibiting samples of goods, and taking orders on his employer or employers for such goods from consumers, is a "traveling salesman," within the meaning of the act of December 14, 1896.

(Syllabus by the Court.)

Error from superior court, Sumter county; Z. A. Littlejohn, Judge.

G. F. Kimmel was convicted of violating a city ordinance, and from a judgment dismissing a writ of certiorari he brings error. Reversed.

W. P. Wallis and J. B. Hudson, for plaintiff in error. Jas. Taylor and F. A. Hooper, Sol. Gen., for defendants in error.

FISH, J. 1. We are of opinion that the judgment of the court below, affirming the judgment of the municipal court and dismissing the certiorari, was erroneous. The defendant in the municipal court was tried "for violating license ordinance, and peddling in the city of Americus, Ga., without license." The prosecution introduced in evidence the following section of the license ordinance of the city for the year 1897: "Peddlers engaged in selling any kind of merchandise shall pay per year \$500.00." The accused put in evidence the following portions of the ordinance: "Transient traders or dealers, who shall take orders for any of the following named articles at retail, shall, before offering the same for sale, or soliciting orders, take out a license to be fixed by the mayor, viz.: Clocks, watches, clothes, shirts, dry-goods, boots, shoes, hats, caps, hardware, jewelry, spectacles, silver and plated ware, fancy goods, groceries or furniture. Persons who from their general commercial actions or professions shall make it evident to the mayor and city council that they are not bona fide resident merchants, shall be considered transient traders or dealers." The evidence failed to show that the defendant was a peddler, within the meaning of the word "peddlers" in the municipal ordinance in question. Whether the word "peddler," when used in a municipal ordinance, without any descriptive words enlarging or qualifying its ordinary meaning, should generally be construed in the sense in which this court has decided it is used in the Code, we are not called upon to determine. Counsel representing the city cite the case of *Range Co. v. Johnson*, 84 Ga. 754, 11 S. E. 233, in which it was held that "one whose vocation is to go from place to place with a sample stove carried upon a wagon, exhibiting the sample, and procuring orders, which his employer afterwards fills by delivering through other agents the stoves so ordered, is a peddler, within the meaning of the Code of Georgia." That decision was based upon a construction of the following provisions of section 1631 of the Code of 1882, which are now embodied in section 1640 of the Political Code: "Every peddler or itinerant trader, by sample or oth-

erwise, must apply to the ordinary of each county where he may desire to trade, for a license, which shall be granted to him on the terms said ordinary has or may impose," etc. Under that decision, we think that the evidence in the case at bar showed that the accused was a peddler, within the meaning given to that word by the Code. We think it is evident, however, that the word "peddlers" in the ordinance in question was not intended to have the enlarged meaning which it has in the Code. While the license for "peddlers engaged in selling any kind of merchandise" is absolutely fixed at \$500 per year, a separate provision is made for "transient traders or dealers" taking orders for goods at retail, who are required to take out a license to be fixed by the mayor. The fact that a distinction is made in the ordinance between "peddlers" and "transient traders or dealers" taking orders for goods at retail—the former being required to pay a fixed, and what seems, for the city in question, a very high, license, and the amount to be paid for a license by the latter being left entirely to the discretion of the mayor—shows that the word "peddlers" was not intended to include transient traders taking orders for goods. In this view of the matter, we do not think it makes any difference whether the catalogue of goods in the section of the ordinance which treats of transient traders or dealers is exhaustive or not. It is sufficiently comprehensive, we think, to show that, if any particular article or class of goods was left out of the list, it was either by mere inadvertence, or for the purpose of allowing those taking orders for it to do so without paying a license for so doing. It appeared from the defendant's statement that he was engaged in going from house to house in the city of Americus, carrying samples of curtains and rugs, and taking orders for such goods, which were filled by the L. B. Price Company, of Kansas City, Mo., which he represented, and he had neither sold nor offered to sell any of the goods which he carried with him as samples. It was admitted by the prosecution that "Mr. E. L. Stanfield bought a rug from the defendant, paying for it in installments, taking a contract, and it was not delivered until two weeks after he took the order, and that he made a contract whereby the L. B. Price Company took title to the goods; that he told Mrs. Ragan that he was taking orders to be delivered in the future; and that she gave him an order to be delivered in the future." Only three witnesses were introduced by the city. One of these was the city marshal, whose testimony, except in so far as it involved mere hearsay and the opinions of the witness, was not at all inconsistent with the defendant's statement. The testimony of the second witness, Nina Postell, corroborated the statement. The only thing in the testimony which conflicted in the slightest degree with this statement of the defendant was the evidence of

the witness Leona Lee. Counsel for the city contend that her testimony shows that he came to her house, and sold her a curtain which he carried around with him, or one which he at least had in Americus at the time he took an order from her. We do not think that Leona Lee's testimony shows that the defendant sold her a curtain. Taking her evidence in the strongest light against him, and without considering it in the light of the explanation which he gave of the transaction with her, it simply shows an effort on his part to sell to her one of the curtains which he carried as a sample. According to his statement, with which her testimony is perfectly reconcilable, he did not even offer to sell her one of his samples, but intended and did undertake to fill an order which he obtained from her with a curtain which was to be forwarded to him from Birmingham, Ala., by the house which he represented, upon an order which he had obtained from another party, who had countermanded the order after he had sent it to the company which he represented. In the light of the other testimony and the admissions of the prosecution, the evidence of Leona Lee was wholly insufficient to show that the defendant's vocation while he was in Americus was different from what it appeared to be from his statement. If the only vocation in which the defendant engaged in Americus was to go from house to house, carrying samples of curtains and rugs, and taking orders for such goods, to be filled by the company which he represented, he was not a peddler, within the meaning of the municipal ordinance. That a person engaged in such business is not a peddler, where the statute or ordinance does not undertake to enlarge the ordinary meaning of the word, see *Town of Spencer v. Whiting*, 68 Iowa, 678, 28 N. W. 13; *City of Davenport v. Rice*, 75 Iowa, 74, 39 N. W. 191; *Com. v. Farnum*, 114 Mass. 267.

2. The mere fact that a person engaged in such vocation in a single instance offers for sale, or actually sells, an article which he carries with him as a sample, will not make him a peddler. If, in connection with proof of a single sale, it were also shown that he went from house to house trying to sell the goods which he had with him, we think he might be considered a peddler. But proof of a single sale of one of his samples, without more, would not be sufficient to show that he was a peddler. *Rex v. Little*, 1 Burrows, 609; *Town of Spencer v. Whiting* and *Com. v. Farnum*, *supra*; *State v. Moorehead*, 42 S. C. 211, 20 S. E. 544. See, also, *In re Houston*, 47 Fed. 539; *State v. Ray*, 109 N. C. 736, 14 S. E. 83.

3. We next consider whether the business carried on by the accused in Americus was protected from municipal taxation by the act of December 14, 1896. We think it was. That act provides that "it shall not be lawful for the municipal authorities of any incorporated town to levy or collect any tax or li-

cense from any traveling salesman engaged in taking orders for the sale of goods where no delivery of goods is made at the time of taking such orders." We are of opinion that the defendant was a "traveling salesman," within the meaning of this act. It was admitted that "the headquarters and general offices and main and principal shops [of the L. B. Price Company] are at Kansas City, Missouri, that the goods are shipped from Kansas City to the distributing points, and that the accounts are kept in Kansas City, Missouri." The defendant stated that the distributing points of the Price Company were Houston, Tex., Birmingham, Ala., and Atlanta, Ga.; that his home was in the state of Iowa, and he traveled over Georgia and several other Southern states, representing this company and taking orders for goods. He also stated that all the goods for which he took orders in Americus were shipped to him, upon such orders, from the Birmingham distributing point, and he delivered them to the customers who had ordered them. There was nothing in the evidence introduced by the city which at all conflicted with this portion of his statement, unless it be the testimony of Leona Lee, to which we have already alluded; and the evidence of the express agent at Americus, who was introduced by the defense, tended to confirm the statement with reference to the point from which the goods were shipped to the defendant. No effort was made to prove that the accused lived in Americus, or even in Georgia. We apprehend that the term "traveling salesman" cannot properly be confined simply to those persons who travel from place to place, representing wholesale houses or manufacturers, and taking orders for goods only from persons or firms who buy to sell again. It seems to us that one who represents a manufacturer or a retail house, and goes from place to place, taking orders on his house from consumers, is as much a "traveling salesman" as a drummer who confines his dealings to merchants. A drummer who goes from town to town, taking orders from manufacturers for machinery, fuel, oil, belting, or other necessary supplies, which are to be consumed in the purchaser's business, although he may take orders only from consumers, is as much a traveling salesman as he would be if he took orders for such articles only from those who purchased them with a view of selling them again. We cannot see that it makes any difference whether the person who goes from town to town, taking orders for goods, deals only with merchants or large consumers, or takes orders only from very small consumers. In either case we think he is a traveling salesman, within the meaning of the term as employed in this act. We apprehend that one purpose of the general assembly—perhaps the main one—in passing this act was to protect the traveling representatives of mercantile houses or manufacturers which are located in this state from

municipal taxation, because of the fact that the salesmen or agents of merchants or manufacturers located and holding their goods in other states can come into Georgia and take orders for such goods without paying any municipal tax whatever, being protected from such taxation by the constitution of the United States. To hold that the term "traveling salesman" does not apply to a person carrying on the kind of business in which the accused was engaged in Americus would be to hold that the agents of firms and manufacturers which are located in other states can come into the towns and cities of Georgia, and take orders for their principals from consumers in this state, unhampered by municipal taxation, and yet that the municipalities in Georgia can tax the travelling agents of our resident firms and manufacturers who undertake to do the same thing. This, it seems to us, would in a great measure defeat the purpose which the legislature had in view in passing the act. The travelling agents of dealers located and keeping their stocks of goods in other states needed no protection from municipal taxation from the lawmaking power of Georgia. It was only the travelling representatives of Georgia merchants and manufacturers who needed such protection; and we think the legislature intended to protect such agents who take orders from consumers, as well as those who take orders only from dealers. The decision of this court in the case of *L. B. Price Co. v. City of Atlanta* (decided at the March term, 1898) 31 S. E. 619, which is cited by counsel for the prosecution, is not in conflict with these views. The evidence warranted a finding in that case that the agent of the *L. B. Price Co.*, who it was claimed was a "traveling salesman," within the meaning of the act of 1896, lived in Atlanta, and canvassed that city for orders, which were filled by the Price Company from a stock of goods which was kept by the company in Atlanta. He was no more a traveling salesman than the driver of a grocer's wagon, or the grocer's clerk, who goes around from customer to customer in the city where the grocer keeps his goods and conducts his business, delivering goods which have been purchased from his principal, and taking orders on such principal for other goods. He was merely a local salesman, and it was rightly held that he was not protected from municipal taxation by the act in question.

The above rulings absolutely control the present case, and it is unnecessary to consider the constitutional question made in the record. Judgment reversed.

(123 N. C. 358)

IN RE YOUNG'S WILL.

(Supreme Court of North Carolina. Dec. 6, 1898.)

WILLS—PROBATE—NONSUIT—APPEAL—TRANS-ACTION WITH DECEDENT.

1. As the probate of a will is a proceeding in rem, the parties cannot have a judgment of

nonsuit, and thus relieve the court of its duty.

2. Error in rendering judgment of nonsuit on the contested probate of a will, will not be revised in the absence of an appeal by the caveators.

3. On an issue of *devisavit vel non*, a creditor who is a witness to and propounder of the will is competent to testify as to decedent's declarations; the witness not being an interested party, nor the attestation of the will a personal transaction with deceased, within Code, § 590.

Appeal from superior court, Forsyth county; McIver, Judge.

J. P. Fearington offered for probate the will of W. E. Young, deceased. On the issue *devisavit vel non*, nonsuit was taken, and the propounder appeals. Reversed.

Watson, Buxton & Watson and Jones & Patterson, for appellant. Glenn & Manly, for appellee.

FAIRCLOTH, C. J. The script found in the record was offered to the clerk as the nuncupative will of W. E. Young for probate, and was caveated by the heirs and distributees of Young. The issue *devisavit vel non* was transferred to the superior court for trial. The offer to probate was made by J. P. Fearington, one of the witnesses and the largest creditor, no executor being named. On the trial, the witness Fearington was asked to state the declarations of Young. This was objected to by the caveators, and excluded by the court as incompetent, under section 590 of the Code. Nonsuit was taken, and the propounder appealed.

A similar case was *Hutson v. Sawyer*, 104 N. C. 1, 10 S. E. 85, and cases cited, in which it was held that the probate of a will was a proceeding in rem, to which there is strictly no party; that, whether the acting parties are silent or withdraw, the matter is in custody of the law, and the court must retain, determine, and settle the issue; and that the parties cannot have a judgment of nonsuit, and thus relieve the court of its duty. As the caveators did not appeal from the judgment of nonsuit, we do not further consider it. The witness, not being a party, and not a distributee or legatee, is in no way interested in the issue. As a creditor, it is immaterial to him how the issue may be determined.

In *Vester v. Collins*, 101 N. C. 114, 7 S. E. 687, it was held that the act of attesting the execution of a will is not a personal transaction with the deceased, within the prohibition of section 590 of the Code. Such a witness is the witness of the law, and not of the parties. Looking at the law before, and under the Code, we hold that the judgment excluding the testimony of Fearington was erroneous.

Pepper v. Broughton, 80 N. C. 251, was relied on as a contrary decision. It does not clearly appear to be so on close examination. It was a decision under Code Civ. Proc. § 343. Two wills were offered, and both issues submitted to the same jury,—Pepper caveating one, and Broughton the other. None of the heirs or devisees of the testator took any part in the controversy. The question was as to the con-

versation between the testator and Broughton at some time; when, not stated; and the court excluded Broughton's evidence, he being interested as legatee and in the event of the action, to which Pepper and Broughton were parties. The decision treats the probate as a matter in rem, and the case seemed to turn on a matter collateral to the main issue. If, however, the opinion means what is claimed for it under Code Civ. Proc. §§ 342, 343, it must be considered overruled in *Vester v. Collins*, supra, under Code, § 590. So, Fearington not being a party, and not interested as a legatee or distributee, and being indifferent as a creditor, he can be heard to testify to the testator's declarations as if he were a stranger. Error.

(123 N. C. 349)

McGUIRE, County Treasurer, v. WILLIAMS, Sheriff, et al.

(Supreme Court of North Carolina. Nov. 28, 1898.)

TAXES—LIABILITY ON SHERIFF'S BONDS — ESTOPPEL—DEMAND BEFORE ACTION.

1. The sheriff and his bondsmen, in an action against them for the sheriff's failure to settle taxes which he has collected, are estopped to deny validity of the tax.

2. Though a sheriff who has collected taxes, but failed to pay them over, had no technical assessment roll, this is no defense to an action on his bond.

3. A sheriff being required to settle the taxes by a certain day, demand is not necessary before action on his bond.

4. Demand before action being necessary only to enable a debtor to pay without the expense of an action, he cannot be injured by want of demand, where he denies indebtedness.

5. A surety on a sheriff's bond conditioned that he "collect, settle, and pay over * * * the school poll taxes" is not liable, where this has been done, though some of the money collected for another tax has been used to pay the school tax.

Appeal from superior court, Davie county; McIver, Judge.

Action by James McGuire, county treasurer, against W. F. Williams, sheriff, and others. From a judgment for plaintiff against certain defendants, they appeal. Reversed in part.

T. B. Bailey and Jones & Patterson, for appellants. E. L. Gaither, for appellee.

DOUGLAS, J. This is an action brought by the county treasurer on the bonds of the sheriff to recover the sum of \$3,515.75, balance of unpaid taxes, with the statutory penalty of 2 per cent. per month. Only two of the sheriff's bonds are really involved, one for the collection and settlement of the school and poll tax, and the other for the general public taxes. The defendants W. A. Bailey, B. R. Bailey, and C. G. Bailey are sureties on both bonds, while the defendant W. R. Ellis is surety only on the first. The case was referred to a referee, to whose report exceptions were filed by all parties, but those of the defendants Bailey and Ellis are

the only ones that need be considered. These exceptions are as follows:

"W. F. Williams, W. A. Bailey, C. G. Bailey, and B. R. Bailey file the following exceptions to the report of G. M. Bingham, referee: (1) Because the levy of 22 cents on the \$100 worth of property for special or railroad tax was illegal and void, and without authority of law, for reason that the Acts of the Legislature of 1879 (chapter 118) do not appear from the evidence to have been ratified by a vote of the people of said county, as required by said act and the constitution of the state. (2) Because no act of the legislature authorizing said special tax levy was ever submitted to, or ratified by, a vote of the people of Davie county. (3) Because referee charged defendants with \$3,504.72 merely because the levy was made; there being no evidence nor finding by the referee that the sheriff actually collected any part of the special tax fund sued for. (4) If the court should construe the referee's report to mean that sheriff did collect a part of the special tax, then defendants except because the referee found that, at the time of the alleged settlements and payments of the sheriff to the treasurer, the sheriff, having mixed the funds collected, used \$3,097.42% of the special and ordinary fund, and paid the same on the school fund, and these defendants, sureties on said special and ordinary tax bonds, claim that they are entitled to be exonerated to the amount of the special fund so used by the sheriff in the payment of the school tax. (5) Because the referee did not charge the sureties on the school bond with \$3,097.42%, the amount of special or railroad and ordinary tax money used in the settling of school funds. (6) Defendants further except to the report because the referee ruled that the defendants W. A. Bailey, C. G. Bailey, and B. R. Bailey were primarily liable for the whole amount of alleged default, to wit, for \$3,504.72. (7) Because the referee charged said W. A. Bailey, B. R. Bailey, and C. G. Bailey with the sum of \$1,365.18, it being 2 per cent. per month interest, as a penalty for the alleged default."

"The defendant W. R. Ellis excepts to the report of the referee, for that: (1) The referee having found as a fact that all taxes levied by the county during the term of defendant Williams' office were duly collected and properly disbursed, save and except for the year 1896, and that which was collected and not disbursed was not of the school fund, but the general tax fund; and having further found as a fact the defendant W. R. Ellis had signed, during the last term of defendant Williams' office, only on the bond dated December 3, 1894, designated as 'Exhibit No. 8,' and known as 'School Tax Bond'; and having further found as a fact that the school tax levied for the year 1896 was \$1,646.14, and that the defendant W. F. Williams had paid to plaintiff on school tax for

year 1896 the sum of \$4,646.14, and that the defendant did not sign the general tax bond of the defendant W. F. Williams,—it was error on the part of the referee to hold, as a matter of law, that the defendant W. R. Ellis was secondarily liable for any part of the defalcation; that said referee should have held, from the facts found, that the defendants W. A. Bailey, B. R. Bailey, and O. G. Bailey, who signed the general tax bond dated December 3, 1894, are alone liable for the defalcation, there being no default for any part of the school fund for the year 1896, or any year during the term of office of the defendant W. F. Williams; that the referee did not have evidence upon which to support his findings as to how much of other funds was used by the sheriff in paying off to the plaintiff treasurer the amount due on school fund, and his findings as to this should not be sustained."

The defendants Bailey, who also use the name of the defendant Williams throughout, assign as error "(1) that the court committed error in the judgment rendered by overruling exceptions 1, 2, 3, 6, and 7 filed by these defendants; (2) because he rendered judgment against the defendants for any amount whatever."

The defendant Ellis assigned as error "(1) that the court committed error in the judgment rendered by failing to render judgment absolutely and alone against the sureties on the general tax bond; (2) that the court erred in charging a contribution on the part of defendant Ellis to pay any part of said judgment; (3) that the court erred in sustaining the findings of the referee as to the amount of funds collected from other sources and used by the sheriff in the settlement of his school tax, the evidence not warranting the findings of the referee or the court in such an adjudication and finding."

It appears that the full amount of the special railroad tax, and that alone, remains unsettled.

The material contentions may be briefly stated as follows: (1) That it does not affirmatively appear that the act of March 5, 1879, was ever ratified by a popular vote, and therefore the sheriff's bond cannot be held liable for a tax which, in the absence of such ratification, would be unconstitutional; (2) that the defendant Ellis, having signed only the bond under which the sheriff has fully settled, cannot be held liable, either legally or equitably, for any part of the railroad tax, even if any part of said tax had been collected and used in the payment of the school and poll tax.

The first contention cannot be sustained. The validity of the special railroad tax cannot be called in question by the defendants in this action. Admitting, for the sake of the argument, that the tax may be unconstitutional, the defendant sheriff and his bondsmen are estopped from denying the validity of a tax which he has already collected. It

appears from the report of the referee and the accompanying evidence that the railroad tax was expressly included in the regular printed receipt used by the sheriff; that the entire amount of county taxes for the year 1896 was \$13,370.16, including \$5,399.52 for school taxes, \$4,454.89 for county purposes, and \$3,515.75 for railroad tax; and that of these amounts less than \$100 remains uncollected, of which less than \$25 would belong to the railroad tax. The sheriff made no objection to the levy, nor does it appear that the collection of any part of the tax was obstructed by legal process or otherwise. To permit him now, after having collected \$3,500 in taxes, to set up the unconstitutionality of the act under which they were collected, merely as a bar to their recovery, would be in the highest degree unconscionable. This money cannot belong to the sheriff, under any construction of the law, and must be paid over to the county in accordance with the obligation of his bond to "well and truly collect and account for, pay over, and settle all the public taxes during his continuance in office." Whatever constitutional objections may have existed to his collecting the money, certainly none remain to his paying it over.

We think that a tax levy, in all respects regular upon its face, carries with it the presumption of validity. This presumption is not conclusive, but, however slight it may be, it exists, in the absence of any impeaching fact. Since the opinion in *Charlotte v. Shepard*, 122 N. C. 602, 29 S. E. 842, concurred in by every member of this court, it must be considered a settled rule that the provisions of the constitution in relation to municipal indebtedness and taxation are mandatory, and will be strictly enforced by this court. So great is their effect that any act repugnant thereto, at least to the extent of that repugnance, will be declared null and void ab initio, not only without legal effect, but without legal existence. It makes no difference when or how such unconstitutionality appears to us, but it must be made to appear; and until it does appear the presumption is in favor of the statute, at least in matters of collateral attack. We repeat that, even if the statute were unconstitutional and the tax levy consequently invalid (a question upon which we do not now pretend to pass), the sheriff could not be permitted to retain moneys illegally collected under color of his office. *State v. Woodside*, 31 N. C. 496; *Clifton v. Wynne*, 80 N. C. 145, and cases therein cited.

This reasoning applies also to the exception that the plaintiff failed to show that a tax list or assessment roll had been delivered to the sheriff. This exception appears more clearly from the brief than from the record, but it is immaterial how it appears, as it is untenable. It seems that he must have had some kind of a list in order to have known the exact amount of taxes to collect from each individual, and it appears that he did have the duplicates in stub books, as provid-

ed in section 30, c. 119, Laws 1895. All the taxes, except the special railroad tax, were properly collected and accounted for, and about the amount of the special tax there seems to be no dispute. Even if the sheriff did not receive a technical assessment roll, as its absence does not seem to have hindered him in the collection of the taxes, it need not hinder him now in paying them over.

A demand is not necessary before suit brought by the treasurer on a sheriff's bond, as the sheriff is required by law to settle on or before a day certain. Moreover, a demand is necessary only to enable the debtor to pay without the expense of an action. If, as in this case, he denies the alleged indebtedness, he cannot have been injured by the want of a demand. *State v. McIntosh*, 31 N. C. 307; *State v. Woodside*, supra; *Commissioners v. Magnin*, 86 N. C. 285.

The exception of defendant Ellis, as to his liability for any part of the special taxes, must be sustained. The only bond that he signed was on the condition that the sheriff "collect and settle and pay over to the county and state treasurer the school and poll taxes," and this obligation has been fully met. It is true that a part of the money collected as special taxes has been used to pay the school taxes, but this could be a breach only of the general tax bond. A payment in accordance with the terms of the bond cannot be a breach of that bond, and we see no ground for equitable contribution or subrogation. *Liles v. Rogers*, 113 N. C. 197, 18 S. E. 104; *Board of Education v. Commissioners of Bladen*, 113 N. C. 379, 18 S. E. 661.

The judgment of the court below is affirmed, except wherein it holds the defendant Ellis liable in equity for contribution, as, in our opinion, he is not liable for any amount whatever. The judgment is therefore modified, and affirmed.

(123 N. C. 368)

WHITAKER v. OLD DOMINION GUANO CO. et al.

(Supreme Court of North Carolina. Nov. 28, 1898.)

TRUSTEES—RIGHT TO COMMISSIONS—CONSTRUCTION OF "ETC."

1. A trustee is not entitled to a 5 per cent. commission, under the deed of trust, providing that he should have such commission "on the sale of the whole of said land sold," where there was no sale, but a postponement after it was advertised.

2. The 5 per cent. commission provided in a deed of trust for sale of the land is not meant by the word "etc.," in a contract made by the grantor with the trustee on postponing sale after advertisement, whereby it was agreed that the grantor should make certain payments, "and [pay] the costs and charges of advertising, etc., of the mortgage."

Appeal from superior court, Surry county; Starbuck, Judge.

Action by H. G. Whitaker against the Old Dominion Guano Company and others to enjoin a sale under a trust deed. From a judg-

ment allowing the trustee commissions, plaintiff appeals. Reversed.

Virgil E. Holcombe, for appellant. W. F. Carter, for appellees.

FAIRCLOTH, C. J. The plaintiff made an assignment to the defendant Purvis in trust to secure his creditors. On default, the trustee advertised a sale of the property on April 4, 1891. After chaffering, the plaintiff and the trustee agreed to postpone the sale until December, 1891; and, among other things, they agreed in writing that the plaintiff should make certain payments, "and [pay] the costs and charges of advertising, etc., of the mortgage." The trustee afterwards advertised again, and the plaintiff obtained an order restraining the sale on the ground that he had paid the debt, including "all lawful charges thereon." The trust deed provides that the trustee shall receive as a compensation 5 per cent. commissions "on the sale of the whole of said land sold," etc. When the cause was heard, his honor rendered judgment that the trustee "is entitled to commissions provided for in the deed of trust." No sale was made. The plaintiff appealed, and the trustee's right to commissions is the only matter for us to determine. The same question was presented in *Pass v. Brooks*, 118 N. C. 397, 24 S. E. 736; and it was held that the trustee was not entitled to commissions, and the reasons given. It was also held, on the authority of *Boyd v. Hawkins*, 17 N. C. 336, that the trustee was entitled to "a just allowance for time, labor, services, and expenses under all the circumstances that may be shown before a master," when the court sees fit to make it. These cases were followed in a similar case. *Fry v. Graham*, 122 N. C. 773, 30 S. E. 330. The defendant, however, insists that the word "etc." in the contract, means and includes commissions in its connection, and relies on *Gray v. Railroad Co.*, 11 Hun, 70. That was a boat contract, and the defendants agreed to take the boat, "provided, upon trial, they were satisfied with the soundness of her machinery, boiler, etc." The court held that the word "etc." was for construction by the court, and was not for the jury, and that "etc." meant "other things"; that is, other material parts of the boat. In *Hayes v. Wilson*, 105 Mass. 21, the contract was for "sixty-one days' work on house, etc." The court allowed the jury to consider whether "etc." included work on the lot around the house. Another case was a sale of "china, wearing apparel, linen, etc."; and the last word was held to include things ejusdem generis; also, "all my furniture, etc.," included things ejusdem generis. It would probably be safe to say that in these and other like cases, where the sense of the abbreviation may be gathered from the preceding words, there is sufficient certainty; but where the abbreviation cannot be understood, and affects a vital part of the contract or instrument, the uncertainty will be fatal.

The word "etc." ("et cetera"), in the case be-

fore us, does not necessarily mean commissions. It may mean expenses and moneys necessarily expended in the legitimate discharge of fiduciary duties. "Commissions" means compensation for selling. Charges and expenses are incidental, and for money paid out in the discharge of the duties of the office. Without undertaking to harmonize the nice distinctions above referred to, we think it better to adhere to the plain rule laid down in the first three cases cited above; and in doing so we find the judgment erroneous, in allowing commissions, upon the agreed state of facts. Error.

(53 S. C. 563)

DAVENPORT et al. v. LATIMER et al.
(Supreme Court of South Carolina. Nov. 24, 1898.)

VENDOR AND PURCHASER—SPECIFIC PERFORMANCE—PLEADING—EVIDENCE—PURCHASER'S DEFAULT—INNOCENT PURCHASER—WAIVER—CONTRACT—INFERENCE OF ABANDONMENT—REASONABLE TIME.

1. The heirs of a vendee may sue for specific performance.

2. A complaint for specific performance, stating facts entitling plaintiff to compensation for a breach if specific performance was impossible, is not demurrable as alleging a cause of action for damages only.

3. Specific performance is not a matter of absolute right, but rests in the sound judicial discretion of the court, guided by established principles.

4. Where a purchaser did not comply, or offer to comply, with the contract, and showed no satisfactory excuse for his failure, and delayed for two years to bring suit after a refusal to deed, specific performance will not be decreed, even if the delay to sue did not amount to laches.

5. Pending a suit on a mortgage which both a vendor and purchaser in an executory contract for the sale of the mortgaged land were contesting, the vendor could not be required to satisfy the mortgage within 30 days, by a decree for specific performance.

6. Where a purchaser bought relying on the vendor's covenant of warranty against a mortgage, he could not refuse payment of the price because it was exceeded by the amount claimed on the mortgage, foreclosure of which both he and his vendor were contesting.

7. Specific performance will not be decreed against a vendor where it was made impossible by his deed to an innocent purchaser.

8. Strict performance of the contract is waived by the vendor consenting, subsequent to a default, to accept payment for a deed within a reasonable time.

9. Where a vendor is in possession, and his purchaser has not complied with his agreement to pay within a reasonable time, a subsequent purchaser from the vendor with notice thereof has a right to infer that the former purchaser has abandoned his right to specific performance.

10. A vendor's agreement to deed on the purchaser's making payment "promptly" means within a reasonable time.

11. Where a vendor agreed, July 25th, to deed if the purchaser made payment within a reasonable time, an offer to pay, not made until November 15th, is an unreasonable delay.

Appeal from common pleas circuit court of Greenville county; O. W. Buchanan, Judge.

Suit by Nancy Davenport and others against Jos. P. Latimer and others. From

a decree for plaintiffs, defendants Jos. P. Latimer and Alfred Johnson appeal. Reversed.

Jos. A. McCullough, for appellants. Blythe & Blythe, for respondents.

JONES, J. This is an action by the heirs at law of the vendee against the vendor and his subsequent grantee for the specific performance of a contract to sell land. The contract is as follows: "That the said J. P. Latimer agrees to put the said Irvine Davenport, on January 1st, 1891, in possession of that tract of land, situated in Oak Lawn township, Greenville, S. C., adjoining lands of Amanda Davenport, W. P. Culbertson, Geo. Terry, and others, and containing twenty-six acres, more or less, and to convey said land to said Davenport by a good warranty deed, dower of my wife to be renounced, on his paying me \$100 on January 1st, 1892, \$100 January 1st, 1893, \$100 on January 1st, 1894, with interest on the whole from January 1st next, at the rate of eight (8) per cent. per annum, the interest to be paid or computed annually at said rate as aforesaid. The said Irvine Davenport agrees to take possession of said land on January 1st next, or make the payments as above specified, with interest as aforesaid; and further agrees that, in default of paying either principal or interest, that the whole sum agreed to be paid shall immediately become due; that said Davenport further agrees that in default of payment of principal or interest as aforesaid for the space of thirty days to give possession of said premises to the said J. P. Latimer. In witness whereof, we have hereunto set our hands and seals this 19th day of November, A. D. 1890. [Signed] J. P. Latimer. [L. S.] Irvine Davenport. [L. S.] Attest: W. P. Turner. M. G. Batson."

Under this agreement Irvine Davenport went into possession of the premises. On December 18, 1891, he paid \$100, the first installment. On April 14, 1893, he paid \$105, for which Latimer gave him a receipt, containing also these words: "Upon the payment of the balance of the purchase money, with interest, at maturity, I bind myself, my heirs and assigns, to execute or cause to be executed to said Irvine Davenport, or his order, valid and good title to said tract of land" (describing it). This payment was the last payment made or tendered on said said contract. On the 16th day of January, 1894, Latimer wrote a letter to C. J. Davenport, a son of Irvine Davenport, then living in Texas, in which he stated: "I am ready to make the deed to you for your mother for the land, 26½ acres, at any time you will forward the balance of purchase money. * * * Send the money to any one here you may wish, * * * and I will execute a proper deed, guaranteed, and copper-fastened, to be made to you for this land." On the 13th day of April, 1894, Richard Lenhardt

brought an action against Thomas Moore and Irvine Davenport, to which action, by subsequent amendment, J. P. Latimer was also made a party defendant, for the foreclosure of a mortgage alleged to have been given by Thomas Moore on the 8th day of December, 1887, to Dill & Flemming, on the land in question, to secure a note for \$238 by Moore to Dill & Flemming on same day. Latimer had acquired this land by sheriff's deed under execution sale against said Moore. The amount alleged to be due on said mortgage in the complaint was \$183.96, with interest from December 8, 1888, at rate of 10 per cent. per annum. Irvine Davenport and J. P. Latimer both answered; the former, on May 22, 1894, denying generally the allegations of the complaint, and specifically the allegations as to the amount claimed to be due on said mortgage. That action has never been tried, and is now pending in the court of common pleas for Greenville county.

On the 13th day of June, 1895, Irvine Davenport died, intestate, leaving the plaintiffs in this action as his only heirs at law. Some time in the fall of 1895, J. P. Latimer took possession of the premises, and received the rents thereof for the year 1895. There was no evidence to sustain the finding by the master, concurred in by the circuit court, that J. P. Latimer received the rents and profits of said land for the years 1896 and 1897. According to Dr. Latimer's testimony, which was not contradicted in any way, he received only the rent for the year 1895. Nor was there any evidence to sustain the finding of the master, concurred in by the circuit court, as follows: "The rent has been received by the defendant Latimer for 1895-96; and, as he is now [July 14, 1897,—date of filing the master's report] in possession, it is presumed that he will receive the rent for the present year." The master found the amount due on the contract for sale of land, calculated up to January 1, 1898, to be \$160.85; that the rental value of the land was \$24 per year; and therefore, deducting the rents for 1895, 1896, and 1897, which he found that J. P. Latimer received, he found the net balance due on the contract to be \$88.81. The facts found and reported by the master substantially as stated above are supported by the evidence, except in the particulars named, and except as will be hereafter noticed. The master's conclusions of law thereon were: (1) That plaintiffs are entitled to specific performance of said contract on payment of said sum of \$88.85. (2) That the suit pending for foreclosure is a cloud upon the title, and this fact was sufficient to justify Irvine Davenport in his lifetime, and the plaintiffs since his death, in their refusal to make any further payment upon the contract till that claim is removed. (3) That defendant Latimer is liable to have judgment rendered against him requiring him to remove the cloud upon the title, and to execute and deliver to plaintiffs a good and sufficient

conveyance of said premises, with renunciation of his wife's dower, upon payment of the sum of \$88.85. (4) That upon failure of defendant to remove the cloud upon the title, and execute said conveyance, plaintiffs are entitled to have judgment against him for the sum of \$205, with interest from January 1, 1895, as the date of eviction. (5) That, should plaintiffs fail to pay the \$88.85 on a day certain upon the removal of the cloud upon the title, then defendant Latimer is entitled to a judgment for the sale of the premises, to provide for the payment of the said sum of money; the balance, if any, in case of such sale, to be distributed among plaintiffs according to their rights. The circuit court overruled all the exceptions of defendants to the master's report, and confirmed said report. The circuit court decreed that J. P. Latimer remove the cloud from the title by paying off or satisfying the said mortgage within 30 days from the date of the decree; that, upon the satisfaction of said mortgage, plaintiffs, within 30 days thereafter, pay defendant Latimer the said \$88.85, balance due on said contract; that upon said payment the defendant Latimer, within 30 days thereafter, execute and deliver to plaintiffs a good and sufficient conveyance of the premises described in the complaint, with renunciation of his wife's dower therein; that, should defendant Latimer fail to remove the cloud upon the title to said land, then that plaintiffs have leave to enter up judgment against him for the said sum of \$205, with interest from January 1, 1895, and the costs of this action, and to enforce the collection of the same by execution; that, should defendant Latimer remove the cloud upon the title, and plaintiffs fail to pay to him the said sum of \$88.85 within the time indicated, then the master should sell said land at public auction, and dispose of the proceeds as provided for in his report; that the decree is without prejudice to the rights of defendant Lenhardt on account of the said mortgage set up in his answer herein. The defendants Latimer and Johnson appeal on a number of exceptions set out in the record. We will consider the case first from the standpoint of the vendor, Latimer, as if no question is involved concerning the rights of the defendant Johnson, who claims as grantee of Latimer, without notice of the alleged equity of the plaintiffs.

1. As to the demurrer interposed by defendant Latimer, that the complaint did not state facts sufficient to constitute a cause of action: The record shows that the demurrer was to be heard after the testimony was taken. No specifications were filed with the demurrer, and it seems that neither the master nor the circuit court has specifically ruled thereon. Perhaps the hearing of the case on its merits may be treated as an overruling of the demurrer. The demurrer was not well taken on the grounds specified in the exception. In overruling the same we may brief-

ly say: (1) That plaintiffs, as heirs at law of Irvine Davenport, deceased, have the right to bring this action, as under the theory of the complaint the equitable title in the premises alleged to have belonged to Irvine Davenport on his death intestate descended to his heirs at law, and so whatever right he had to require specific performance from the holder of the legal title descended to his heirs at law. (2) The complaint is not demurrable as alleging a cause of action for damages only, which should be tried on the law side of the court. The primary right set up in the complaint is equitable, and the claim for damages is incidental to, and intimately connected with, the equitable right claimed. Therefore, while it may be that a court of law could have rendered relief in damages, still, the court of equity, having exclusive jurisdiction of the equitable primary right, and concurrent jurisdiction with the court of law as to the incidental and alternative right to damages or compensation, is competent to administer full relief according to the ultimate rights of the parties. *Hammond v. Foreman*, 48 S. C. 175, 26 S. E. 212. (3) The complaint states facts which, if true, would entitle plaintiff to a specific performance of the agreement alleged, or, if specific performance was impossible, to compensation for breach. After setting out the relation of plaintiffs to the vendee, the contract between vendor and vendee, and the payment by the vendee in part performance, the complaint alleged: "Sixth. That the said J. P. Latimer, at the time said contract of purchase was made, and at all times thereafter, up to the time of the last payment, assured the said Irvine Davenport that there were no incumbrances on said land, and that the title thereto was clear; but about that time he discovered that there was an outstanding mortgage covering this land, which is recorded in the register of mesne conveyance's office for said county, and remains unsatisfied of record; and the holder thereof, the defendant Richard Lenhardt, claims that the same is unpaid, and brought suit to foreclose the same in the lifetime of the said Irvine Davenport, to which he made him and the said J. P. Latimer parties defendant. Seventh. That when the said last payment became due, on account of the facts above set forth, the said Irvine Davenport demanded of the said Latimer that he satisfy said mortgage, and tender him a deed to the land free of incumbrances; but the said Latimer refused to do so. Pending the controversy on this point, the said Irvine Davenport died. Eighth. That, after the death of the said Irvine Davenport, the plaintiffs, as his heirs at law, offered to carry out said contract of purchase, and pay to the said Latimer the balance due thereon; but the said Latimer refused to receive the money, or to make them a deed thereto, claiming that the failure to pay the balance promptly when due was a forfeiture of the contract on the part of the said Irvine Davenport, that the rights

of himself and his heirs were forfeited thereby, that said contract was now null and void, that all his rights as fee-simple owner were restored, and that he is now entitled to the possession thereof. * * * Eleventh. That these plaintiffs are now, as the heirs at law of the said Irvine Davenport, ready to comply with said contract, and ask to be allowed to pay the balance of the purchase money into court."

2. As to the findings of fact and failure to find facts by the circuit concurring with the master: (1) There was error in finding that J. P. Latimer received the rents of the premises for the year 1896, and would receive the same for the year 1897. As stated above, the evidence only warranted a finding that J. P. Latimer received the rents for the year 1895. Hence the amount found to be due on the contract should only be reduced by the rents for the year 1895. (2) There was error in finding that J. P. Latimer was in possession of the premises after 1895. The case does not, as it ought to do, show when this action was commenced. The record before us dates the summons January 14, 1895. This is probably January 14, 1896, as the complaint alleges the death of Irvine Davenport in June, 1895, and as the reference was in November, 1896. The complaint also alleged that defendant Latimer had attempted to sell the land to defendant Johnson, and had put Johnson in possession. The answer of defendant Latimer admitted that subsequently to the death of Irvine Davenport, and before the commencement of the action, he did sell to his co-defendant Johnson the tract of land in dispute, and put him in possession thereof. The testimony shows that J. P. Latimer took possession of the land some time after July 25, 1895, and that on the 14th day of November, 1895, when one of the plaintiffs (W. V. Davenport) called to see J. P. Latimer in reference to the land, Latimer told Davenport he had sold the land to Alfred Johnson. (3) There was error in failing to find that Irvine Davenport knew of the mortgage alleged to be a cloud upon his title, at the time of the execution of the agreement to sell the land. W. P. Turner, a witness to the agreement, testified that: "The matter of the Lenhardt mortgage was discussed before the paper was executed. That Dr. Latimer told Mr. Davenport that he would stand between him and all damage on account of this mortgage, which Mr. McKelvey held at that time. After that suit was brought, I heard Davenport say that Dr. Latimer was to assume that mortgage, and that he (Davenport) was to testify as a witness in the case. * * * At the time Mr. Davenport was sued on the mortgage, I heard him say that they had got the thing wrong; that he had nothing to do with it. He had the papers, and said he was going to take the papers to Dr. Latimer. He said the doctor was to stand between him and all danger. He had the doctor's bond for title, and it was as good as gold." There was no testimony

conflicting with this. (4) There was absolutely no testimony whatever to sustain the allegations of the complaint as contained in the sixth, seventh, and eighth paragraphs thereof, as quoted above. (5) There was no testimony whatever tending to show any tender or offer to pay the balance due on the contract by either Irvine Davenport in his lifetime, or by any of the plaintiffs after his death. On the contrary, the evidence shows that Dr. Latimer stood ready and willing to execute the deed in accordance with the agreement, certainly as late as July 25, 1895, when he said to one of the plaintiffs that he would make the title if any of them would pay the balance due on the land "right away" (as W. V. Davenport testified),—"promptly" (as Dr. Latimer testified). Nothing further was done until in November, 1895, when W. C. Crompton, for W. V. Davenport, went to Dr. Latimer to ascertain the amount he held against the place, at which time Dr. Latimer said he had sold the place, and would have nothing further to do with it. But it appears that even after this,—some time late in November, 1895,—when W. V. Davenport met Dr. Latimer, and the subject was again discussed, Dr. Latimer told Davenport that, if Johnson would give up the land, and the parties would comply with the contract, he would make title. (6) There was nothing in the testimony to show that either Irvine Davenport in his lifetime, or his heirs at law after his death, failed to pay or tender the balance due for the purchase of the land because of the existence of the Lenhardt mortgage. The testimony does not disclose why the vendee in his lifetime did not comply, nor why his heirs at law did not comply, or offer to comply, within a reasonable time after Dr. Latimer notified W. V. Davenport, one of the heirs, that he would make the deed, provided they paid the balance due promptly.

3. Applying the principles of equity to the facts in this case: Specific performance is not a matter of absolute right, but rests in the sound judicial discretion of the court, guided by established principles. Generally, a vendee cannot maintain an action against a vendor for specific performance of a contract to sell land, unless he shows that he has complied, or offered to comply, with the contract on his part, and this has been refused by the vendor. But, since equity leans to compensation in preference to forfeiture, the vendee, if he cannot show exact compliance with the contract on his part, may still have specific performance, or compensation, provided he is not guilty of laches in the assertion of his claim, stands ready and willing to comply, and shows reasons satisfactory to the court in excuse of his failure to comply. Plaintiffs have not brought themselves within this principle, for, as stated, they have not complied, or offered to comply, and have shown no reason in excuse of their default, even if it be conceded that an action brought two years after default on the contract is not

laches under the circumstances of this case. But it may be argued that the existence of the Lenhardt mortgage was sufficient to justify the failure to pay the balance of the purchase money, the amount claimed on the mortgage being in excess of the balance due on the purchase money, and probably equal to the value of the land. This, if there were no obstacle in the way, might have justified the court in decreeing for a deposit of the balance of the purchase money, and a deed of the premises, with adequate security against the result of the pending suit on the mortgage. But the court, pending the suit on the mortgage, which both vendor and vendee were contesting, could not require the vendor to pay off or satisfy the contested mortgage within 30 days from the decree, on a condition precedent to the payment of the balance due by the vendee. Further, the vendee knew of the Lenhardt mortgage when he contracted to purchase the land. The payments made by him were made with this knowledge. The evidence shows that he was relying for his protection against the mortgage upon the covenants of warranty by the vendor. He could not, therefore, refuse to comply with his contract because of the contested mortgage, of which he had notice before contracting. This principle was recognized in *City of Charleston v. Blohme*, 15 S. C. 124, where the court said: "If, however, the purchaser, at the time of the sale, knows of the defects in the title, or has means of knowing of them, and fails to avail himself of such means, he cannot afterwards refuse to comply upon the ground of such defect." The vendee, having contracted with his eyes open to the knowledge of the incumbrance, if the warranty deed of the vendor is insufficient to protect him, must suffer the consequence of his own negligence. Then equity will not decree specific performance against the vendor when performance is impossible. The evidence shows that, after waiting a reasonable time after July 25, 1895, for the heirs of the vendee to comply, he sold the land to his co-defendant Johnson. The legal title not being in defendant Latimer at the time of the decree, it is impossible for him to comply. It is true, if his inability to comply is the result of his own fault, equity, as well as law, on a proper case, could make him render compensation.

Further, the decree of the circuit court wholly ignores the rights of the defendant Johnson. The vendee cannot have specific performance against the grantee of the vendor unless the vendor is himself liable, and unless the grantee takes with notice of the vendee's equity. In this case the vendor was in possession of the premises when he sold to Johnson, and put him in possession. There is no suggestion of any fraud or collusion between Latimer and Johnson, and no evidence tending to show that Johnson had any notice of plaintiffs' equity. If it be so that, being privy in estate with Latimer, Johnson is af-

fected with the notice or knowledge of Latimer, then he had a right to infer from the possession of the land by Latimer, and the failure of the heirs of Davenport to comply within a reasonable time after July 25, 1895, that the heirs had abandoned their equity to compel specific performance. In the case of *Doar v. Gibbes, Bailey, Eq. 371*, the court held that "specific performance of an agreement to sell land will not be enforced against the vendor where the vendee has neglected to comply with conditions stipulated by the agreement within the time limited by it, and the vendor has, in consequence, sold and conveyed to another purchaser." That case also decides another well-established principle, viz. that "time is not usually of the essence of a contract for the sale of lands, but it may become so if the delay is injurious, and especially where a period is fixed within which a condition is to be performed in order to complete the contract." We think the evidence in this case would warrant the conclusion that the vendor waived the strict performance of the contract as to time by consenting July 25, 1895, to make the deed, provided the heirs of the vendee complied promptly. This would give them a reasonable time after the date in which to comply. As they had nothing to do but pay the money, it was unreasonable to wait until the middle of November before attempting to ascertain the amount claimed to be due. Plaintiffs did not express their willingness to comply until the filing of the complaint, at which time they knew another purchaser was in possession. We are therefore of the opinion that the decree of the circuit court must be reversed, and that the case be remanded to the circuit court for such further proceedings as may be proper or necessary in accordance with the views herein announced.

(53 S. C. 414)

ALLEN v. COOLEY et al.

(Supreme Court of South Carolina. Oct 25, 1898.)

PARTNERSHIP—DISSOLUTION—RIGHTS AND LIABILITIES OF PARTNERS—SURETIES—TRUSTS—INSOLVENCY—RECEIVERS—APPOINTMENT—MOTIONS—NOTICE—PLEADING—PARTIES—JUDGMENT—CORRECTION—APPEAL—JURISDICTION.

1. Under Act 1897 (22 St. at Large, p. 510), requiring notice of an application for a receiver to be given to the party whose property is sought to be affected, without prescribing how such notice shall be given, and Code Civ. Proc. § 409, subd. 2, providing that service of notice may be made on a party by leaving the paper at his residence, with some person of suitable age and discretion, service of such notice by leaving copies of the papers with the wife of such party, at his place of residence, in his absence, was sufficient, where he was not absent from the state.

2. Where the notice of an application for a receiver was served on the adverse party by leaving copies of the papers with his wife, at his place of residence, and he appeared by counsel at the hearing, submitted a verified answer, and otherwise resisted the motion, personal service of such notice was waived.

3. On motion for appointment of a receiver, plaintiff is entitled to open and reply, under the provision of rule 59, that the actor or party submitting any motion or special matter shall begin and close.

4. In a proceeding by a retiring partner against his former co-partner, who retained the assets and assumed the liabilities of the late firm, to compel the application of such assets to the payment of such liabilities, the creditors are not necessary parties.

5. Where one of two partners on the dissolution of their partnership retained all the assets and assumed all firm debts, and released his co-partner from any liability therefor, the relation between them became that of principal and surety, as between themselves, though both continued liable to the firm creditors; and therefore the retiring partner, as such surety, was entitled to the appointment of a receiver, in an action for his protection against such liabilities, and for the preservation of such assets from waste and misapplication, on showing that they were in danger of being dissipated by the continuing partner.

6. Partnership assets left in the hands of the remaining partner, on the dissolution of a firm, with an obligation on his part to apply them to firm debts in exoneration of the retiring partner, thereby become impressed with a trust for such purpose, which the latter may enforce in equity.

7. In an action by a retiring partner to enforce an obligation of the remaining partner to apply to partnership debts assets of the firm left in his hands for such purpose on the dissolution of the firm, it is not necessary to allege the insolvency of defendant.

8. The insolvency of defendants is sufficiently alleged by averments that executions against one of them have been returned nulla bona, and, in substance, that the other has no property that can be subjected to his debts.

9. A complaint by a surety to compel the principal to pay the debt need not allege an attempt of the creditor to enforce such liability against plaintiff.

10. The fact that a retiring partner has fraudulently transferred his real estate does not affect his right to sue to compel his former co-partner to pay the partnership debts, which he assumed on the dissolution of the firm, and for which purpose he was provided with sufficient funds.

11. Where the circuit judge, in an order appointing a receiver, made an inadvertent error in fixing the value of the property, and the consequent amount of the bond to be given by defendants in order to entitle them to move to vacate such order, he had power to correct such error.

12. A receiver need not give notice of an application for instructions as to his duty under a state of facts set out in his petition.

13. An order directing a receiver in the performance of his duties is not beyond the jurisdiction of the court, though notice of an appeal from the order appointing such officer has been given, where the return on appeal has not been filed.

14. Under Act 1897 (22 St. at Large, p. 510), requiring notice to be given of the appointment of a receiver, where "the party claiming the property cannot be found in the state," jurisdiction to make an order directing such receiver in regard to his duties is not affected by the fact that notice of such appointment has not been served, in the absence of evidence that the party claiming the property cannot be found in the state, especially where such appointment was made at a hearing at which he was represented by counsel, in a cause to which he had become a party by answer.

Appeal from common pleas circuit court of Abbeville county.

Action by B. Berry Allen against D. K. Cooley and another for the appointment of a receiver and for other relief. From certain orders therein, defendants appeal. Affirmed.

The opinion of Judge Aldrich in the court below was as follows:

"Application for the appointment of receiver of the property and assets of the late firm of Allen & Cooley, noticed to be heard before me at Pickens on March 10, 1898, at 10 o'clock a. m., and, by consent and agreement of counsel, heard at Greenville at 8 p. m., same day. Plaintiff's attorneys read the complaint, notice of application, and affidavits upon which the motion was made. Mr. E. G. Graydon read answers of D. K. Cooley and Thomas D. Cooley, affidavit of D. K. Cooley, and numerous other affidavits, resisting the motion, covering the entire case; strenuously defending the conduct of the defendant D. K. Cooley as well as that of T. D. Cooley in the transaction assailed. After the argument of Mr. Cothran for the plaintiff, and Mr. Watkins for the defendant T. D. Cooley, Mr. Graydon raised the objection for the first time that the notice of the application had not been personally served upon the defendant D. K. Cooley, and that he could not be affected by the present proceeding. The sheriff's return shows that diligent search was made for D. K. Cooley, and that he could not be found, and that the notice was served upon the wife of D. K. Cooley at his notorious place of residence in Lowndesville. Under section 409, subd. 2, of the Code of Civil Procedure, I hold that the service was sufficient. I hold further that, if the service were defective, the defendant D. K. Cooley has waived all objection thereto by the action of his attorneys hereinbefore set forth.

"The plaintiff and the defendant D. K. Cooley had been in the mercantile business, as partners under the firm name of Allen & Cooley, for many years, at Lowndesville, S. C. On September 30, 1897, they, by mutual consent, dissolved the partnership. It was agreed at the dissolution that D. K. Cooley should pay B. Berry Allen the sum of \$5,107.50 for his interest in the property of said firm, in satisfaction of which Allen accepted about 800 acres of land belonging to the firm, at a valuation of \$3,500, and the two notes of D. K. Cooley, indorsed by T. D. Cooley, for \$790 each, payable November 1, 1898, and December 1, 1898; the defendant D. K. Cooley making to the plaintiff a deed to his interest in the said partnership land. The defendant D. K. Cooley executed at the same time an instrument in writing assuming all the indebtedness of the old firm, and releasing Allen from all obligation in the payment of the same. The entire assets of the firm, except the 800 acres, were turned over to D. K. Cooley, who continued business at the same place. On the 7th or 8th of October, 1897, Mrs. K. W. Allen presented to D. K. Cooley a note for \$2,000, dated Novem-

ber 20, 1891, purporting to be signed by Allen & Cooley, and demanded payment of D. K. Cooley. The latter said that he knew nothing about it, that it was not on his books, and that he did not intend to pay it. On the following day, D. K. Cooley attempted to transfer the stock of goods to his brother, the defendant T. D. Cooley, at ninety cents on the dollar. He went to the insurance agent, and had the policy of insurance changed to T. D. Cooley's name. A few days thereafter he returned to the insurance agent, and told him that T. D. Cooley had been unable to procure the funds with which to pay for said stock of goods from a kinsman from whom he expected to get it, and declared that the trade was rescinded, and procured a retransfer of the insurance. On November 1, 1897, Mrs. K. W. Allen commenced suit upon the \$2,000 note. On November 8, 1897, D. K. Cooley executed a bill of sale to T. D. Cooley of the said stock of goods, store fixtures, etc., for the expressed consideration of \$3,580, \$2,000 of which was to be paid to the Bank of Anderson upon a note of Allen & Cooley, and the remaining \$1,580 was to be paid to B. Berry Allen upon the notes of D. K. Cooley indorsed by T. D. Cooley. T. D. Cooley on November 24, 1897, paid the bank \$2,000, took up the note of Allen & Cooley with the collaterals, which he delivered to D. K. Cooley. On December 9, 1897, D. K. Cooley executed to T. D. Cooley a mortgage on the stores he had received in the dissolution agreement to secure an alleged debt of \$714 for services as clerk and bookkeeper to the firm of Allen & Cooley. The mortgage was recorded January 13, 1898, four days before the court met at Abbeville, during which the case of Mrs. Allen v. D. K. Cooley was to be tried. This suit resulted in a verdict for Mrs. Allen of \$2,990, upon which judgment was duly entered, execution issued, and on February 9, 1898, returned unsatisfied. On February 12, 1898, this action was commenced. The defendants assail the plaintiff's right, under the circumstances, to the relief asked for, and insist that, admitting all allegations of the complaint to be true, the plaintiff is not entitled to the appointment of a receiver. To this proposition I will address myself.

"The plaintiff's case, as made by the complaint, is that the partnership is dissolved; that in the dissolution D. K. Cooley assumed the debts of the old firm; that these debts amounted to \$11,536.72; that D. K. Cooley received good assets amounting to \$18,598.02, besides two stores and a dwelling house, with which to pay said debts; that the debts have not been paid, and claims to a large amount have been placed in attorney's hands for collection against the said Allen; that other suits have been instituted; that D. K. Cooley has entered into a fraudulent scheme with his brother, T. D. Cooley, by which all the visible assets of the late partnership have been transferred to the latter, and the real

estate of D. K. Cooley incumbered with a mortgage which will exhaust all of it, outside of his homestead exemption; that nulla bona returns have been made upon the executions issued against D. K. Cooley; that T. D. Cooley is without means; that the assets of the partnership are being wasted and misapplied; and that there is imminent danger of loss to the plaintiff, in having to pay the debts which D. K. Cooley assumed upon the dissolution. If these facts be true, I have no hesitation whatever in saying that the plaintiff is entitled to the relief he prays for. This relief is worked out upon the plainest principles of equity and justice. When one partner retires, and is paid by the remaining partner for his interest in the business, the remaining partner, who assumes the debts of the old firm, becomes the principal debtor, so far as the creditors of the firm are concerned, and the retiring partner occupies the relation of surety. No private arrangement can, of course, affect the rights of creditors, but the retiring partner is entitled to all the rights and consideration which the law accords to the favored surety. 'On dissolution of partnership, a partner who receives property of the firm and assumes the firm debts is, as to the other partners, the principal debtor; and they are his sureties, and may sue to compel him to pay the debts, without having paid them themselves.' *Graham v. Thornton* (Miss.) 9 South. 292; *Colgrove v. Tallman*, 67 N. Y. 95; *Smith v. Sheldon*, 35 Mich. 42; *Rawson v. Taylor* (Ohio) 27 Am. Rep. 464. 'When a partnership is dissolved, and one partner purchases the interest of the other in the partnership property, and assumes and agrees to pay the partnership debts, he thereby becomes, in equity, the principal debtor, as to such debts, and the other his surety; and a creditor having notice of such agreement is bound by such relationship.' *Colgrove v. Tallman*, 67 N. Y. 95, 23 Am. Rep. 90. 'If a partnership is dissolved, and one of its members agrees to discharge all of its liabilities, a note subsequently executed by him in the firm name, in consideration of a pre-existing partnership indebtedness, extending the time for its payment, cannot be enforced against his co-partners, if the payee knew of the existence of the agreement, because after such agreement the position of the other partners was that of surety to the partner who had agreed to pay the debt, and the creditor should not be allowed to make a new contract extending the time of payment without their consent. The new note is therefore binding only upon the partner who executed it.' *Leithauser v. Baumelster* (Minn.) 49 N. W. 660.

'The relation of principal and surety being thus unquestionably established, a court would not deny relief to a surety who makes it appear that his principal is insolvent, and is wasting and fraudulently transferring his property, which is stamped with the trust of being applicable to the debt. 'A court of

equity, upon the application of a surety who apprehends injury from further delay, may compel the principal debtor to discharge his debt past due, although the surety has not been sued, and has not paid the debt.' *Norton v. Reid*, 11 S. O. 593. A fortiori will the court of equity afford relief when the surety has been sued to judgment, and the trust property is being fraudulently disposed of. The court, in *Norton v. Reid*, supra, quotes with approval the remarks of Lord Keeper North in *Ranelagh v. Hayes*, 1 Vern. 189, as follows: 'Although the surety is not troubled or molested for the debt, yet at any time after the money becomes payable on the original bond this court will decree the principal to discharge the debt; it being unreasonable that a man should always have such a cloud hang over him.' It would be equally unreasonable to hold that a surety should stand by and see the property which is, in all good conscience and fair dealing, applicable to these debts, dissipated by the fraudulent conduct of the remaining partner. I am not without express authority sustaining this position which strongly commends itself to my judgment. 'Where, upon the dissolution of a partnership, one partner is authorized by agreement between the partners to close up the firm business, and its property and assets are turned over to him, upon his agreeing to hold the other parties harmless, notwithstanding his right, under the contract, to exclusive possession, if the bill shows that he is wasting or misapplying the funds, or that there is danger to the remaining partners from his insolvency or fraudulent conduct, a sufficient case is stated to justify a receiver.' *High*, Rec. p. 506. 'And where, upon a dissolution, a retiring partner transfers his interest to the remaining partners on condition that they assume all the firm indebtedness and agree to hold him harmless, such agreement does not release him as to the firm's creditors, but he assumes a position of surety as to the remaining partners. Where they act in violation of the terms of the agreement, as by sending the firm's money beyond the state, or are otherwise wasting and misapplying the funds, or where the retiring partner is sued for the firm's debts, or there is danger of such suits by reason of the insolvency of the remaining partners, the court may appoint a receiver of the firm's assets upon the application of the retiring partner.' *Beach*, Rec. § 580; *West v. Chasten*, 12 Fla. 315; *Drury v. Roberts*, 2 Md. Ch. 157. 'Where the security of an administrator of a deceased partner, who purchased the firm assets and bound himself to pay the firm debts, and who has died, leaving firm debts unpaid, and firm assets, is insufficient, the court may appoint a receiver to receive from said administrator the partnership assets in his hands, and to proceed to collect the same.' *Shackelford v. Shackelford*, 32 Grat. 481. 'Although an injunction will not be granted merely on the ground of the dissolution of the partner-

ship, it will be granted where there is a violation of duty in the partner, or breach of contract.' *Ellis v. Commander*, 1 Strob. Eq. 192. 'And a receiver will also be granted * * * if there had been abuse of the assets, and there is danger of further misapplication, and he is insolvent.' 2 Bates, Partn. § 1001. 'There must be some palpable breach of contract or of duty, or some misconduct amounting to fraud, or such as will endanger the property and the rights of the partner who has withdrawn, in order to justify this court's interference by injunction and receiver.' *Walker v. Trott*, 4 Edw. Ch. 39; *Colly. Partn.* 196, 197. 'Where continuing partners have agreed to apply the assets to the debts of the old firm, and one of the partners in the new firm misapplies them, a receiver will be appointed.' *Coddington v. Tappan*, 28 N. J. Eq. 141. 'When, upon the dissolution of a partnership, its members form new firms, under agreement to apply the partnership assets in their hands to the payment of debts of the old partnership, and one of the firms converts to their own use or misappropriates such assets, or their conduct induces the conclusion that they have been or are likely to be untrue to the trust so reposed in them, the court will take the partnership assets out of their hands, and place them in the hands of a receiver.' *Id.*

'The defendants' counsel insisted at the hearing that the creditors of Allen & Cooley should have been made parties to the suit, and that the action would not lie for that reason. It is a sufficient answer to this position to say that the objection is that of defect of parties, and should have been made by demurrer or answer, which was not done.

'Another objection was that it was not alleged in the complaint that D. K. Cooley is insolvent. The complaint alleges that nulla bona returns have been made upon executions issued against him, and I have always supposed that that was the highest legal evidence of insolvency. Besides, I do not think that such allegation is essential. When it is alleged that suits have been commenced and judgments obtained against the retiring partner, and the assets have been fraudulently transferred, a sufficient case of *quia timet* is made out.

'I will now consider the testimony in this case, and determine whether, in my opinion, the truth of the allegations of the complaint is established:

'The dissolution occurred on the 30th of September, 1897. The business was turned over to D. K. Cooley, who continued to run it. It does not appear but what his intention was to continue it indefinitely. No satisfactory reason is apparent why he should so suddenly change his plans, unless it is found in the facts about to be referred to. On October 8, 1897, Mrs. K. W. Allen, wife of the plaintiff herein, presented to D. K. Cooley a note for \$2,000 signed by Allen & Cooley, and dated November 20, 1891. Cooley stated

that he knew nothing about it, and did not intend to pay it; that it was not on his books. The very next day D. K. Cooley attempted to transfer the stock of goods to Thomas D. Cooley. In his answer he admits this, but offers no explanation of his sudden change of plans. He admits also that he went to the insurance agent, and procured the transfer of the policy of insurance to T. D. Cooley, and that a few days thereafter he returned to the insurance agent, and telling that, his brother having failed to procure the funds from a kinsman with which to pay for the stock of goods, the trade was off, procured a retransfer of the policy. Shortly thereafter, on November 1st, the summons and complaint in the case of K. W. Allen v. D. K. Cooley, on the note referred to, were served upon the said D. K. Cooley. It seems to have started again the train of thought and action interrupted by the failure of T. D. Cooley on October 8th to procure the funds from his kinsman; for on November 8th D. K. Cooley executed an alleged bill of sale to T. D. Cooley of all the stock of goods, iron safe, and store fixtures, for the consideration of \$3,580, \$2,000 of which to be paid to the Bank of Anderson, on December 3d, upon a note of Allen & Cooley, and the remainder, \$1,580, to B. Berry Allen, upon the two notes executed by D. K. Cooley for Allen's interest in the business, indorsed by said T. D. Cooley. T. D. Cooley claims to have paid to the bank this \$2,000 out of his own funds, realized from the drug business of Cooley & Speer, and from his peddling clocks and Bibles during the spring and summer of 1897. It is incredible to me that he should have accumulated such a surplus in so short a time from such sources. The complaint alleges that he was a young man living on a salary such as is usually paid to a clerk or book-keeper in a country store,—little if any more than was necessary for his support,—that he supported his family from said salary, that his home is unpaid for, and that he has been paying for it by monthly installments to a building and loan association. These statements are not denied by either defendant in his answer, and I take them to be true. It is also admitted on all sides that a few days after the attempted transfer of the property from D. K. Cooley to Thomas D. Cooley the trade between them was declared off, on account of T. D. Cooley's inability to raise the necessary funds. This was about the 8th of October, yet on the 8th of November T. D. Cooley found himself prepared to consummate a trade which he failed to do thirty days previous, with funds received from the two enterprises referred to. In other words, on October 8th he failed to get money from a kinsman as he expected, and between that time and November 8th he realized enough to consummate the trade, from a source to which he does not seem to have looked at all on October 8th. They attempted to explain this by saying that the first trade was

that T. D. Cooley should take the entire business of Allen & Cooley, and pay all the debts, that the debts amounted to \$12,000, and that he was unable to raise that amount. This, I think, is an afterthought; for, in D. K. Cooley's answer (paragraph 7), he states with particularity that the trade was rescinded 'because of the inability of his co-defendant to raise the money to pay this defendant for the said stock of goods.' None of the money would have gone to D. K. Cooley, if the afterthought had been the true relation of what the agreement was; it would have gone to the creditors. My opinion is that D. K. Cooley's first impression, when the note was presented to him, was to transfer the entire business to his brother to defeat Mrs. Allen; for some reason, he concluded that that was not the best thing to do, and rescinded the trade; that, when the suit was commenced on the Allen note, he saw that the 'Philistines were upon him,' and his brain evolved the scheme now relied upon.

"The affidavits satisfy my mind that, between the 8th and 24th of November, D. K. Cooley collected considerable money from the business of Allen & Cooley, turned it over to T. D. Cooley, who deposited it to the credit of Cooley & Speer, and drew against it on November 24th to pay the \$2,000 bank note. The plaintiff presents the affidavit of B. F. Mauldin, cashier of the Bank of Anderson, to which is attached the following checks of Allen & Tennent, which were paid to D. K. Cooley for cotton: October 8, 1897, \$200. The check is indorsed by D. K. Cooley and by T. D. Cooley, to whose credit it appears to have been deposited. November 11, 1897, \$20.50. This is indorsed by D. K. Cooley, and was deposited in the Bank of Anderson to the credit of Cooley & Speer. November 16, 1897, \$198.82. This is indorsed by D. K. Cooley, and was deposited in the Bank of Anderson to the credit of Cooley & Speer. November 22, 1897, \$585.38. This was indorsed by D. K. Cooley, and was deposited in the Bank of Anderson to the credit of Cooley & Speer. These aggregate \$1,004.70 of D. K. Cooley's money directly traceable to T. D. Cooley's possession, and just about the time when T. D. Cooley was admittedly impecunious, on October 8th, and needed funds to take up the bank note of \$2,000. It also appears that on November 18th D. K. Cooley sold a lot of cotton to Allen & Tennent, and insisted on having the money, and not a check. The amount was \$869. This fact, taken in connection with T. D. Cooley's statement that he paid off the bank note of \$2,000 with a check of Cooley & Speer, \$1,150, and cash, \$850, constrains me to the conclusion that every dollar paid by T. D. Cooley on the bank note was furnished by D. K. Cooley covertly, to falsely present the appearance of bona fides to the transfer from him to T. D. Cooley. After December 1st all checks paid to D. K. Cooley by Allen & Tennent appear to have been deposited to his credit, and

not to the credit of Cooley & Speer. It appears also that T. D. Cooley had a claim of several years' standing, amounting to \$1,750, against D. K. Cooley, for money loaned while the latter was a fugitive from justice; that he also had a claim for \$714 for services against the firm of Allen & Cooley. These two claims, amounting to \$2,464, do not appear to have been considered at all in the trade between the two brothers. It seems unreasonable in the extreme that T. D. Cooley should have paid out \$2,000 in cash to D. K. Cooley, or for his benefit, at a time when D. K. Cooley was owing him \$1,750, with six years' interest, and \$714 besides. It is compatible with the view I have taken, that T. D. Cooley was paying out D. K. Cooley's money when he took up the bank note. This note was not due until December 3d. Why T. D. Cooley anticipated the payment on November 24th is not explained.

"At the time of dissolution, D. K. Cooley presented a statement showing the assets and liabilities of the partnership. It does not include the real estate belonging to the firm, which consisted of a tract of 800 acres of land, two stores, and a dwelling house in the town of Lowndesville. The tract of land was allotted to Allen, and the other real estate to Cooley. The valuation placed upon the tract of land, as stated in D. K. Cooley's answer, was \$3,500. The other real estate is estimated in the complaint at \$1,700, and there is no further evidence as to its value. Estimating the 800 acres at \$3,500, and the other real estate at \$1,700, the—

Total assets of the firm were.....	\$44,071 84
Deduct liabilities	\$11,536 72
And bad debts.....	8,737 10
	<u>20,273 82</u>
Net assets	\$23,798 02
Deduct real estate to	
Allen	\$ 8,500 00
And Cooley's notes.....	1,580 00
	<u>5,080 00</u>
Leaving for Cooley.....	\$18,718 02
Charged with the debts.....	<u>11,536 72</u>
Net for Cooley.....	\$ 7,181 30

"The plaintiff has directly traced to the possession of D. K. Cooley, in only four items, the following receipts from the business of Allen & Cooley:

Proceeds of cotton sold Harper and Latimer	\$ 1,722 95
Proceeds of cotton sold E. R. Horton	4,367 06
Proceeds of cotton sold Allen & Tennent	2,603 10
Proceeds of cotton seed.....	1,000 00
	<u>\$ 9,693 20</u>
To this may be added amount received from T. D. Cooley for certain mortgages	315 00
	<u>\$10,008 20</u>

"These five items above aggregate a little over \$10,000 received by D. K. Cooley, and, according to his own statement, he has paid out a little over \$7,000 on the debts. There

should be in his hands, then, almost enough to pay the outstanding debts of Allen & Cooley, which amount to \$3,500, exclusive of the K. W. Allen judgment. In February, after the Allen judgment was obtained, D. K. Cooley stated to Mr. Heath, a salesman for Franks & Co., creditors of Allen & Cooley, that he would not pay any of the claims against Allen & Cooley until he got rid of the Allen judgment. I am satisfied that the desire on the part of D. K. Cooley to evade the payment of this note was the moving cause of all his schemes, and in his effort to do so he cared not what became of his obligations to pay the other creditors.

"The defendants insist that the plaintiff does not come into court with clean hands, because he has conveyed the real estate acquired by him to his wife. It does not appear that he has no other real estate; and, whether or not that conveyance was in fraud of the creditors of Allen & Cooley, it will be time enough to inquire when those creditors whom D. K. Cooley contracted to provide for complain.

"The affidavits submitted by the defendants attacking the validity of the K. W. Allen note, upon which judgment has been obtained, are not relevant to this issue, and are stricken out.

"The order appointing a receiver in this case, signed March 11, 1898, was prepared very hurriedly, on the eve of my departure from Greenville for Aiken; and there is a manifest error in it, which I desire to correct. The value of the assets of Allen & Cooley is fixed in that order at \$2,500, and the bond at \$5,000. From the foregoing statement, it is apparent that this is incorrect. The net assets which went to D. K. Cooley—

By the agreement were.....	\$18,718 02
It appears that he has	
paid out	\$7,518 90
And that T. D. Cooley	
has paid bank.....	2,000 00
	<u>9,518 90</u>

D. K. Cooley should have assets	
worth	\$ 9,199 12
But deduct therefrom for losses....	<u>4,199 12</u>

Leaving him with assets cer-	
tainly worth	\$ 5,000 00

"The bond required of him should therefore have been fixed at \$10,000. The amount fixed in the order as the value of the assets of Allen & Cooley was intended to refer only to the assets in the possession of T. D. Cooley, claiming an interest therein under any contract, lease, or conveyance thereof from the alleged owner, D. K. Cooley. It is fixed at \$2,500; and the latter, having given bond to account for it at that valuation, is, of course, not affected by the correction.

"I find as conclusions of fact: (1) That the partnership of Allen & Cooley has been dissolved. (2) That in the dissolution D. K. Cooley assumed the payment of all the debts of the old firm, and released B. Berry Allen from all obligation thereupon. (3) That the

debts amounted to \$11,536.72, and that D. K. Cooley received assets of the value of \$18,718.02 with which to pay them. (4) That there are judgments and other debts outstanding and unpaid against the said firm of at least \$3,500,—the exact figures not being available,—in addition to the K. W. Allen judgment. (5) That the defendant D. K. Cooley, having determined to resist and evade the payment of the K. W. Allen note, fraudulently conspired with the defendant T. D. Cooley, who was cognizant of his purpose, to transfer all the visible assets of the firm of Allen & Cooley received by him in the agreement of dissolution to the said T. D. Cooley, with intent to hinder, delay, and defraud the said K. W. Allen and the other creditors of Allen & Cooley. (6) That nulla bona returns have been made on the executions lodged against the said defendant D. K. Cooley. (7) That the assets of the said partnership received by D. K. Cooley are being wasted and misapplied. (8) That the plaintiff is in imminent danger of being required to pay the debts of Allen & Cooley assumed by D. K. Cooley in the said agreement of dissolution.

"I find as conclusion of law: (1) That the plaintiff is entitled to the relief prayed for in the complaint.

"An order has heretofore been passed appointing a receiver of the assets of said firm. Let the original affidavits read upon this hearing be forthwith filed in the office of the clerk of the court of Abbeville county. It is further ordered that the value of the assets of Allen & Cooley transferred to, and now in the possession of, D. K. Cooley, be, and hereby is, fixed and adjudged at the sum of five thousand dollars (\$5,000); and the said D. K. Cooley, by giving bond as provided by law, in the penalty of ten thousand dollars (\$10,000), may apply for the discharge of the receiver herein, as against himself."

Exceptions of defendants were filed as follows:

"The defendants, David K. Cooley and Thomas D. Cooley, except to the order appointing a receiver in the above-stated case, dated March 11, 1898, and also to the decree herein, dated March 24, 1898, on the grounds stated below; respectfully submitting that his honor erred in the following particulars: First. In not holding that the complaint is fatally defective, and is insufficient to base an application for the appointment of a receiver upon, for the following reasons: (1) That it does not allege that the plaintiff has any debt against D. K. Cooley that is due, but, on the contrary, alleges that the debt is not due, and will not be due until next November, and does not allege that the plaintiff is a creditor of the firm of Allen & Cooley. (2) That it does not allege that said defendant Thomas D. Cooley is indebted to the plaintiff, or to the firm of Allen & Cooley. (3) That it does not allege that at the time of the sale of the said stock of goods, or at the time of the giving of the said mortgage, T. D. Cooley

was a creditor of the said firm of Allen & Cooley, or either of them, and therefore states no cause of action under the assignment act of this state. (4) That it does not state that any creditor has attempted, or is about to attempt, to make any money out of the said plaintiff, or that there is any immediate danger of his having any of the debts to pay. (5) That the complaint shows on its face that the partnership heretofore existing between the plaintiff and D. K. Cooley has been dissolved by mutual consent, an account stated and agreed to, and that the plaintiff has received his full share of the partnership assets, and has no longer any interest in said business. (6) That the complaint fails to state that plaintiff has any right to any of the property mentioned in the complaint, or that either of the defendants is selling or making way with any of said property so as to injure the plaintiff during the litigation. (7) That it does not allege that either of the defendants is insolvent, but, on the contrary, shows that D. K. Cooley is abundantly able to pay any judgment that may be rendered against him. (8) That the complaint does not allege that the price paid by said Thomas D. Cooley for said stock of goods is not a full and fair price for the same. Second. In holding that the objection of the defendants that the creditors of Allen & Cooley should have been made parties to the action should have been taken by demurrer or answer, which was not done; he having no right at chambers to pass upon a demurrer, and having himself so held in this case. Third. In holding that it is not necessary to allege in the complaint that D. K. Cooley is insolvent. Fourth. In speaking of the debt secured by mortgage on the stores as 'an alleged debt of \$714 for services as clerk and bookkeeper of the firm of Allen & Cooley'; there being no evidence whatsoever that it was 'an alleged debt,' and there being clear and positive proof that it is a bona fide debt of Allen & Cooley to T. D. Cooley for services rendered to said firm. Fifth. In stating, 'It does not appear but what his intention was to continue it indefinitely;' said statement being irrelevant to the issues involved in this case. Sixth. In making this statement: 'On November 8th D. K. Cooley executed an alleged bill of sale to T. D. Cooley,' etc.; there being no evidence whatsoever offered by the plaintiff, except the unsupported statement of his complaint, that the bill of sale was not bona fide, and the overwhelming and uncontradicted proof offered by the defendants being that Thomas D. Cooley paid out of his own funds to the Bank of Anderson the sum of \$2,000, due there on a note of Allen & Cooley, and is able and ready to pay the two notes to B. Berry Allen at their maturity. Seventh. In finding that the statements of the complaint are true as to the said Thomas D. Cooley having worked for a salary little more than sufficient for the support of his family, etc.; the proof being that the said Thomas D. Cooley was not mar-

ried until the fall of 1895, and the said finding being irrelevant to the issue involved herein, in the absence of an allegation that the said defendant had no other sources of income, and in the face of uncontradicted evidence that he has been for some years engaged in a prosperous mercantile and peddling business, and has had for years money lent out at interest. Eighth. In finding that it was an afterthought in Thomas D. Cooley to say that according to the first trade he was to take the entire business of Allen & Cooley, when the complaint of the plaintiff states in the seventh paragraph thereof that the said D. K. Cooley 'bargained his stock and business to his brother,' and that allegation is not denied by either answer. Ninth. In finding 'that, between the 8th and 24th of November, D. K. Cooley collected considerable money from the business of Allen & Cooley, turned it over to T. D. Cooley, who deposited it to the credit of Cooley & Speer, and drew against it on November 24th to pay the \$2,000 bank note'; there being no evidence offered by the plaintiff to support such finding, and evidence offered by the defendants showing that the four checks mentioned in B. F. Mauldin's affidavit submitted by plaintiff were paid for with the money of Cooley & Speer, and the evidence being, as stated a little further on in the decree, that the \$2,000 note was paid with a check of Cooley & Speer for \$1,150 and \$850 in cash. Tenth. In finding that 'these [four checks] aggregate \$1,004.70 of D. K. Cooley's money directly traceable to T. D. Cooley's possession'; there being no evidence offered by the plaintiff that any of them, except the check for \$200, fully explained by T. D. Cooley, went into T. D. Cooley's possession, and the evidence offered by the defendants being that the other three checks were bought by the firm of Cooley & Speer with their own money, and in the usual course of business, and according to their usual custom, which was for the benefit of both the seller and the buyer. Eleventh. In finding 'that every dollar paid by T. D. Cooley on the bank note was furnished by D. K. Cooley covertly'; there being no evidence offered by the plaintiff to sustain that finding, and the evidence offered by the defendants showing that the money with which the bank note was paid belonged to T. D. Cooley. Twelfth. In finding that it was unreasonable for T. D. Cooley to have paid out \$2,000 for D. K. Cooley at a time when D. K. Cooley owed T. D. Cooley \$2,464, with six years' interest on \$1,750. Thirteenth. In making the following finding of fact: 'That the defendant D. K. Cooley, having determined to resist and evade the payment of the K. W. Allen note, fraudulently conspired with the defendant T. D. Cooley, who was cognizant of his purpose, to transfer all the visible assets of the firm of Allen & Cooley, received by him in the agreement of dissolution, to the said T. D. Cooley, with intent to hinder, delay, and defraud the said K. W. Allen and the other creditors of

Allen & Cooley.' Fourteenth. In finding as a fact 'that the assets of the said partnership received by D. K. Cooley are being wasted and misapplied.' Fifteenth. In finding 'that the plaintiff is in imminent danger of being required to pay the debts of Allen & Cooley in the said agreement of dissolution.' Sixteenth. In finding as a conclusion of law 'that the plaintiff is entitled to the relief demanded in the complaint.' Seventeenth. In not finding and holding that, when answers are filed positively and explicitly denying all the material allegations of the complaint, the plaintiff is not entitled to the appointment of a receiver after the answers are filed, unless he offers evidence to sustain the allegations of the complaint and disprove the statements of the answers. Eighteenth. In not holding that the plaintiff is not entitled to the appointment of a receiver in this case; both the defendants having filed answers before the hearing denying all the material allegations of the complaint; the plaintiff not having offered any evidence to sustain said allegations; and the defendants having gone further than they are required by law to do, and offered positive evidence disproving all said allegations. Nineteenth. Because the said order and decree are contrary to law, and without evidence to support them. Twentieth. Because his honor should have held that the plaintiff had no standing in a court of equity, for the reason that he does not come with clean hands, and for the further reason that he does not offer to surrender the property of the firm received by him in the agreement for dissolution, and does not offer to do anything himself for the protection of the creditors. Twenty-first. In allowing plaintiff to open and reply."

"The defendant D. K. Cooley further excepts to the said decree, and the said order appointing a receiver, on the grounds stated below, respectfully submitting that his honor erred in the following additional particulars: First. In holding that the service of the notice of application for the appointment of a receiver, and the order of injunction on the wife of this defendant, was sufficient to bind this defendant and give his honor jurisdiction to pass the said order. Second. In not holding that he had no jurisdiction of this defendant, by reason of the fact that the said notice and order were not served upon him. Third. In holding 'that, if the service were defective, the defendant D. K. Cooley has waived all objection thereto by the action of his attorneys hereinbefore set forth'; his attorney having made the objection at the beginning of his argument, and the objection to the jurisdiction being one that is never waived, and can be taken at any stage of the proceeding. Fourth. In finding that 'the plaintiff has directly traced to the possession of D. K. Cooley, in only four items,' \$9,692.20; the evidence being that this defendant paid out in cash for cotton bought by him \$3,737.44, and that his cot-

ton-seed purchases amounted to about \$793.14, and he paid in cash therefor about \$591.72. Fifth. In finding that this defendant has paid out a little over \$7,000 on the debts of Allen & Cooley; the evidence being that this defendant has collected of the assets of said firm the sum of \$7,708.71, and paid out \$7,518.90, besides the \$2,000 paid by T. D. Cooley to the Bank of Anderson, which statement of payments is made further on by his honor in his said decree. Sixth. In finding that this defendant sold to Allen & Tennent on November 18th a lot of cotton for \$866, and demanded the cash for it; there being no evidence to sustain such finding, except the unsupported statement of B. Berry Allen, not made under oath. Seventh. In finding that the debts of Allen & Cooley now unpaid amount to at least \$3,500; he having found in a preceding part of his decree that the debts of the said firm amounted to only \$11,536.72, and that this defendant and T. D. Cooley had paid thereon \$9,518.90, which would leave a balance due of \$2,017.82. Eighth. In changing the valuation of the assets fixed by his order appointing a receiver at \$2,500 to \$5,000, and in changing the bond from \$5,000 to \$10,000, without notice to this defendant; the said order having been already filed with the clerk of the court, and having fixed the rights of the parties. Ninth. In not finding and holding that this defendant has acted in perfect good faith, and has done all in his power to collect the assets and pay the debts of Allen & Cooley. Tenth. In not finding that there is no evidence that this defendant has wasted or misapplied the assets of said firm, or done anything else to the prejudice of the creditors of said firm. Eleventh. In striking out the affidavits submitted by this defendant to show that at the time the plaintiff and his wife swore this defendant was at Lowndesville, November 20, 1891, and directed the plaintiff to sign the alleged note to the said K. W. Allen, this defendant was in Graves county, Kentucky. The said affidavits being responsive to the issues raised by the pleadings, and this being an action between other parties, and not between the said K. W. Allen and this defendant, this defendant has the right to show, as against the plaintiff, or any one except the said K. W. Allen, that the said judgment is not a valid debt of Allen & Cooley or of this defendant, and that it was obtained by the fraud of the said plaintiff.

"The defendant D. K. Cooley also excepts to the order made by his honor on March 24, 1893, directing the said receiver to proceed to collect the debts due to Allen & Cooley, and also excepts to his order refusing to vacate and set aside the said order, on the following grounds: First. Because his honor had no right to make said order without notice to the said defendant or his attorneys. Second. Because his honor was without any jurisdiction or authority to make said order. Third. Because, notice of appeal to the su-

preme court having been given from the order appointing a receiver, the circuit court has no longer any jurisdiction in the premises. Fourth. Because the notice of appeal from the order appointing a receiver operates as a stay of proceedings, and his honor had no jurisdiction to make said order. Fifth. Because, no notice of the appointment of a receiver having been served on the said D. K. Cooley in accordance with the provisions of the Acts of 1897 regulating the appointment of receivers, his honor was without jurisdiction to make said order. Sixth. Because his honor erred in refusing to vacate and set aside the said order of March 24, 1898, upon motion of the said defendant after due notice, on the grounds above set forth."

Graydon & Graydon, for appellants. Wells, Ansel & Cothran and Parker & McGowan, for respondent.

McIVER, C. J. The plaintiff and the defendant D. K. Cooley were co-partners in trade under the name of Allen & Cooley, carrying on a mercantile business for a series of years prior to the 30th of September, 1897; and on that day the partnership was dissolved by mutual consent. For the purpose of the dissolution, a statement of the assets and liabilities of the firm was submitted by D. K. Cooley, who seems to have had the active management of the mercantile business; the plaintiff being a farmer, and taking but little part in the management of the business. This statement seems to have been prepared by the defendant T. D. Cooley, who is the brother of his co-defendant, and had been for several years a clerk in the store, and since June, 1891, the bookkeeper of the concern. In this statement the total assets of the partnership, not including certain real estate owned by it, was set down at \$38,871.84, and the total liabilities at \$11,536.72, which, after deducting the amount of certain choses in action said to be not good, \$8,737.10, showed a balance of good personal assets to the amount of \$18,598.02. By the terms of the dissolution the plaintiff agreed to receive, and did receive, in full of his interest, a tract of land estimated at \$3,500, and two notes of D. K. Cooley, indorsed by T. D. Cooley, for \$790 each,—one payable on 1st of November, 1898, and the other payable on 1st of December, 1898; and all the other assets of the firm—real as well as personal—were turned over to the defendant D. K. Cooley, he agreeing to pay all the debts of the firm, and releasing plaintiff from any liability therefor. A few days after this transaction was consummated, Mrs. K. W. Allen presented a note bearing date 20th of November, 1891, purporting to be signed by Allen & Cooley, for \$2,000, to the defendant D. K. Cooley, and demanded payment thereof. He refused to pay it, saying he knew nothing about any such debt of Allen & Cooley. Very soon thereafter, probably the next day, D. K.

Cooley made an arrangement to sell his stock of goods to his brother, T. D. Cooley, and went to the insurance agent, and had the policy issued on the goods changed to the name of T. D. Cooley. But a few days afterwards D. K. Cooley returned to the insurance agent, and procured a retransfer of the insurance policy to himself; stating to the agent "that the trade with T. D. Cooley had fallen through, as T. D. Cooley had failed to get some money from a kinsman of his, whom he expected to let him have it." All this occurred about the 8th of October, 1897,—eight days after D. K. Cooley had bought out the interest of the plaintiff in the assets of Allen & Cooley, and assumed the payment of the debts of the firm. On the 1st of November, 1897, Mrs. K. W. Allen commenced an action against D. K. Cooley on the \$2,000 note above referred to, and recovered judgment therein, probably, at the next term of the court, as the execution issued on such judgment was returned unsatisfied on the 9th of February, 1898. Before this judgment was recovered, but after the action was commenced, to wit, on the 8th of November, 1897, D. K. Cooley executed a bill of sale to T. D. Cooley of the said stock of goods and store fixtures, for the consideration expressed therein of \$3,580, to be paid as follows: \$2,000 to the Bank of Anderson, on a note of Allen & Cooley due 3d of December, 1897, and \$1,580 to the plaintiff, on the two notes given by D. K. Cooley to plaintiff, and indorsed by T. D. Cooley, on the dissolution of the partnership. And on the 9th of December, 1897, D. K. Cooley executed a mortgage to T. D. Cooley on the storehouses, which he received upon the dissolution of the partnership of Allen & Cooley, to secure the sum of \$714.03, claimed to be due T. D. Cooley by Allen & Cooley for his services as clerk and bookkeeper; but this sum, as well as a claim for \$1,750 by T. D. Cooley against D. K. Cooley for money alleged to have been advanced by T. D. Cooley to D. K. Cooley in 1891, when he was a fugitive from justice, does not appear to have been considered in the trade between the two brothers for the stock of goods.

Upon the foregoing facts, which cannot well be disputed, the plaintiff commenced this action on the 10th of February, 1898,—among other things, for the purpose of having a receiver appointed to take charge of all the assets of the late firm of Allen & Cooley, and administer the same under the direction of the court. In the complaint many other allegations are made, the most of which are disputed, going to show that D. K. Cooley was wasting the assets of the late firm of Allen & Cooley left in his hands for the payment of the debts of that firm, whereby the plaintiff is in danger of being subjected to personal liability to the creditors of said firm, wherefore, among other things, the appointment of a receiver is prayed for. But the allegations of the complaint are so clearly and succinctly stated in the decree of the

circuit judge, which will be incorporated by the reporter in his report of the case, that no more detailed statement is needed here. On the 3d of March, 1898, the plaintiff applied for and obtained from his honor, Judge Aldrich, an order restraining and enjoining the defendants from delivering to any person whatsoever the property and assets belonging to the late firm of Allen & Cooley pending the hearing of an application for the appointment of a receiver of said property noticed to be heard by him at Pickens, S. C., on the 10th of March, 1898; and on the same day the plaintiff issued a notice, addressed to the defendants, "that upon the verified complaint in the above-stated case, and upon the accompanying affidavits," an application would be made to Judge Aldrich, at Pickens C. H., on the 10th of March, 1898, at 10 o'clock a. m., for an order appointing a receiver, as aforesaid. It is stated in the "case" that "a certified copy of the above order of injunction, and copies of the above notice of motion and affidavits, were duly and personally served on the defendant Thomas D. Cooley on the 4th day of March, 1898; and on the same day the sheriff left copies of the above papers with the wife of D. K. Cooley, at his residence at Lowndesville, he being absent." By consent of counsel the hearing of the motion for the appointment of a receiver was transferred to Greenville, and it was there heard on the 10th of March, 1898, at 8 o'clock p. m. At the hearing the defendants, for cause why the motion should not be granted, submitted the pleadings, including the answer of D. K. Cooley to the complaint, which had been served on the 25th of February, 1898, together with numerous affidavits set forth in the "case." The plaintiff was represented at the hearing by Messrs. Wells, Ansel & Cothran, and the defendants, D. K. Cooley and T. D. Cooley, by Messrs. Graydon & Graydon; Messrs. Bonham & Watkins being also of counsel for T. D. Cooley. The complaint and affidavits submitted in support of the motion were read by plaintiff's attorneys, and Mr. Graydon read the answers of D. K. Cooley and T. D. Cooley, together with numerous affidavits submitted in their behalf in opposition to the motion, all of which are set out in the "case." The defendants then claimed the right to open and reply in argument, but the circuit judge held that plaintiff had the right to open and reply. After the argument of Mr. Cothran for plaintiff, and Mr. Watkins for defendant T. D. Cooley, Mr. Graydon raised the objection, for the first time, that defendant D. K. Cooley had never been served personally either with a copy of the order of injunction, or with the notice of the motion for the appointment of a receiver, and therefore the circuit judge could not take jurisdiction of the matter, so far as said D. K. Cooley was concerned. The objection was overruled, and the application was considered on the merits. After argument and due consideration an order was granted appointing W. C. Tennent receiver, fixing the value of the property at \$2,500, and the amount of

the bond which defendants might give at \$5,000; saying that his reasons would be stated in a decree thereafter to be filed. This order was granted on the 11th of March, 1898, but has not been served on D. K. Cooley, nor has any notice of the appointment of a receiver been published. Subsequently, to wit, on the 24th of March, 1898, Judge Aldrich made a decree setting forth at length the reasons for granting the above-mentioned order of the 11th of March, 1898, and taking occasion to correct an inadvertent error in that order as to the value of the property, and in the amount of the bond which defendants might give, explaining how such error occurred. On the 23d of March, 1898, the receiver presented his verified petition to Judge Aldrich, setting forth that said D. K. Cooley is in possession of a large quantity of choses in action belonging to the late firm of Allen & Cooley; "that, ever since the proceedings were instituted to have a receiver appointed, the said D. K. Cooley has absented and secreted himself to avoid service of process, and it has been impossible to effect personal service upon him," and "that the wife of said Cooley is alone with her family at the residence of said Cooley at Lowndesville; that the receiver has made demand upon her for the said premises, but the same has been refused." Wherefore he asked the instructions of the court as to how to proceed in the present situation of affairs. Thereupon the circuit judge granted an order, without notice either to D. K. Cooley or his attorneys, directing the receiver to procure from the records of the office of register of mesne conveyances a list of all notes secured by mortgages of real and personal property executed to the firm of Allen & Cooley, notify the makers of such notes and mortgages that the same are payable to him and not to D. K. Cooley, and that he proceed at once to collect the same. This order bears date 24th of March, 1898. On the 31st of March, 1898, the attorneys of D. K. Cooley gave notice to the attorneys for the plaintiff of a motion to vacate said last-mentioned order, upon the several grounds stated in the motion, which will hereinafter appear, but Judge Aldrich refused to vacate said order. The defendants gave notice of appeal from the foregoing orders and decree in reference to the appointment of a receiver, including the last-mentioned order instructing the receiver how to proceed with reference to the collection of choses in action belonging to the late firm of Allen & Cooley, upon the several exceptions set out in the record, which will be incorporated in the report of this case. We do not propose to consider these exceptions seriatim, but rather to consider the several questions which we understand them to present.

The first question which we propose to consider is whether the circuit judge had acquired jurisdiction of the person of the defendant D. K. Cooley at the time he heard and determined the application for the appointment of a receiver. While the act of 1897 (22 St. at Large, p. 510) does require

notice to be given to the party, whose property is sought to be put in the hands of a receiver, of the application for such an order, it does not prescribe how such notice shall be given; and hence we must look to the law as it stood at the time of the passage of such act, in order to ascertain how such notice should be given. Section 408 of the Code of Civil Procedure provides that "notices shall be in writing and notices and other papers may be served on the party or attorney in the manner prescribed in the next three sections, where not otherwise provided by this Code of Procedure." Section 409 provides that "the service may be personal, or by delivery to the party or attorney on whom the service is required to be made; or it may be as follows: * * * If upon a party it may be made by leaving the paper at his residence between the hours of six in the morning and nine in the evening, with some person of suitable age and discretion." It will be observed that neither the act of 1897, nor any other statute, so far as we are informed, requires personal service of the notice of the motion for the appointment of a receiver, though the act of 1897, in the proviso to the second paragraph of the first section, does require "that wherever a receiver is appointed and the party claiming the property cannot be found within the state, *notice of such appointment shall be forthwith given by publication or personal service without the state, as prescribed by law in the case of a summons in a civil action.*" (Italics ours.) This shows that the legislature, in passing that act, had in mind the difference between personal service and other modes of service recognized by law, and that, when their intention was to require personal service, they knew how to express such intention. We agree, therefore, with the circuit judge, that the service of the notice of the motion for the appointment of a receiver upon D. K. Cooley (who was not shown or even alleged to be absent from the state, but simply that he was evading the service of process, and who probably was near at hand, as he verified his answer before a magistrate of Abbeville county, where his residence was), by leaving copies of the papers with his wife, at his place of residence in Lowndesville, Abbeville county, S. C., was sufficient. But, in addition to this, we also agree with the circuit judge in holding that, even if he was not served with notice, he waived such service by appearing, through his counsel, at the hearing of the motion, submitting his verified answer in the case, and otherwise resisting the motion. This court has frequently held (one of the last cases being *Rosamond v. Earle*, 46 S. C. 9, 24 S. E. 44) that a defendant waives any objection to jurisdiction of his person by want of service of process when he appears and answers, thereby waiving any such objection, and submitting himself to the jurisdiction of the court.

The next question to be considered is whether the circuit judge erred in holding that the plaintiff had the right to open and reply in argument. Rule 59 is conclusive of this question. It provides as follows: "On all rules to show cause, where a party failing to answer would be in contempt, the party called on shall begin and end his cause; and on all motions or special matters, either springing out of a cause or otherwise, the actor or party submitting the same to the court, shall in like manner begin and close." This motion for the appointment of a receiver was not a rule "to show cause where the party failing to answer would be in contempt," but, on the contrary. It is a "motion in a cause," submitted by the plaintiff; and hence, under the express terms of the rule, the plaintiff was the actor, and entitled to open and reply.

The next question is whether there was any error in striking out the affidavits submitted by defendants tending to show that D. K. Cooley was in Kentucky at the time the note to Mrs. K. W. Allen purports to have been given. Those affidavits were not pertinent to any issue presented by the motion for the appointment of a receiver. They related, not only to an issue between Mrs. K. W. Allen and D. K. Cooley, but to an issue which had already been decided, and we are unable to see any relevancy to the issue in this case. There was no error, therefore, in striking out such affidavits.

The next inquiry is whether the creditors of Allen & Cooley were necessary parties to this action. This question could not properly be raised except by demurrer or answer, as it is an objection for "defect of parties"; and, as it was not so raised, the objection was waived. Code Civ. Proc. § 169. But, in addition to this, we are not prepared to admit that such creditors are necessary parties to this action, although they may have been proper parties. The main object of this action was to protect the plaintiff against being subjected to liability to the creditors of Allen & Cooley, by preserving the assets of Allen & Cooley, which had been left in the hands of D. K. Cooley for the very purpose of meeting such liabilities, from waste and misapplication. The issue, therefore, was between the plaintiff and D. K. Cooley and his brother, T. D. Cooley, who was charged with complicity in such waste and misapplication. The rights of the creditors were not necessarily involved; for, even if the assets of Allen & Cooley were entirely wasted, they would still have their claims, not only on D. K. Cooley personally, but also on the plaintiff.

Our next inquiry is whether the allegations contained in the complaint, if shown to be true, are sufficient to warrant the appointment of a receiver. We do not think that there can be any doubt that where two partners dissolve their partnership under an agreement whereby one of them assumes

the payment of all the debts of the partnership, and releases the other from any liability for the same, the relation between them becomes that of principal and surety, as between themselves, though they both continue liable to the partnership creditors. If there could be any doubt of so plain a proposition, so exactly in accordance with reason and justice, such doubt would be entirely dispelled by the authorities cited in the circuit decree. It is clear, therefore, that upon the dissolution of the partnership of Allen & Cooley on the 30th of September, 1897, upon the terms set out in the complaint, and proved by the writing signed by D. K. Cooley, the relations between D. K. Cooley and the plaintiff became those of principal and surety, so far as the partnership debts were concerned. This being so, what are the rights of the plaintiff as surety? There is no doubt that the surety might have brought an action against the principal debtor and the creditor to require the principal debtor to pay the debt, to the relief of the surety, as was done in the case of *Norton v. Reid*, 11 S. C. 593; and, if so, we see no reason why the surety may not, in a case like this (where the creditors are probably numerous, and the assets left in the hands of the principal debtor for the payment of the partnership debts consist largely of choses in action, which can be so easily dissipated), resort to the mode which has been adopted by the plaintiff to protect himself from liability to the partnership creditors. This view is amply sustained by the authorities cited in the circuit decree. Indeed, this view may be sustained upon another ground. The partnership assets were left in the hands of D. K. Cooley, with an obligation on his part to apply the same to the payment of the partnership debts, in relief of the plaintiff, and are in fact impressed with a trust for that purpose. If so, then the plaintiff unquestionably would have a right in equity to take any suitable measures for the protection of that trust fund, and enforce its application to the purpose for which it was intended, so as to relieve himself from loss.

It is said, however, that the complaint contains no allegation that the defendants, or either of them, are insolvent. In the first place, we do not regard such an allegation as necessary. It certainly was not so regarded in the case of *Norton v. Reid*, supra,—a case analogous in principle to this,—for in that case the circuit chancellor said in his decree, "From the evidence, there is no great danger of the complainant's having to pay any portion of the single bill, but his fears upon that subject cannot be regarded as groundless;" and the only allegation in the bill as to this point was that the principal debtor "was in affluent circumstances, but that he [the surety] now fears that so much of his fortune was swept away by the disastrous termination of the late war that he will not be able to pay his debts," but this allega-

tion was denied in the answer. But, even if an allegation of insolvency were necessary, we think it was sufficiently made in the complaint. It was alleged that executions obtained on partnership debts against D. K. Cooley had been returned nulla bona, and this has always been regarded as one of the highest evidences of insolvency. See *Akers v. Rowan*, 33 S. C. 451, 12 S. E. 165. And, as to the allegations in reference to the defendant T. D. Cooley, they practically amount to an allegation that he has no property subject to the payment of his debts.

It is also insisted that there should be an allegation that some creditor of Allen & Cooley either has attempted or is about to attempt to subject the plaintiff to liability for the payment of a debt of Allen & Cooley; but the cases of *Norton v. Reid*, supra, and *Hellams v. Abercrombie*, 15 S. C. 110, show that such an allegation was unnecessary. We agree, therefore, with the circuit judge, that the allegations in the complaint, if proved, were quite sufficient to warrant the appointment of a receiver.

The next inquiry is whether these allegations were sustained by the proof. This presents a question of fact, pure and simple. It would unnecessarily prolong this opinion to enter into a discussion of the numerous questions of fact presented by the exception, and such discussion would prove of no value as a precedent. We must therefore say that, after a careful consideration of the numerous affidavits presented at the hearing, we have been unable to discover any error in the conclusions reached by the circuit judge upon all the material questions of fact, and we therefore concur in his conclusions.

The defendants set up as a separate defense the charge that plaintiff does not come into court with "clean hands"; referring to the fact, which appears in some of the affidavits, that plaintiff has transferred some of his real estate to his wife. What this, if true, has to do with any issue presented in this case, we are at a loss to conceive. Whether such a transfer is in fraud of the creditors of Allen & Cooley is a question with which defendants have no concern. The defendant D. K. Cooley has assumed the payment of the debts of Allen & Cooley, and has been provided with funds sufficient for that purpose; and, if he performs his duty, this question can never arise. At all events, as the circuit judge well says, it will be time enough to consider that question when some one of the creditors of Allen & Cooley sees fit to raise it. The defendants certainly are in no position to raise any such question.

The next question is whether the circuit judge erred in correcting an inadvertent error into which he had fallen in his short order fixing the value of the property, and the consequent amount of the bond which the defendants would be entitled to give, under the provisions of the act of 1897, above referred to, in order that they might move to vacate

the order appointing the receiver. It seems to us that the power of the circuit judge to correct such error is fully vindicated by the decision of this court in *Chafee v. Rainey*, 21 S. C. 11, and that the circuit judge, in his decree, has satisfactorily explained how he fell into this inadvertent error.

The only remaining inquiry is whether there was any error in granting the order of 24th of March, 1898, based upon the verified petition of W. C. Tennent as receiver. The error assigned in granting this order is lack of jurisdiction, based upon four grounds: (1) Because the order was made without notice to the defendants' attorneys. (2) Because, notice of appeal to the supreme court having been served from the order appointing a receiver, the circuit court no longer had jurisdiction of the case. (3) Because the notice of appeal operated as a stay of proceedings, and hence the circuit judge had no jurisdiction to grant the order. (4) "Because, no notice of the appointment of a receiver having been served on the said D. K. Cooley in accordance with the provisions of the act of 1897 regulating the appointment of receivers, his honor was without jurisdiction to pass said order."

It will be observed that the application of the receiver was simply for instructions as to his duty in the premises under the state of facts presented in his petition. It was not a motion to take property from the possession of one party and deliver it to another. The defendants had already been ordered by the judge to deliver all of the property and assets of the partnership of Allen & Cooley to the receiver, to be by him administered under the directions of the court. This was done by the order of 11th of March, 1898, made upon the hearing, when all parties were before the court, represented by counsel. Nor was it an application for leave to expend any of the funds in his hands as receiver, as in the case of *State v. Port Royal & A. Ry. Co.*, 45 S. C. 464, 23 S. E. 380, where it was held that notice of an application to make expenditure was necessary. But it was simply an application to the court for instructions how to proceed, under the circumstances stated in the petition, in the performance of his duties. The receiver is an officer or agent of the court,—the hand of the court, as it is expressed in some of the cases,—and when the court takes possession of property, and places it in the hands of a receiver to be administered under its directions, and when an application is made to the court for its instructions under a given state of circumstances, we see no necessity for notice of the application, and we know of no statute which requires notice of such an application.

The second ground upon which jurisdiction is denied is that, after notice of appeal from the order appointing a receiver, the circuit court no longer has jurisdiction of the case. In the first place, there is nothing in the "case" to show that any such notice of appeal

had been given before the application for the order in question was made. But, even if such notice had then been given, that would not oust the jurisdiction of the circuit court; for the jurisdiction of the supreme court does not attach until the return is filed, and there is no pretense that the return had then been filed.

The third ground upon which it is claimed that the circuit judge had no jurisdiction to grant the order under consideration is that the notice of appeal operated as a stay of proceedings. Besides the fact above adverted to, that it does not appear from the "case" that any notice of appeal had been given when the order of 24th of March, 1898, was applied for, it is quite clear, from the statute, as well as from the decision of this court in the case of *Harmon v. Wagener*, 33 S. C. 487, 12 S. E. 98, that a mere notice of appeal in a case like this, where the order appealed from directs "the assignment or delivery of documents or personal property, the execution of the judgment shall not be stayed by appeal, unless the things required to be assigned or delivered be brought into court, or placed in the custody of such officer or receiver as the court shall appoint, or unless an undertaking be entered into on the part of the appellant, by at least two sureties, and in such amount as the court, or a judge thereof, shall direct, to the effect that the appellant will obey the order of the supreme court upon the appeal." Code Civ. Proc. § 350. And there is no pretense that any of these provisions were complied with in this case.

The fourth ground upon which the objection to the jurisdiction is based is because notice of the appointment of the receiver was never served upon D. K. Cooley, in accordance with the provisions of the act of 1897 above referred to. While that act does provide for notice of the application for the appointment of a receiver, the only provision requiring notice of such appointment is where "the party claiming the property cannot be found in the state"; and in this case it has not been shown that D. K. Cooley cannot be found in the state. The return of the sheriff of Abbeville county, at most, only shows that he could not be found in Abbeville county, but there is no affidavit or other evidence that he cannot be found in the state. On the contrary, as we have said above, the circumstances tend to show that he was in the state, and was merely concealing himself to avoid the service of process, so as to avoid any proceeding for contempt in disobeying the order appointing the receiver. If this had been an application for a rule to show cause why D. K. Cooley should not be attached for contempt in failing or refusing to obey the order appointing the receiver, then, apart from any statute, we could see the necessity for showing that the order appointing the receiver had been personally served upon him. But this is not the nature of the order under consideration, and we see no necessity in this case

For serving D. K. Cooley with notice of the order appointing the receiver, especially when that order was granted at a hearing where D. K. Cooley was represented by able and experienced counsel, in a case to which he had become a party by answering the complaint, if in no other way. The judgment of this court is that the orders appealed from be affirmed.

(96 Va. 473)

SNYDER et al. v. GRANDSTAFF et al.
(Supreme Court of Appeals of Virginia. Nov. 17, 1898.)

EQUITY—PLEADING—MULTIFARIOUSNESS—MISTAKE—
—BONA FIDE PURCHASERS—CONVEYANCE IN CON-
SIDERATION OF MARRIAGE—BURDEN OF PROOF—
CONSTRUCTION OF DEED.

1. A bill in equity, presenting different views of the same collocation of facts, stated in the alternative, is not multifarious because thereof.

2. Where a bill to reform a deed was based on an alleged mutual mistake, it was not demurrable, though it failed to allege notice to a purchaser for value.

3. A mutual mistake in a deed on the part of antecedent parties will not affect a purchaser for value and without notice.

4. A deed made by a man to his intended wife, followed by marriage, is conclusively presumed to be in consideration of marriage, and is based on a valuable consideration.

5. Under a bill to reform deed, on the ground of mutual mistake, against a purchaser for value, the burden of showing that such purchaser had notice was on complainants.

6. Testator devised his whole estate to his three grandchildren, in equal shares, but provided that, "on the death of either of them without issue, his or her share should pass to the survivors or survivor, and, in case all died without issue, then to collateral kin." After his death the devisees, by deeds reciting that under such devise they were each entitled to one-third of the estate, that they had agreed on a partition thereof, and that they desired "to vest exclusive title to the several parcels of land in the said parties to whom they had been assigned and allotted, respectively," conveyed to each other, respectively, his or her heirs and assigns, "all right, title, and interest of the said parties of the first part" in the property described in each deed. Thereafter the brother of complainants, referring to their deed to him for description, conveyed the land embraced therein, in fee, with general warranty, to the feme defendant, on the expressed consideration of one dollar, and thereupon married her, and soon afterwards died without issue; leaving his father as his heir, and his widow and father as his distributees. Complainants claimed the real estate in question as surviving devisees, and that, if their deed to decedent was inconsistent with such claim, it was executed under a mutual mistake and contrary to the real intention of the parties; and the widow claimed to be a purchaser for value, without notice, and that the consideration of the deed to her was marriage. *Held*, that the absolute title, divested of their right of survivorship, passed by such deed of complainants to decedent, and by his deed to his grantee.

Appeal from circuit court, Shenandoah county.

Bill by L. A. Snyder and another against A. J. Grandstaff, administrator of the estate of Joseph V. Snyder, deceased, and Flora Snyder, widow of decedent, to enforce an alleged claim to certain real estate, as sur-

living devisees of Israel Allen, deceased, and for other relief. From a decree dismissing the bill, complainants appeal. Affirmed.

Walton & Walton, for appellants. Barton & Boyd and L. Triplett, Jr., for appellees.

CARDWELL, J. This is an appeal from a decree of the circuit court of Shenandoah county. In deciding the case the learned judge of that court delivered the following opinion, which is filed with, and made a part of, the record:

"Israel Allen devised, in the third clause of his will, that after the death of his wife his whole estate, real, personal, and mixed, should pass to his three grandchildren, L. A. Snyder, Amanda Long, and Joseph V. Snyder, to be equally divided between them, share and share alike, but, on the death of either of them without issue, his or her share should pass to the survivors or survivor, and, in case all died without issue, then to collateral kin.

"By deed dated 20th July, 1895, L. A. Snyder and wife, Amanda Long and husband (Joseph V. Snyder signing the deed as party of the second part), reciting that under the third clause of the will the said parties were entitled to one equal third of the estate, that they had agreed upon a partition of the real estate, that Jos. V. Snyder was to be equalized by payment to him of \$3,000 out of the personal estate, that the said parties desired 'to vest exclusive title to the several parcels of land in the said parties to whom they had been assigned and allotted, respectively,' in consideration of one dollar, etc., conveyed unto the said Joseph V. Snyder, his heirs and assigns, 'all right, title, and interest of the said parties of the first part' in the described property.

"Similar deeds were made to each of the grantors by the other two devisees for the tracts assigned and allotted to each.

"On the 7th of April, 1896, Joseph V. Snyder, referring to this deed for description, conveyed the real estate embraced therein in fee to Flora Grandstaff, with general warranty, and upon the expressed consideration of one dollar cash in hand paid, and on the same day, and shortly thereafter, intermarried with her. This deed was duly recorded on the 8th, and within some six weeks thereafter Joseph V. Snyder died, without issue or possibility of issue. His father is his heir, and A. J. Grandstaff is his administrator, and his widow and father are his distributees.

"L. A. Snyder, Amanda Long, and Lee Long, her husband, filed their bill to December rules, 1896, claiming that under the will of Israel Allen they are entitled to the real estate, by virtue of survivorship; that Mrs. Flora Snyder withholds possession from them; that under a proper construction of the deed of 20th of July, 1895, they never parted with this interest; but, if such deed should be otherwise construed, then it was

executed under a mutual mistake, and contrary to the real intention of the parties; and they pray that the same may be reformed, and for general relief. To this bill the administrator and widow are made parties. No claim is asserted against or through the estate of Joseph V. Snyder. The widow demurs to the bill, and files her answer. Depositions on the part of the plaintiffs have been taken, with intent to show mistake, and on the part of the defendants to show that the consideration of the deed to her was marriage. In her answer, after denying any mistake in the deed, she claims to be a purchaser for value, without notice.

"I do not think the bill is multifarious, for parties have the right to state their case in the alternative. Multifariousness does not arise from the presentation of different views of the same collocation of facts, but it must be two distinct collocations of distinct and different facts, each collocation presenting different rights and calling for different relief. Equity is the proper forum for the reformation of a deed, and I have reached the conclusion that this claim in the bill of a mutual mistake prevents the bill from being demurrable, even though the bill fails to allege notice to a purchaser for value. There is no doubt that complainants must prove notice to a bona fide purchaser for valuable consideration, but under the decision of the court of appeals in *Iron Co. v. Trout*, 83 Va. 415, 2 S. E. 713, the defense must be made by plea or answer. This case seemingly conflicts with *Carter v. Allan*, 21 Grat. 241, on this point; but it is a later case, and the views of the court are sustained by reference to various authorities, and I have not observed that it has yet been overruled. Besides, in the case at bar the defense is made by answer, and can better be considered in connection with the evidence than upon demurrer. I therefore overrule the demurrer.

"Passing from the demurrer, the first suggestion is the question we adjourned from the demurrer, namely, assuming that a mistake has been made, how is the defendant affected thereby?

"1. A purchaser for value and without notice is not affected by any latent equity. A mutual mistake stands on the same footing as any other equity. *Kerr, Fraud & M. p. 436*, specifically lays this down as to mistake. I quote: 'As against a bona fide purchaser for value, without notice, no relief can be had in equity.' Almost the same words is *Pom. Eq. Jur. § 776*. But the case of *Carter v. Allan*, 21 Grat. 241 (and on this point it is cited with approval in *Iron Co. v. Trout*, supra), is directly in point: 'The doctrine that the courts of equity will not grant relief against bona fide purchasers without notice has always been adhered to as an indispensable muniment of title. It is wholly immaterial of what nature the equity is,—whether it is founded on a lien, or incumbrance, or trust, or a fraud, or any other claim; for

a bona fide purchaser of the estate for a valuable consideration, without notice, purges away the equity from the estate, in the hands of all persons who may derive title under it, with the exception of the original party, whose conscience stands bound by the violation of his trust, and meditated fraud.' In *Iron Co. v. Trout*, supra, the same broad doctrine is laid down: 'It cannot be questioned at this day that the purchaser for value, without notice, actual or constructive, will not be affected by a latent equity, whether by lien, incumbrance, or trust, or fraud, or any other claim.'

"2. A deed made by a man to his intended wife, followed by marriage, is conclusively presumed to be in consideration of marriage, and is based on a valuable consideration. In *Sterry v. Arden*, 1 Johns. Ch. 271, Chancellor Kent says: 'The marriage was a valuable consideration, which fixed the interest in the grantee against all the world, and as much as if she had paid an adequate consideration pecuniary. It has been a principle of long standing, and uniformly recognized, that a deed voluntary or fraudulent in its creation, and voidable by a purchaser, may become good by matter ex post facto. It is the constant language of the books and of the courts that a voluntary deed is made good by subsequent marriage, and marriage has always been held to be the highest consideration in law.' He cites for this *Co. Litt.* This citation is quoted with approval by the court in *Huston's Adm'r v. Cantrill*, 11 Leigh, 136, and in *Herring v. Wickham*, 29 Grat. 628. In the last-named case, which is an exceedingly careful discussion of the matter by Judge Staples, Justice Story is quoted with approval as follows: 'Marriage, in contemplation of the law, is not only a valuable consideration to support such a settlement, but a consideration of highest value, and, from motives of the soundest policy, is upheld with steady resolution. The husband and wife, parties to such a contract, are therefore deemed, in the highest sense, purchasers for a valuable consideration.'

"Judge Tucker, in *Huston's Adm'r v. Cantrill*, supra, says: 'Marriage, from the earliest times, has been considered, in law, a valuable consideration.'

"Judge Baldwin, in *Welles v. Cole*, 6 Grat. 645, says: 'Marriage furnishes a valuable consideration for an agreement,—as much so as money paid or agreed to be paid.'

"I might multiply indefinitely citations to show that a voluntary deed before marriage, upon marriage becomes a deed for valuable consideration, for the citations above made are from cases of this character. Such undoubtedly is the law, unless the Code has changed it. Judge Burks, in his review of the changes made by the Code, assigns as a reason for the change made by section 2459 that it was intended to defeat frauds perpetrated upon existing creditors by the marriage of an insolvent debtor, accompanied by gifts to his wife.

Herring v. Wickham and *Coutts v. Greenhow*, 2 Munf. 363, furnish instances of gross injustice to existing creditors. In these cases the man, co-habiting with a woman for years in concubinage, becoming involved, conveyed to her all his property, and then married her. Marriage in such extreme instances furnished the valuable consideration, and the settlements were maintained, and just creditors defeated. Actually a man was allowed to do for his concubine what he could not do had she been his lawful wife. In the transformation of the character of the relationship, she carried his property beyond the reach of just obligations. It was to correct any repetitions of such an evil that the change was made. This object is plainly expressed in the wording of the law. The statute does not declare that such conveyances are voluntary. It simply declares that conveyances upon consideration of marriage are void as to existing creditors. Complainants present no claim as creditors. They claim, not as subsequent purchasers, but as paramount purchasers under the will of Israel Allen. The statute does not seem to make reference to this class of rights, and I believe the doctrine applies, that the law will not be considered changed by statute beyond the modifications of the statute. It is not necessary to refer to the testimony in relation to the consideration of this deed. The law imports that the consideration was marriage, and the parol testimony is but confirmatory of what the law unaided by testimony presumes. I believe the conclusion, then, is inevitable; that Mrs. Snyder is a purchaser for value.

"3. The burden is now on the complainants to show that she is a purchaser with notice. This notice may be actual or constructive. It is not pretended by the complainants that they, or anybody else, told this purchaser for value of the equity, although some of them seem to have known of the deed of April 7th prior to the marriage ceremony. It is urged that the confidential relations between the grantor and grantee in the deed of April 7th will imply that the grantee received notice. This confidential relation was not held sufficient in *Herring v. Wickham*, when a great wrong was perpetrated on creditors. The deed itself imports that Joseph Snyder did not know of or recognize the equities of complainants. Why should we suppose that he conveyed a title to Flora Grandstaff, telling her that he had no such title to convey? Nor is anything to be inferred from the fact that she was in the habit of passing by the several tracts of land. What more natural than to suppose that she drew the natural inference that the parties were in possession under their deeds? This is all the evidence to show actual notice. As to constructive notice, the principal point urged in argument was the existence of a preliminary contract, of date — April, 1895, which should have apprised Mrs. Snyder that the deed of 20th of July, 1895, was made under mistake. There is

no evidence to show that Mrs. Snyder knew of this contract. If, by reading the deed of 20th July, 1895, she could gather there was a contract of such date or character in existence, it is more than I have been able to do after careful study. But, suppose that she did know of it; that every provision in it was known to her; this does not prove that she did know the deed did not express the final and true agreement between the parties. On the contrary, she would have a right to presume that the purposes of the parties were altered, if there was conflict between the agreement and deed. In *Donaldson v. Levine*, 93 Va. 472, 25 S. E. 542, the court says: 'The burden is throughout on the complainant, who must rebut the presumption that the writing speaks the final agreement, by the clearest and most satisfactory evidence. It must not only appear that the parties entertained a different intention in the first instance, but that it was not changed at or before the execution of the instrument; for otherwise the legal and natural inference is, it was laid aside for that expressed in the writing.' Why should any one be required to look behind the recorded title, and run down the preliminary contracts, to discover that the parties to a solemn deed have made a mistake? In the first recital of the deed, reference is made to the third clause of the will, and the parties declare that under said clause they are entitled to the whole estate. This is a mistaken construction of that clause, but, so far from showing that the parties intended to convey only a limited estate, it goes strongly to show that it was their intention to convey the whole estate. Why recite they were entitled to the whole, if they intended to convey only a part, and do not then use restrictive words? It is a principle, too, that purchasers for value have a right to rely on the affirmations of grantors, and grantors are bound by their affirmations of title. See *Reynolds v. Cook*, 83 Va. 817, 8 S. E. 710; *Nye v. Lovitt*, 92 Va. 710, 24 S. E. 345.

"I have come to the conclusion that there was nothing on the face of the deed from which Mrs. Snyder could have inferred that the parties thereto had made a mistake. She stands as a purchaser for value and without notice, and has a right to such title as the deed of 20th July, 1895, conveys. This renders wholly unnecessary any consideration of the evidence as to whether a mistake in fact was made, or whether it was such a mistake as equity would correct. It is certain that the parties cannot be restored to the status quo of 20th July, 1895. The right of survivorship in the lands of the complainants held by Joseph V. Snyder on that day, and which it is claimed he surrendered to them in consideration of their surrender to him, was worth at least as much as the rights they surrendered to him. It is not shown there was anything unreasonable in the exchange. To-day, by the providence of God, his right is worth nothing. Theirs, they claim, is worth this \$10,000 farm.

Contingencies have become events. A reformation is a revision now. The altered conditions are not favorable for the interposition of equity, to say the least. There seems to have been no haste about the deed. Five persons signed it. Three on its date acknowledged it in Shenandoah; two on the 1st of August in the county of Page,—and it was not recorded until 2d October.

"Having reached the conclusion that each party is entitled to stand upon the deed as written, I am in exceeding doubt if the province of the court of equity is not exhausted. The construction of the muniments of title, whether the same be deed or will, furnishes no ground of equitable jurisdiction. Courts of law construe deeds or wills involving legal rights. Where there are mutual rights under the same instrument, whether deed or will, in the same property, courts of equity often have jurisdiction to define and partition, or otherwise divide; but, where one holds adversely to the instrument under which another claims, there is no jurisdiction in equity, whether the instrument is a deed or will, as a general rule. Certainly not for the mere purpose of construing the deed or will. If such were the case, all a party would have to do in any case would be to file his muniments of title with his bill, aver some one holds adversely, and pray the court to say if he was not entitled. The action of ejectment would soon become obsolete. In this case I have proceeded on the theory that a purchaser for value without notice is protected against any equity that may exist. This is a matter of defense. Again, in certain contingencies this widow may be entitled to dower. It has been decided in Virginia that widows are endowable in defeasible fees of this character, even where the husband died without issue, viz.: *Jones v. Hughes*, 27 Grat. 560, and *Medley v. Medley*, Id. 568. If the deed of 20th July should be held not to pass the right of survivorship, and should the deed of 7th April, under sections 2270 and 2271, be held no bar to dower, the widow in this case would be entitled to dower. After a good deal of hesitation, I think the court should proceed to a final determination of the rights of parties.

"There are some cases which hold that a partition deed is not to be so strictly construed as other deeds. This was decided prior to our Code, under the law which then seemed to exist, that partition between co-parceners and co-tenants might be by parol. No deed being necessary, the title vested, not by operation of the deed of partition, but by virtue of the original grant. The Code made a deed necessary, and the reason no longer exists. But, however this deed is viewed, it unmistakably conveys unto Joseph V. Snyder, his heirs and assigns, all of the right, title, and interest of the parties of the first part. It precedes this sweeping granting clause by a declaration that it is the intention of the parties to vest exclusive title to the tracts of land in the grantee, and throughout the deed it wholly discards any right of survivorship in the grantors. There is no ambig-

ity about the word 'all.' A conveyance of 'all' is not a reservation of 'part.' Suppose any one examined this deed for the purpose of lending money on it; would he not have been justified in believing that the grantors no longer retained any interest in the property? The widow, as we have seen, stands in this position. I am of the opinion that the title of survivorship did pass under this deed to Joseph V. Snyder, and that by his deed to Flora Grandstaff the same became vested in her.

"I think the court should refuse relief to parties careless enough to blunder, who received at the time full value for their blunder, who have everything to gain and nothing to lose by its correction now, as against one who dealt for a valuable consideration on the faith of their recorded deed."

Upon a careful examination of the record, we find that our views of this case are fully and clearly expressed in the opinion of Judge THOMAS W. HARRISON, which this court adopts; and, for the reasons therein given, we are of opinion that there is no error in the decree complained of, and it is therefore affirmed.

(105 Ga. 610)

COX v. STATE.

(Supreme Court of Georgia. Oct. 12, 1896.)

CRIMINAL TRESPASS—INSTRUCTIONS.

1. Where one is indicted for trespass, the court may, in his charge to the jury, enumerate acts and conduct constituting all the essentials of the offense charged, and instruct the jury that, if these be established by proof, such acts and conduct would be sufficient to authorize a conclusion that the trespass was willful.

2. The evidence was amply sufficient to sustain the verdict, and there was no error in overruling the motion for new trial.

(Syllabus by the Court.)

Error from superior court, Clinch county; J. L. Sweat, Judge.

Horace Cox was convicted of trespass, and brings error. Affirmed.

The following is the official report:

Cox was indicted for trespass in cutting a number of cypress and pine trees upon the land of Mrs. Anderson. The testimony for the state was to the effect that the husband of Mrs. Anderson leased (for her) the land to Cox for two years, ending December 31, 1896, to cut pine trees only, and that during the month of January, 1897, he cut more than 50 cypress trees, and a number of pine trees also. Anderson went to him while he was on the land, near where the cutting was being done, and objected thereto; telling Cox his time was out. Cox replied that his time was not out; that he would be damned if he did not cut the timber, in spite of hell and high water; and that if Anderson went to law, and gained it, Cox would bushwhack him until he killed him. Anderson saw no firearms that day. The lease was oral. The value of the timber was proved. One witness testified that Cox would go to the

land while his employ  s were cutting the timber in 1897, and would sometimes have with him his rifle. He did not carry it with him all the time. In defense to the prosecution it was set up that Cox bought all the timber from Anderson, and paid him for it, that no time was set within which the same was to be cut, and that Cox had a right to cut it when he did so. The exceptions are that the verdict finding the defendant guilty is contrary to law and unsupported by evidence, and that the court erred in charging the jury: "If you find that the claim as made upon the part of the state, that the right to cut and fell the trees upon the land described was only granted by the owner, * * * or her husband for her, for the term of two years, embracing the years 1895 and 1896; and if you find that during the year 1897, after the right of this defendant under the contract made to cut and fell timber had expired, the defendant entered upon the land and continued to cut and fell trees, and that he was approached by * * * Anderson, * * * and warned to desist from cutting and felling them, and that he used the language as claimed to Mr. Anderson, and that, as claimed, the defendant had and kept with him upon the land his gun or rifle,—the court charges you that, if you find these facts and circumstances to be true, they would be sufficient to authorize you to find that the cutting and felling of the trees in question was a willful trespass upon the part of this defendant, Horace Cox, and that in that event it would be your duty to return a verdict of guilty against him." The errors specified are that this excluded from consideration the defendant's claim of entry in good faith and of right; that it required the jury to treat as conclusive evidence of guilt facts and circumstances contended for by the state, which were only evidence from which the intention with which the entry was made might be inferred; and that the evidence in regard to defendant having and keeping a gun with him upon the premises did not warrant the charge upon that as a circumstance of guilt.

S. C. Townshead and Hitch & Myers, for plaintiff in error. John W. Bennett, Sol. Gen., for the State.

SIMMONS, C. J. The plaintiff in error in the present case complains only that the verdict was contrary to law and the evidence, and that the judge erred in a certain portion of his charge which is set out in the official report. The evidence brought up in the record fully authorized the jury to convict the accused. The charge complained of was not erroneous; the question being controlled by the case of *Hill v. State*, 63 Ga. 582. In his opinion in that case, Judge Bleckley discusses at length the point made in this record, and distinguishes the charge given in that case, and we may say the one in this, from the cases relied upon by counsel for plaintiff in error. *Parker v. State*,

34 Ga. 262, and *Tucker v. State*, 57 Ga. 503. We therefore content ourselves with a reference to the opinion in the case of *Hill v. State*, as decisive of the case now under consideration. See, also, *Hagar v. State*, 71 Ga. 164. Judgment affirmed. All the justices concurring.

(106 Ga. 280)

CARTER et al. v. WILLIAMSON et al.

(Supreme Court of Georgia. Dec. 20, 1898.)

LOGS AND LOGGING — CONVEYANCES OF TIMBER — PAROL EVIDENCE.

1. A lease of "all of the round timber, or timber suitable for turpentine purposes," on designated lots of land, each described as containing a specified number of acres, is not ambiguous. Such a lease passes, for the purposes designated, all the round timber on the land, and also all other timber thereon. If any, suitable for turpentine purposes, just as the trees stood when the lease was executed; and this is true, although the instrument contained a clause warranting generally the "right and title to all of the property [therein] conveyed." The lease being unambiguous, parol evidence was inadmissible to show an intention on the part of the lessor to lease lots actually having thereon the same number of acres of round timber as the lots themselves contained acres of land.

2. Irrespective of other questions presented by the record, this case turns upon the law above announced, and, applying the same to the facts in evidence, the verdict was contrary to law, and should have been set aside.

(Syllabus by the Court.)

Error from superior court, Wayne county; J. L. Sweat, Judge.

Action by Williamson & Co., for the use of McCranle & Vickers, against Carter & Elliott. There was a judgment for plaintiffs, and defendants bring error. Reversed.

S. R. Harris and E. D. Graham, for plaintiffs in error. Hitch & Myers, for defendants in error.

SIMMONS, C. J. 1. Carter & Elliott leased to Williamson & Co. "all of the round timber, or timber suitable for turpentine purposes," on certain designated lots of land, each described as containing a specified number of acres. The lease contained a warranty of all of the property conveyed. Williamson & Co. brought suit, for the use of McCranle & Vickers, against Carter & Elliott, for breach of warranty, claiming that 520 acres of the land contained no round timber or timber suitable for turpentine purposes. On the trial of the case, over the objection of the defendants, the judge allowed the plaintiffs to introduce a memorandum, made before the lease, for the purpose of showing what was meant by the lease. The plaintiffs claimed that it was the intention to warrant to the defendants that there were the same number of acres of round timber and timber suitable for turpentine purposes that there were acres of land. It is a recognized principle of law that all negotiations and conversations leading up to a written contract are merged into the contract itself. Nothing said or done by the parties is admissible to vary or contradict the terms of

the written contract. If the contract is ambiguous, parol testimony may be admitted to explain the ambiguity, and it must have been upon this theory that the learned trial judge admitted the evidence above mentioned. After carefully reading the lease, we are of the opinion that it is not ambiguous as to what was conveyed. It conveyed all of the round timber, and other timber suitable for turpentine purposes, then standing upon the lands described. It does not mean that all of this land shall be wooded with such timber, but that the lessors conveyed all of such timber as then stood upon the land. If the timber on the 520 acres was not round or suitable for turpentine purposes, such timber was not conveyed by the lease. The warranty covered no more than was conveyed, being as follows: "And the said parties of the first part will * * * warrant and forever defend their right and title to all of the property herein conveyed, against themselves or the claims of any other person or persons whomsoever." If a portion of the land had been already worked for turpentine, this lease did not warrant that the trees on such portion were of the kind conveyed, but simply conveyed all timber on such portion as came within the classes conveyed. The lease would not apply to a portion of the land which had been entirely cleared of timber for the purpose of cultivating it. The lessors did not warrant more than was conveyed, and the lease conveyed only such round timber, or timber suitable for turpentine purposes, as was standing on the land at the time of the execution of the lease. The warranty covered such timber, and no more. This being the true construction of the lease, and the lease being unambiguous, the plaintiffs could not explain it by parol evidence, so as to show a right to recover in this case. The verdict of the jury was contrary to law, and should have been set aside.

2. The right of the plaintiffs turning upon the principles above announced, and the verdict being contrary to law, no ruling is made upon special grounds of the motion for a new trial. Judgment reversed. All the justices concurring.

(123 N. C. 280)

WRIGHT v. SOUTHERN RY. CO.

(Supreme Court of North Carolina. Nov. 28, 1898.)

FELLOW SERVANTS—NEGLECT OF MASTER—EFFECT OF STATUTE.

1. Act 1897, providing that, in actions against railroads for injury to employé, negligence of a fellow servant shall not be a defense, does not apply to an accident occurring prior thereto.

2. Negligence in not furnishing a railroad with sound ties, by reason whereof a brakeman was injured, cannot be attributed to the section master as a fellow servant, it being the duty of the master, the railroad company, to furnish a safe roadbed, which it could not shift onto a subordinate as a fellow servant.

Appeal from superior court, Rowan county; Allen, Judge.

Action by R. L. Wright, administrator of Wilson Williams, deceased, against the Southern Railway Company. Judgment for defendant. Plaintiff appeals. Reversed.

A. C. Avery, Lee S. Overman, and R. L. Wright, for appellant. George F. Bason and Charles Price, for appellee.

CLARK, J. The death of the plaintiff's intestate occurred prior to the act of 1897 (inadvertently printed among the Private Laws of that year,—chapter 56), which provides that in actions against railroad companies for death or injuries sustained by an employé the negligence of a fellow servant shall not be a defense. Therefore the doctrine in force prior to that statute applies. *Rittenhouse v. Railway Co.*, 120 N. C. 544, 26 S. E. 922. The court charged the jury that, if they found that "the death was caused by the negligence of the section master in not providing the road with sound ties," to answer the second issue, "Yes." That issue was, "Was the injury and death of plaintiff's intestate caused by the negligence of a fellow servant?" This instruction was specifically excepted to, and is clearly erroneous. It is the duty of the master, the corporation, to furnish a safe roadbed. It is not within the scope of the duty or the powers of the section master to provide cross-ties. The plaintiff's intestate (a brakeman) and the section master were, as held in *Wright v. Railroad Co.*, 122 N. C. 852, 29 S. E. 100, and in *Rittenhouse's Case*, supra, fellow servants, within the scope of their duties. In the latter case there was a defect in the roadway by a spike projecting too high, and this was the negligence of the track foreman of the street railway, and it was held that, being the fellow servant of the motorman, the latter could not recover for an injury caused by the negligence of such fellow servant. But the failure to provide a safe roadbed, or material for it, such as sound ties, or good rails, and the like, is the negligence of the corporation, and not of the section master. Indeed, when this case was here before (122 N. C. 959, 30 S. E. 348), the court said: "If the defendant, by having proper appliances (air brakes) and a good roadbed, could have avoided the injury to the intestate, it is liable." That it is the negligence of the master not to have a safe roadbed, and that this duty cannot be shifted off on a subordinate, as the fellow servant of an employé who is injured or killed, is almost universally recognized. *Chesson v. Lumber Co.*, 118 N. C. 59, 23 S. E. 925; *Railroad Co. v. Daniels*, 152 U. S. 688, 14 Sup. Ct. 756; *Hough v. Railway Co.*, 100 U. S. 213, 218; *Patton v. Railway Co.*, 27 C. C. A. 287, 82 Fed. 979; *Lewis v. Railroad Co.*, 59 Mo. 495; *McKinney, Fel. Serv.* § 29, citing many cases; and 1 *Shear & R. Neg.* (5th Ed.) § 197, and numerous cases cited in note 12. Indeed, the proposition requires no citation of authority. *Pleasants v. Railroad Co.*, 121 N. C. 492, 28 S. E. 267, instead of being an authority for the defendant,

clearly concedes (page 496, 121 N. C., and page 268, 28 S. E.) that it was the duty of the railway company to keep its roadbed in safe condition, and that it could not delegate this duty to a servant so as to exempt the company from liability to an employe for injury caused by a defective roadway.

It is true that on the first issue, "Was the injury and death of plaintiff's intestate caused by the negligence of the defendant?" the court charged the jury, "if they found it was caused by reason of a defective roadbed, or of the cross-ties being defective or rotten, they should answer the first issue 'Yes,'" but added, "This is subject to instructions on second issue," and on the second issue he instructed the jury erroneously, as above pointed out, that they might find that "the failure to provide cross-ties was the fault of a fellow servant,"—a section master. These instructions are contradictory, and, if the jury took the latter view as law, they necessarily would find, as they did on the first issue, that the railroad company was not guilty of negligence. Error.

(128 N. C. 345)

HAIRSTON et al. v. GARWOOD et al.

(Supreme Court of North Carolina. Nov. 28, 1898.)

JUDGMENT — CONFESSION BY ATTORNEY — REINSTATEMENT OF CASE—SURPRISE AND EXCUSABLE NEGLIGENCE.

1. Plaintiffs are not entitled to vacation of judgment dismissing the case, and to reinstatement of the same, on the ground of surprise and excusable neglect, where the judgment was by consent of their attorney, and the contention is that he exceeded his authority.

2. It is within the authority of an attorney to consent to judgment for the opposing party.

Appeal from superior court, Davie county; Starbuck, Judge.

Action by Peyton Hairston and others against J. M. Garwood and others. Motion to vacate a judgment for defendants was denied, and plaintiffs appeal. Affirmed.

E. M. Raper, for appellants. E. L. Gaither and T. B. Bailey, for appellees.

MONTGOMERY, J. This proceeding is on a motion made by the plaintiffs to vacate and set aside a judgment taken against them by the defendants at the fall term, 1896, of Davie superior court, and to reinstate the case which was dismissed by that judgment. The case in which the motion was made embraced a former suit by the defendants here against the plaintiffs, and a later suit by the plaintiffs here against the defendants; both suits being over the same subject-matter, and consolidated by order of the court. The grounds of the motion were—First, irregularity of the judgment; and, second, surprise and excusable neglect, under section 274 of the Code. The plaintiffs are entitled to no relief on the latter point, as the whole proceeding shows that the plaintiffs' contention is that their counsel exceeded his au-

thority in his conduct of the case. He is not charged with negligence, but with too much zeal. The judgment complained of recited that the matters and things set up and involved in the cases were, by and with the consent of the attorneys for plaintiffs and defendants, determined in favor of J. M. Garwood, the defendant, and that J. M. Garwood was the owner of the land described in the pleadings, and that the consolidated case be dismissed. The plaintiffs contended on the hearing of the motion that the judgment was irregular for the reason that the consent of the attorney of the plaintiffs to the rendition of the judgment was not the consent of the plaintiffs themselves. Affidavits were introduced by the plaintiffs going to show that the plaintiffs' attorney, without the consent of the plaintiffs, and even against their instructions, entered into a compromise of the lawsuit, and that the judgment was the result of the compromise; that, as soon as they heard of the judgment, they made the motion to vacate it; and that, if they had been present when the judgment was rendered, they would have opposed it. The defendants also had affidavits, in which the compromise was admitted, but affirming that the plaintiffs had knowledge of the action of their attorney. His honor declined to find whether the plaintiffs did or did not consent to the compromise and judgment, and held the judgment to be regular. There was no error in that course by his honor. The action of the plaintiffs' attorney was plainly within the scope of his authority. An attorney can confess a judgment, and thereby bind his client. *Weeks, Attys. at Law, § 222*. In *Stump v. Long*, 84 N. C. 616, it is said by the court that "every agreement of counsel entered on record and coming within the scope of his authority must be binding on the client"; and to the same effect is the opinion in the case of *Bradford v. Colt*, 77 N. C. 72; *Henry v. Hillard*, 120 N. C. 479, 27 S. E. 180. If the judgment had shown upon its face that it had been entered as the result of a compromise made by the attorney, and that the judgment had been entered by his consent, the question would be a very different one from the one presented by this record. That question is not before us, and we need not discuss it. On the subject, however, the case of *Moye v. Cogdell*, 69 N. C., at page 95, may be read with interest. Affirmed.

(128 N. C. 345)

SHOAF et al. v. FROST.

(Supreme Court of North Carolina. Nov. 28, 1898.)

ALLOTMENT OF HOMESTEAD—REMEDY FOR DEPRECIATION.

The verdict of a jury, on exceptions to return of appraisers appointed to lay off defendant's homestead, that it was worth \$2,000, instead of \$1,000, as appraised, having been held to be final, for purpose of a reallocation of homestead the depreciation in value since the verdict cannot be considered, the defendant's remedy being in equity, after acceptance of the homestead.

Appeal from superior court, Davie county; Coble, Judge.

Proceedings by O. J. Shoaf & Co. against E. Frost for allotment of defendant's homestead. From a judgment denying defendant's motion that, on a reallocation, there be taken into consideration depreciation in value since the verdict, on exceptions to return of appraisers first appointed to lay off the homestead, he appeals. Affirmed.

E. L. Gaither and Glenn & Manly, for appellant. Watson, Buxton & Watson, for appellees.

FAIRCLOTH, C. J. The history of, and the facts in, this case, will be found in same case reported in 116 N. C. 675, 21 S. E. 409, and 121 N. C. 256, 28 S. E. 412. Pursuant to the opinion of this court, the value of the tract of land, which had been set apart by the commissioners, was found by the jury to be \$2,000, and this court held that the verdict was conclusive in that respect, and directed that a commissioner be appointed to divide said land into two equal parts, one part to be selected by the homesteader as his homestead. The defendant now moves on affidavit that the order to reallocate his homestead shall contain a provision that the appraisers take into consideration any material depreciation in the value since 1894, when the verdict of the jury was rendered. This proposition we declined to adopt in the second opinion above cited, and pointed out, by reference, the defendant's remedy if depreciation has taken place. The defendant has remained in possession of the whole tract, and to grant his motion now would, in effect, be a revaluation, and might differ from the finding of the jury, which, we have said, must stand. It would seem that when the defendant has accepted the homestead, valued at \$1,000 by the jury, then he may consider the question of depreciation, but not in this action, nor out of the excess laid off in this proceeding, as the creditors may in the event it has appreciated. Affirmed.

(123 N. C. 285)

THOMAS v. THOMASVILLE SHOOTING CLUB.

(Supreme Court of North Carolina. Nov. 28, 1898.)

CONTRACTS—EVIDENCE—SUFFICIENCY.

A person who agreed to build a barn for the exclusive accommodation of a shooting club, in consideration of receiving the entire patronage of its members, desisted from completing it on the commencement of the erection of a barn by the club itself. He testified that the club asked him to build on his own land, and agreed to "furnish part of the money for its erection," and afterwards refused to do so, and that he had expended certain amounts of money for labor and material. Held not to tend to establish a contract, because of uncertainty of the terms.

Douglas and Furches, JJ., dissenting.

Appeal from superior court, Davidson county; Allen, Judge.

Action by P. C. Thomas against the Thomasville Shooting Club. There was a judgment for plaintiff, and defendant appealed. Reversed.

E. E. Raper, for appellant. Walser & Walser, for appellee.

MONTGOMERY, J. The complaint is as follows: (1) That the Thomasville Shooting Club is a body corporate, duly incorporated under the laws of North Carolina. (2) That the plaintiff, by request or order of the defendant, expended considerable money and labor to erect a barn for the use of defendants, and agreed to advance the money to assist plaintiff in erecting said barn. (3) That defendant failed to comply with agreement, and erected another barn on defendant's property. Wherefore the plaintiff demands a judgment for damages in the sum of \$75, with interest from the 1st day of October, 1894, and the costs of this action. The plaintiff testified in these words: "Thomasville Shooting Club is a corporation. The club asked me to build a barn on my own premises, and agreed to furnish part of the money for its erection, and afterwards refused to do so. I built it 40 by 45 feet, and put up a brick wall, about four feet above ground, and built a basement. I put in only part of timber, and got it this far in September. In September, 1894, Mr. Davis came down, and went in, and showed me how he wanted it arranged. He afterwards sent for me, and said, 'I have decided to build a barn myself on club lot;' and I did nothing more on my barn. Davis wrote me a letter about barn, and in it said substantially: 'How about barn? We will want ample stable accommodations. Our business will be a considerable item. I mean to rig you up so you may make something out of this.' The lumber I got to build barn cost me \$65. I had no use for it. I sold part of it. Brick cost me \$60. I used part of them last year in my house. Labor cost \$15, and lime cost \$10. The barn was to be walled in, and was to be exclusively for the use of the club. It was to be my barn on my own lot, but it was to be for the club's stock exclusively. My compensation for building barn was to come out of what I got from the club for taking care of their stock."

The defendant moved to dismiss the action as upon judgment of nonsuit, under chapter 109 of the Acts of 1897. The motion was refused, but it ought to have been allowed. The plaintiff abandoned here any claim to recover for damages based upon the profits which he might have made if the barn had been completed and the stock of the defendant stabled there. Such claim was admitted to be purely speculative. But the plaintiff insists that he had a contract with the defendant to build the barn on his own land, for the accommodation of the stock of the defendant for profit, and that the defendant failed to comply with its part of the contract.

The plaintiff's testimony is the only evidence of the contract. That evidence does not tend to prove a contract; it was no evidence of a contract. "The club," the plaintiff testified, "asked me to build a house on my own land, and agreed to furnish part of the money for its erection, and afterwards refused to do so." Who could tell how much money the defendant agreed to furnish? The plaintiff did not say. And who can estimate the damages which arose from the failure of the defendant to furnish an unknown and uncertain amount of money for the purposes mentioned in the complaint? The communications between the parties are too uncertain to constitute a contract. "In order to constitute a valid verbal or written agreement, the parties must express themselves in such terms that it can be ascertained to a reasonable degree of certainty what they mean. And, if an agreement be so vague and indefinite that it is not possible to collect from it the full intention of the parties, it is void; for neither the court nor the jury can make an agreement for the parties." *Ohit. Cont. p. 68*. Besides, the plaintiff does not allege, nor did he offer to show, that the failure of the defendant to furnish money to build the barn prevented him from completing it. On the contrary, he insists that he left off building the barn after he had commenced the work, because defendant built one on its own property. There was error, and the judgment is reversed. Reversed.

DOUGLAS, J. (dissenting). I cannot concur in the opinion of the court that the "plaintiff's evidence does not tend to prove a contract." It is not for us to say whether the evidence proves or does not prove a contract, as that is the exclusive province of the jury. All that we can say is that there is no evidence, or nothing beyond a mere scintilla, tending to prove a contract. *Wittkowsky v. Wasson*, 71 N. C. 451; *Spruill v. Insurance Co.*, 120 N. C. 141, 27 S. E. 39, and cases therein cited. In going even that far, we must assume the evidence offered in behalf of the plaintiff to be true, and must construe it in the light most favorable to him, because, as this court has said in *Spring v. Schenck*, 99 N. C. 551, 555, 6 S. E. 405, "the jury might have taken that view of it, if it had been submitted to them." *Avera v. Sexton*, 85 N. C. 247; *Hathaway v. Hinton*, 46 N. C. 243; *State v. Allen*, 48 N. C. 257, 265; *Abernathy v. Stowe*, 92 N. C. 213; *Gibbs v. Lyon*, 95 N. C. 146; *Hodges v. Railroad Co.*, 120 N. C. 555, 27 S. E. 128; *Collins v. Swanson*, 121 N. C. 67, 28 S. E. 65; *Cable v. Railroad*, 122 N. C. 892, 29 S. E. 376. Taking, then, the evidence in the light most favorable to the plaintiff, it seems to me that there is unquestionably more than a scintilla of evidence tending to prove a contract, the terms of which were substantially as follows: The defendant induced the plaintiff to build a barn upon his premises, and agreed, in consideration of a right to its exclusive

use, to furnish part of the money necessary for its erection. As a further consideration, the defendant agreed to pay the plaintiff for taking care of the stock kept in said barn. In pursuance of this agreement, the plaintiff began to build the barn, and continued until the defendant notified him of its refusal to abide by the contract. In its partial erection, and before such notification, the plaintiff had expended \$65 for lumber, \$60 for brick, \$15 for labor, and \$10 for lime, aggregating the sum of \$150, no part of which was paid by the defendant. For the labor and the lime (necessarily a total loss), and the depreciation in the value of the lumber and brick by their partial use, the plaintiff demands the sum of \$75. This did not include any speculative or prospective profits. It did not even amount to the bare outlay, but included only the actual loss in cash, after allowing a reasonable sum for the value of the material that could be re-used.

We should remember that speculative damages are denied, not because there is no injury (*Injuria*) of which the plaintiff can complain, but because the loss or damage (*damnum*) resulting from such injury is incapable of definite estimation. In the present case there is no difficulty in estimating the damage asked by the plaintiff for the breach of the contract by which the defendant induced him to alter his condition. Subtract the value of the remaining material from the amount already expended, and you have the actual damages by a mere arithmetical calculation. If a party were to induce a lawyer or a doctor to visit a distant city under the promise of professional employment, and were then to refuse his services, I think the injured party would be entitled to recover his actual damages. The lawyer could not demand the speculative profits of a contingent fee; but why could he not recover his actual expenses incurred at the request of the defendant? It is true that the plaintiff does not allege that he was unable to complete the barn; but neither is there any evidence that he was able to complete it, or had any use for it if completed. Even if able to do so, no one would care to put money into a building which would be neither useful nor profitable, and which would necessarily deteriorate. I think the judgment should be affirmed.

FURCHES, J. I concur in the dissenting opinion.

(123 N. C. 138)

BELVIN et al. v. RALEIGH PAPER CO.
et al.

(Supreme Court of North Carolina. Nov. 28, 1898.)

LESSEES—RIGHTS AGAINST MORTGAGORS—FIXTURES—PRIORITIES—REFERENCE—LIEN.

1. A lessee of mortgaged premises, who puts thereon improvements, including a building and machinery, can hold them free of the mortgage, though the mortgagee did not join in the lease

or consent to the improvements, not only under the law of fixtures, but under the provision of the lease that he should put them on, and they should remain his, with the right to remove them, unless the lessor paid for them.

2. Improvements put on mortgaged property by the lessee of the mortgagor do not become subject to the mortgage by the lessee's conveying them to the mortgagor; the latter at the same time, and as part of the same transaction, having conveyed them to a trustee as security for the purchase money to be paid the lessee.

3. Where a lessee erects buildings on the leased land, and puts machinery therein, giving to each one of whom he purchases machinery a mortgage for the purchase price on the particular articles purchased of him; and then conveys the improvements and machinery to the mortgagor, who at the same time, and as part of the same transaction, conveys to a trustee, to secure the purchase money to be paid the lessee, the trustee takes the property subject only to the claims of the sellers of the machinery under their mortgage, each to the property sold by him.

4. A claim for material furnished, which was necessary, and was used in the manufacture of paper in the mills of a corporation, has priority, under Code, § 1255, as a debt of the corporation, over a mortgage given by the corporation on its property; the corporation having, by vote of the directors, authorized H., its secretary and treasurer, to carry on the business in its name; the seller of the material not knowing at the time that H. was carrying on the business for himself; and judgment, unappealed from, having been obtained on the debt against the corporation, in a suit against it, wherein H., as secretary and treasurer, accepted service.

5. Acts 1897, c. 237, being, so far as it relates to trial by jury in cases of reference, the same as Code, § 421, the right to have issues arising on exceptions to the findings and conclusions of the referee tried by a jury is waived by failure to object to the order of reference.

6. There can be no lien on landlord's property for material sold his lessee by one knowing at the time that he was such.

Montgomery, J., dissenting.

Appeal from superior court, Wake county; Adams, Judge.

Action by C. H. Belvin, cashier of the National Bank of Raleigh, for himself and all other creditors of the Raleigh Paper Company who shall come in and make themselves parties to this action, against the Raleigh Paper Company and others. From the judgment, plaintiff Belvin and defendant the North Carolina Car Company appeal. Modified.

Shepherd & Busbee and J. B. Batchelor, for appellants. B. B. Winborne, Douglass & Simms, Ed. C. Smith, Battle & Mordecai, and Jones & Tillett, for appellees.

FURCHES, J. The plaintiff Belvin is the cashier of the National Bank of Raleigh, and the defendant the Raleigh Paper Company is a corporation. The defendant corporation on the 14th of January, 1890, executed a mortgage to the plaintiff Belvin on its plant at the Great Falls of the Neuse to secure some \$13,000; and on the 5th of June, 1893, the defendant paper company executed a second mortgage to Belvin, including the same property,

and some other property not included in the first mortgage, but subject to the first mortgage, to secure an additional indebtedness of \$9,000. The greater portion of this indebtedness still remains due and unpaid. In April, 1893, the paper company leased this property to the defendant J. N. Holding; and on the 9th of October, 1893, this lease was surrendered, and the paper company then leased said property to the defendant Holding and N. T. Cobb for the term of six years; and in the month of March, 1894, Cobb sold and assigned all his interest in said lease and property to the defendant Holding. By the terms of this lease, said Holding and Cobb were to put certain improvements on said property, including an additional building, a 100 horse power engine, and other machinery, to be used in manufacturing paper; this being the business in which said company was engaged. But by the terms of the lease said improvements and machinery so put on the corporation property by the lessees were to be and remain their property, and they were to have the right to remove the same, unless the paper company paid for said property and improvements. Before the execution of the second mortgage to the plaintiff Belvin the lessee Holding had bought a 100 horse power engine of Ellington, Royster & Co.; and this, it seems, was included in this second mortgage, subject to the payment of the balance due thereon, which was stated to be \$1,500. It is stated that this indebtedness to Ellington, Royster & Co. was secured by mortgage, though this mortgage is not set out in the record as the other mortgages are; but no exception in the case seems to dispute this lien, except as to the amount, which plaintiff says should only be \$1,500. The defendant Holding on the 16th of October, 1894, bought of M. P. Pegram other machinery amounting to \$6,000, and gave Pegram a mortgage on said machinery to secure the notes given for said property, which was registered in Wake county on the 24th December, 1894. After the registration of this mortgage this machinery was put upon the property so leased to the defendant Holding by the Raleigh Paper Company. Besides the engine bought of Ellington, Royster & Co., and the machinery bought of Pegram, the defendant Holding erected on said property a large brick building, adjoining, but not (as the referee finds) attached to, the original buildings on said property when it was leased to Holding. On the 2d January, 1896, the defendant Holding sold to the paper company all the machinery and improvements he had put upon said property during the term of said lease, for \$18,500, to which sum there seems to be added \$1,500, the amount still due on the engine, for which the paper company executed to said Holding 10 promissory notes, for \$2,000 each, amounting to \$20,000; and at the same time, and as a part of the same transaction (as found by the referee), the paper company executed to the defendant W. W. Vass a deed of trust on all this property (im-

provements and machinery) so conveyed to the paper company, to secure the payment of the 10 notes given by said paper company for said improvements and machinery. These notes have not been paid, nor has a large part of the Pegram debt been paid. Besides these debts, there is a large amount of debts made by said Holding while operating this plant as lessee, a part of which is also claimed to be a lien on the original plant, or upon the property sold by Holding to the paper company. But we will first consider the rights of Belvin under these two mortgages, the rights of Pegram under his mortgage, and the rights of Vass under his mortgage or deed of trust.

It would seem that Belvin is entitled to everything conveyed, in either of his mortgages, that belonged to the paper company at the time said mortgages were made, and to any improvements placed upon said property since that time, by the paper company or by any one else, that the paper company would be entitled to if the property had not been mortgaged, but that he is not entitled to improvements put upon said property that the paper company would not have been entitled to if the property had not been mortgaged. The general rule is that whatever improvements a mortgagor puts upon the mortgaged property inure to the benefit of the mortgagee, or, more correctly speaking, is additional security for the debt. But this is upon the idea that the mortgagor is at least the equitable owner of the fee in the land; that he is entitled to the absolute legal as well as equitable title, upon payment of the debt, and that such improvements are his, and are made for his benefit; and that they increase the value of his property. Under the law, when a mortgagor puts such improvements upon the land they become a part of the land; and he cannot remove them, and thereby impair the security for the mortgage debt, any more than he could dispose of a part of the land itself. *Wharton v. Moore*, 84 N. C. 479; *Moore v. Vallentine*, 77 N. C. 188; *Jones v. Hill*, 64 N. C. 198; *Footte v. Gooch*, 96 N. C. 265, 1 S. E. 525; *Horne v. Smith*, 105 N. C. 322, 11 S. E. 373. This is where the improvements—the fixtures—would belong to the mortgagor. The mortgagee is only entitled to this additional security when the fixtures become a part of the soil, or a part of the land belonging to the mortgagor; and if it is not a part of the land of the mortgagor, and does not, and never did, belong to the mortgagor, it cannot belong to, or inure to the benefit of, the mortgagee. The law with regard to fixtures is very different under different relations and circumstances. Thus, we have seen that where a fee-simple owner puts improvements, called "fixtures," on his land, the law at once fixes them with the character of land. But where a tenant for life, or a lessee, or a tenant for a term of years puts such improvements upon the leased property, for the purposes of manufacturing or for trade, while there under the

lease the law does not impress upon such improvements (fixtures) the character of land; and the tenant putting them there is the owner of them, and may remove them from the land. They are considered and treated as personal property. *Railroad Co. v. Deal*, 90 N. C. 112; *Overman v. Sasser*, 107 N. C. 432, 12 S. E. 64; *Woodworking Co. v. Southwick*, 119 N. C. 611, 26 S. E. 253. Therefore, as a matter of law, these improvements were never a part of the land, never belonged to the mortgagor, and cannot inure to the benefit of Belvin under his mortgage. But in this case it is not necessary to rely upon this principle of law, so firmly established in our courts, as it is expressly stipulated, as a part of the contract of lease, that this property is to belong to the lessee, and that he is to have the right to remove the same.

There were many cases cited to sustain the contention of Belvin, and to show that he is entitled to the improvements (the fixtures) put on the property by Holding. But upon examination it is found that they do not conflict with the doctrine stated in this opinion. The cases most relied on for this contention were *Wharton v. Moore* and *Moore v. Vallentine*, supra. These cases are not in conflict with this opinion, but in fact sustain the views we have here expressed. In *Wharton v. Moore* the improvements were made by a fee-simple purchaser, and, when made, the law attached them to, and made them a part of, the land. In *Moore v. Vallentine* the same principle obtains. The improvements (the fixtures) were placed on the land by a fee-simple purchaser, who sustained the relation of a mortgagor; and the law attached them to the land, and made them in law "a part of the land." Indeed, it is said in *Moore v. Vallentine*, supra: "If he had taken a lease, say for five years, his right to remove the engine and appurtenances would have been beyond any question." In both of these cases the nature of the estate proves that the erection of the fixtures was for a temporary purpose, and not for the purpose of making them a part of the freehold. In such cases the fixtures may be removed, and they do not, in contemplation of law, become "a part of the land"; and as the fixtures erected by the lessee Holding "did not become a part of the land," in contemplation of law, and as they were expressly made Holding's personal property by the terms of the contract,—the lease,—we see no ground upon which Belvin is entitled to them under his mortgages. This must be so, unless he is entitled to them by reason of the conveyance made by Holding to the paper company on the 2d of January, 1896. We have seen that these fixtures belonged to Holding, and, being his, he had the right to convey them; and having conveyed them to the paper company, the mortgagor, they would have become a part of the realty, and inured to the benefit of the mortgagee, Belvin, if it had not been that at the same time, and as a part of the same

transaction, the paper company conveyed them to Vass, trustee, to secure the purchase money the paper company agreed to pay Holding for the property. *Moring v. Dickerson*, 85 N. C. 466; *Howell v. Howell*, 29 N. C. 491; *Bunting v. Jones*, 78 N. C. 242. The conveyance of Holding to the paper company, and the assignment of the paper company to Vass, trustee, being parts of the same transaction, the title never "rested" in the paper company, and the improvements did not become a part of the land mortgaged to Belvin, and he can derive no benefit from this transaction.

It now becomes necessary to ascertain the rights of Vass under his assignment. It has been seen that Holding was the owner of this property, and had the right to convey the same, subject to other claims that will be discussed further on; and as it is not disputed but what Holding, through the paper company, conveyed whatever interest he had in said fixtures to Vass, trustee, it follows that Vass holds the same subject to the terms of said trust. But, to determine what his rights are, it is necessary to consider the rights of the other claimants.

It seems not to be disputed that Ellington, Royster & Co. are entitled to be paid the balance of their claim out of the sale of the 100 horse power engine, etc., sold to Holding by them. But this property only can be applied to the payment of their claim.

The next claim to be considered is that of M. P. Pegram for what is known as the "Oats Machinery." This property was in Lincoln county when Holding bought it. The sale was made on time, at the price of \$6,300, for which Holding executed his promissory notes, and secured their payment by a mortgage on the property so bought by him. This mortgage was registered in Wake county on the 24th of December, 1894, and before the property was moved thereto and put up as a part of the machinery of the paper company. Therefore, when Holding conveyed to the trustee, Vass, through the paper company, on the 2d day of January, 1896, he only had the reversion after paying the residue of the mortgage debt to Pegram. Therefore the Pegram mortgage debt must first be paid out of the property so mortgaged to Pegram.

This gives to Vass, trustee, all the fixtures put upon the lands of the Raleigh Paper Company by Holding, under the lease, to be paid out pro rata upon the debts therein secured, but subject—First, to the payment of the debt of Ellington, Royster & Co. out of the sale of the 100 horse power engine, etc., conveyed to Holding by them; and, secondly, to the payment of the balance of the debt due M. P. Pegram out of the sales of the property sold by the Bank of Charlotte to Holding, and by him mortgaged to said Pegram. The residue he will pay out upon the debts secured in the trust deed to him, as is above stated.

The next claim to be considered is that of Daniel M. Hicks. This claim can only be sustained against the mortgages of Belvin, if it can be sustained at all, under section 1255 of the Code. *Pocahontas Coal Co. v. Henderson Electric Light & Power Co.*, 118 N. C. 232, 24 S. E. 22; *Railroad Co. v. Burnett* (at this term) 31 S. E. 602. This statute has been amended by the act of 1897, but the amendment does not affect this case, as it was commenced before the passage of the statute. It appears from the findings of the referee that the material furnished by Hicks was necessary and was used in the manufacture of paper at the mills of the Raleigh Paper Company; that this company is the corporation that executed the two mortgages to Belvin. Thus far the claim seems to fall within the provisions of the statute as construed by this court. But it is contended that the debt was not made by the corporation; that it is not the debt of the corporation, and that the corporation is not liable for it; that Holding had no authority to make this debt for the corporation; that it was his debt, made for his benefit, and not for the corporation. And the referee found that Holding was not authorized to make this debt for the corporation, and that the corporation received no benefit from it. But it appears that Holding had been elected, and was, secretary and treasurer of the Raleigh Paper Company, and that the company, by a vote of the directors on the 9th day of October, 1893, had authorized Holding to carry on the business in the name of the company. It appears that, at the time the drafts were given upon which the judgments were recovered, the attorney of Hicks knew that Holding was carrying on the business of the concern for himself, and not for the corporation. But it does not appear that Hicks knew this when he sold him the goods. The statute provides for debts made by a corporation or its agents. And it would seem that the authority Holding had from the corporation, as its secretary and treasurer, to conduct the business in the name of the company, was *prima facie* sufficient evidence of agency to authorize the plaintiff to sell to him as agent. But the case does not stop here. Hicks brought suit against the company. Holding, as secretary and treasurer of the corporation, accepted service, and judgment was rendered, from which there was no appeal. Holding was secretary and treasurer of the corporation, and, as such, service of process might have been made on him. And, as service might have been made on him, he had the right to accept service for the corporation. These facts appearing, we are unable to see why section 1255 of the Code does not apply, and thereby remove the mortgage lien out of the way of the Hicks judgment, where there was no appeal. This judgment does not create a lien, but it puts the mortgages out of the way of its enforcement, as the mortgages conveyed nothing as against it. *Railroad Co. v. Burnett*, *supra*.

And as the court has taken charge of the property of the corporation, and thereby prevented the plaintiff Hicks from enforcing his judgments, these judgments must be satisfied before there is any application of the assets to the Belvin mortgages. The other judgments appealed from were not allowed, and the judgment of the court below on these judgments is not appealed from. These judgments, from which there was an appeal, do not fall under the ruling of the court upon the final judgments. This may seem to be hard measure as to the corporation and as to Belvin. But they have no right to complain of Hicks. It may be the result of misplaced confidence, but, if so, the corporation authorized it by making Holding its secretary and treasurer, and by authorizing him to carry on the business in the name of the corporation. And Belvin allowed it, by sitting by and permitting the corporation to do this, instead of foreclosing his mortgages, as he might have done. By doing this he took the chances, and they have turned out to his disadvantage.

We are not disposed to interfere with the rulings of the court as to the costs, except as expressly stated in these opinions. The judgment of the court upon the appeal of the plaintiff Belvin will be modified in accordance with this opinion. And as it appears that Holding was to pay the balance due on the 100 horse power engine, estimated at the time by Holding to be \$1,500, this amount, or whatever turns out to be still due on said engine, should be deducted from whatever may be found to be due Holding from the trust fund under the Vass mortgage; that is, this amount should be charged against him, in distributing the assets of the trust, if anything shall be found to be due him. The case will be recommitted to the referee, Zollicoffer, to reform his report in accordance with this opinion and the opinion filed in this case in the appeal of the North Carolina Car Company, *infra*. The plaintiff Belvin will pay the costs of this appeal out of the proceeds of sale under his mortgages and the Vass mortgage,—each fund paying its pro rata proportion. Modified and affirmed.

Appeal of Defendant the North Carolina Car Company.

In this appeal the defendant the North Carolina Car Company insists that it was entitled to have the issues arising upon its exceptions tried by a jury, under chapter 237 of the Acts of 1897. Upon examination of this statute, so far as it relates to the trial by jury in cases of reference, it is almost identical with section 421 of the Code, and must receive the same construction that has been given to that section. The order of reference is as follows: "This action coming on to be heard at this April term, 1897, of the superior court of Wake county, it is ordered that this action be referred to A. C. Zollicoffer, Esq., to hear and determine all questions and issues of fact and law, and all pleas in bar, arising in said action,

and to state all necessary and proper accounts between the parties. This order is made by the court, and not by consent." It seems to us that this was a proper case for an order of reference. This the car company does not dispute, but, under the terms of the order and the statute of 1897, it insists that it was entitled to have the issues arising upon its exceptions submitted to a jury for trial, without objecting to the order of reference. But, if the statute of 1897 is substantially the same as section 421 of the Code, this contention has been decided against the defendant car company. *Driller Co. v. Worth*, 117 N. C. 515, 23 S. E. 427, where it is held that a "failure to object to an order of reference at the time it is made is a waiver of the right to a trial by jury." This case has been cited with approval in *Collins v. Young*, 118 N. C. 266, 23 S. E. 1005; *State v. Mitchell*, 119 N. C. 784, 25 S. E. 783, 1020. Holding as we do that the statute of 1897, in this respect, is the same as section 421 of the Code, we find no error in the court for overruling this motion. This motion being properly refused, it was the duty of the judge to pass upon and find the facts, which he did. *Id.* § 422. And these findings of fact are as binding on us as if they had been found by a jury. We cannot review the *n. Dunavant v. Railroad Co.*, 122 N. C. 999, 29 S. E. 837; *Collins v. Young*, *supra*; *Wilson Cotton Mills v. C. C. Randleman Cotton Mills*, 115 N. C. 475, 20 S. E. 770.

This brings us to the question of lien, and, if a lien, to what extent, and upon what property? These questions the learned counsel did not press in his argument before us. And, upon examining the findings of fact by the referee (and the findings of fact by the referee were expressly adopted by the court as its findings), we readily see why he did not. The referee finds as facts that the defendant car company made the contract for this work, and for furnishing the material charged for in its complaint, with Holding as lessee of the paper company, and not as the agent of the paper company; that it knew at the time it made the contract and at the time it did the work that Holding was the lessee, and that he was having the work done for himself and for his own benefit, and not for the paper company. This being so, the car company has no debt against the paper company, and there can be no lien without a debt. *Baker v. Robbins*, 119 N. C. 289, 25 S. E. 876; *Boone v. Chatfield*, 118 N. C. 916, 24 S. E. 745. As the car company has no debt against the paper company, and no lien on the property of the paper company, of course the plaintiff Belvin's mortgage cannot be affected by this claim. According to the findings of the referee, the car company has a cause of action against the defendant Holding. But the action of the car company is not against him. Under the findings of fact by the referee, the car company has no lien on the property of the Raleigh Paper Company, under section 1255 of the Code, nor under any other statute. There may be other

claims against the paper company that were not specially called to our attention, and to which we have not given a separate treatment, as the record is very voluminous, and they may have escaped our attention. If there are such, they will be considered as falling under the principles we have laid down in discussing this claim of the car company, and will be governed by them. The case will be recommit- ted to Mr. Zollicoffer, to reform his report in accordance with this opinion and the opinion of the court filed in the plaintiff's appeal; and, when so reformed, it will be confirmed, and judgment rendered according to the re- formed report. The car company will pay the costs of this appeal. Modified and affirmed.

MONTGOMERY, J. (dissenting). I cannot concur in that part of the opinion which decides that the improvements put upon the land by the lessee of the mortgagor do not inure to the benefit of the plaintiff, as an additional security to his mortgage debts. I can state the reason for my dissent in a very few words. The legal title to the land was in the plaintiff mortgagee when the lessee of the mortgagor made the improvements. The mortgagor, the paper company, made the lease to Holding, the plaintiff not having been a party there- to. If the paper company, the mortgagor, had made the improvements after the execu- tion of the mortgage, certainly the improve- ments would have become an additional secu- rity for the plaintiff's debt. *Wharton v. Moore*, 84 N. C., at page 488; *Moore v. Val- entine*, 77 N. C. 188. How, then, can the les- see of the mortgagor stand in a different or better position than does his lessor, the mort- gagor? "If the mortgagor, or any one standing in his place, enhance the value of the premises by improvements, they become additional secu- rity for the debt; and he can only claim the surplus, if any, upon such sale being made after satisfying the debt." 2 Washb. Real Prop. p. 174. In *Rice v. Dewey*, 54 Barb. 455, it was decided that "where lands sold and conveyed by the mortgage are charged with the mortgage debt, improvements that constitute a part of the realty, irrespective of the ques- tion by whom made, are equally subject to the lien of the mortgagee as the land upon which they are made." And that case is cited as au- thority by this court in *Wharton v. Moore*, 84 N. C., at page 484. The lessee's contract, and the benefits reserved to himself under it, should have been ratified, at least, by the plaintiff, who held, as we have said, the legal title to the land. That is not a hard rule. It, to my mind, was the most natural course that would have suggested itself to the lessee. The improve- ment erected by the lessee was a brick build- ing 125 feet long by 32 feet wide, with an ex- tension 32x45 feet. The referee, indeed, found that it could be removed without injury to the old building (upon one wall of which it partly rested) or to the freehold. But that finding is of no consequence, as bearing upon the view I have taken of the matter.

(53 S. C. 580)

WHALEY v. LAWTON.

(Supreme Court of South Carolina. Dec. 10, 1898.)

PLEADING—MOTION TO MAKE MORE DEFINITE—TIME.

A stipulation extending the time for "an- swering, pleading, or demurring" to a complaint does not extend the time within which to make a motion to make the complaint more definite and certain.

Appeal from common pleas circuit court of Charleston county; R. C. Watts, Judge.

Action by W. S. Whaley against W. Wallace Lawton for malicious prosecution. From an order refusing a motion to make an amended complaint more definite and certain, defendant appeals. Affirmed.

McCrady & Bacot, for appellant. Thomas B. Curtis, for respondent.

JONES, J. This is an appeal from an order refusing a motion to make an amended com- plaint more definite and certain. In refusing the motion, the circuit court said: "While I hold the complaint is subject to the objection alleged, still, by filing his answer, defendant has waived the objection." The amended complaint was served on August 6, 1897. By written agreement of plaintiff's counsel, on August 21, 1897, the time for answering, pleading, or demurring was extended until September 7, 1897. Then, on September 3, 1897, a further extension of time for answer- ing, pleading, or demurring was made to Oc- tober 1, 1897, with this stipulation: "No ex- tension of time for such purpose, however, to prevent the docketing of the case for trial at the ensuing November, 1897, term of court." On September 7, 1897, the motion to make the amended complaint more definite and cer- tain was served on plaintiff's attorney, and on the 24th day of September, 1897, plaintiff's attorney accepted service of defendant's an- swer. This answer was a general denial of each alleged cause of action, and contained this recital: "The defendant, W. W. Law- ton, reserving, not waiving, his motion to re- quire the plaintiff to make his amended com- plaint more definite and certain, notice of which motion was served upon the plaintiff's attorney, Thos. R. Curtis, on the 7th day of September, 1898, answering," etc. Section 181 of the Code of Procedure is as follows: "If irrelevant or redundant matter be inserted in a pleading, it may be stricken out, on mo- tion of any person aggrieved thereby. And when the allegations of a pleading are so in- definite or uncertain that the precise nature of the charge or defense is not apparent, the court may require the pleading to be made definite and certain by amendment." The time within which such motions must be made is not expressly provided for in the Code, but rule 20 of the circuit court provides that mo- tions under this section "must be noticed before demurring or answering the pleading, and within twenty days from the service

thereof." It appears that the motion in this case was noticed before answering, but not within 20 days after the service of the complaint. The motion, then, was too late, under rule 20, unless the fact that the motion was made within the time allowed for answering or demurring, by agreement of parties, prevents such operation of the rule. If the rule had merely required the motion to be noticed before answering, defendant's motion would have been in time, the agreement of the parties extending the time to answer operating to extend the time for noticing the motion. But the rule requires imperatively that the motion must be noticed within 20 days of the service of the objectionable pleading; hence, unless the parties in stipulating for extension of time for answering, etc., also provide for an extension of time in which to make such motion, the motion comes too late, unless made within the time required by the rule. See cases cited in 6 Enc. Pl. & Prac. note 5, p. 278, being *Hammond v. Earle*, 5 Abb. N. C. 106; *Brooks v. Hanchett*, 36 Hun, 70, construing a rule of court like our rule 20. The stipulation of the parties in this case, while extending the time to answer, did not extend the time in which to make such motion.

We are not prepared to say that a mere answer is a waiver of the right to be heard on such a motion, duly noticed. The authorities settle that answering on the merits, and going to trial without raising such objections, is a waiver thereof. *Zimmerman v. McMakin*, 22 S. C. 372; *Pom. Code Rem. § 549*; *Bliss, Code Pl. § 425*; 6 Enc. Pl. & Prac. 278, 279, and cases cited. It would be a very harsh rule to establish that an answer, reserving the right to insist on such a motion, then duly noticed, is a waiver of such motion. But since the record discloses that the notice was not given in this case within the time required by rule 20, and respondent has given notice, among other things, that he would seek to sustain the judgment below on the ground that the motion comes too late, we affirm the judgment on this ground. Judgment affirmed.

(53 S. C. 547)

EGAN v. BISSELL et al.

(Supreme Court of South Carolina. Nov. 24, 1898.)

TRUST DEEDS—WRITTEN ASSIGNMENT OF SECURED DEBT—CONSIDERATION—PAROL EVIDENCE.

A debtor executed a trust deed to a creditor to secure his debt and certain other debts, and provided therein that, when such debts were paid, the title to the property was to vest in the debtor's wife in fee simple. The debts were all paid, other than the debt of the trustee, who assigned his debt specified in the trust deed to the debtor's wife by a written instrument under seal, purporting to be based on a good and valuable consideration. There was no claim that the trustee's debt had been paid in money. *Held*, that the trustee could avoid his assignment so as to prevent the title in fee from passing to the wife, by showing by parol that it was executed without consideration from the wife, on the request of the debtor, for a temporary purpose, which has been ac-

complished; thereby rendering the assignment void, according to the agreement of the debtor and creditor.

By a divided court; Pope and Gary, JJ., dissenting.

Appeal from common pleas circuit court of Beaufort county; I. D. Witherspoon, Judge.

Action by George W. Egan against Henry Edward Bissell and Sarah H. Bissell to adjudicate the rights of Henry Bissell, under a trust deed, to property purchased by plaintiff from Sarah Bissell. From an order overruling a demurrer to the answer of Henry Bissell and from an order settling the issues to be tried by the jury, plaintiff and Sarah Bissell appeal. Affirmed.

W. M. Fitch, for appellant George W. Egan. J. P. R. Bryan, for appellant Sarah H. Bissell. Mitchell & Smith, for respondent, Henry E. Bissell.

POPE, J. It is deemed important to a correct apprehension of this appeal that the pleadings, in substance, should be repeated. The complaint alleges:

(1) That George W. Egan, on the 21st day of December, 1896, became the purchaser from the defendant Sarah H. Bissell of the tract of land lying in Beaufort county, in this state, known as "Bonny Hall," containing 1,700 acres of rice and uplands, at the price of \$31,000, of which \$11,000 was paid in cash, and the balance in the bond of Egan for \$20,000, secured by a mortgage of the premises sold.

(2) That the defendant Henry Edward Bissell, by written notice dated the 16th of December, 1896, to the plaintiff, claimed that the sum of \$10,374.52, mentioned in the trust deed of said Bonny Hall plantation, made by J. Bennett Bissell to the defendant Henry Edward Bissell, dated 25th day of September, A. D. 1876 (which deed was duly recorded), is still due and unpaid to the said Henry Edward Bissell, and that the same is a lien on the said Bonny Hall plantation under said deed of trust, a copy of which is exhibited as a part of the complaint.

(3) That the plaintiff is informed by the said defendant Sarah H. Bissell, and he believes, that said claim of said Henry Edward Bissell, trustee as aforesaid, is fictitious, having become wholly extinct, as appears by the several instruments in writing or assignments of same to Sarah H. Bissell, indorsed by the said Henry Edward Bissell upon the said trust deed of the said J. Bennett Bissell to Henry Edward Bissell, dated 25th September, 1876. Copies of said several instruments of writing are made a part of the complaint, and exhibited therewith.

(4) And that the plaintiff is further informed by the said defendant Sarah H. Bissell that after the several releases of the said Henry Edward Bissell under said several writings as aforesaid, and the payment and satisfaction of all the debts contemplated by the said trust deed, the said Sarah H. Bissell, by her deed, in the execution of the power in her vested by the trust deed, of date 25th Septem-

ber, 1896, by appointment, declared that the said Henry Edward Bissell should hold as her trustee the said Bonny Hall plantation, and this deed is exhibited with the complaint, as a part thereof.

"Wherefore the said plaintiff demands judgment that the said claim of the said defendant Henry Edward Bissell be adjudicated in this suit, and for a complete determination of all the aforesaid right, interest, lien, claim, or demand of the said Henry Edward Bissell, to the end that the said Bonny Hall plantation, as aforesaid, may be freed from said alleged incumbrance, and the right, title, and possession of the said George W. Egan, under the warranty deed of the said Sarah H. Bissell, may be confirmed and quieted against the claim of the said Henry Edward Bissell aforesaid, and for such other and further relief as the plaintiff may be entitled," etc.

The following is a copy of the trust deed, dated 25th September, 1876, exhibited with the complaint: "State of South Carolina, County of Beaufort. Know all men by these presents that I, J. Bennett Bissell, of the city of Charleston, in said state, for and in consideration of the trusts hereinafter recited, and also in consideration of the sum of five dollars to me in hand paid at or before the sealing and delivery of these presents by Henry Edward Bissell, of Beaufort county, in said state, whereof the receipt is hereby acknowledged, have granted, bargained, sold, and released, and by these presents do grant, bargain, sell, and release, unto the said Henry Edward Bissell, all that plantation or tract of land commonly known as 'Bonny Hall Plantation,' in Beaufort county, state aforesaid, containing about seventeen hundred (1,700) acres of rice and upland, bounding north on Combahee river, west on the lands now or late of Mrs. Arthur Middleton, east on lands now or late of Henry Middleton, and south on lands now or late of Henry Middleton, all of which is more fully described in a plan from Godard's survey, traced by C. J. Baker, surveyor, London, England, bearing date in July, 1867, together with all and singular the rights, members, hereditaments, and appurtenances to the said premises belonging, or in any wise incident or appertaining; to have and to hold, all and singular, the said premises unto the said Henry Edward Bissell, and his heirs and assigns, forever. In trust, nevertheless, to and for the following intents, uses, and purposes, that is to say: In trust, in the first place, to pay the balance due on a certain bond of the said J. Bennett Bissell to Charles H. Simonton, referee, made and delivered, together with a certain mortgage of even date, to secure the credit portion of the purchase money of the premises herein conveyed; and, after the payment and satisfaction of said bond and mortgage, then in trust, in the second place to pay and discharge a certain bond in the penal sum of five thousand dollars, secured by a mortgage of said premises, made and delivered by the

said J. Bennett Bissell to the firm of Charles S. Bennett & Company, of Charleston, state aforesaid, to indemnify and secure them for certain indorsements, of which three thousand dollars are chargeable at present on said mortgage; and, after the payment and satisfaction of the last-named bond and mortgage, then in trust, in the third place, to secure and pay unto the said Henry Edward Bissell certain debts or sums of money now due and owing to him by the said J. Bennett Bissell, and amounting in the aggregate, at this date, to the sum of ten thousand three hundred and seventy-four dollars and fifty-two cents (\$10,374.52), exclusive of interest, of which sum one thousand dollars was borrowed by the said J. Bennett Bissell from the said Henry Edward Bissell on or about the 22d day of March, A. D. 1876, and was then paid to the said Charles H. Simonton, referee, on account of the bond and mortgage herein above first referred to, and the remainder of said sum, to wit, nine thousand three hundred and seventy-four dollars and fifty-two cents (\$9,372.52), represent unpaid balances of salary from January 1, 1868, to January 1, 1876, due and owing to the said Henry Edward Bissell, as superintendent and general agent of all the plantation and stores of the said J. Bennett Bissell, situate in the counties of Beaufort and Colleton, in the state aforesaid. And after the payment of the debts or sums of money aforesaid, together with lawful interest thereon from the time each of said debts or sums of money became due and payable, then in trust to and for such intents, uses, and purposes, and to such person or persons, as Sarah H. Bissell, the wife of the said J. Bennett Bissell, shall, by deed or by her last will and testament, limit, direct, and appoint; and, in default of such limitations, direction, and appointment, then to her, the said Sarah H. Bissell, and her heirs and assigns, forever. In witness whereof I have hereunto set my hand and seal on this the twenty-fifth day of September, A. D. one thousand eight hundred and seventy-six, and in the one hundred and first year of the sovereignty and independence of the United States of America. J. Bennett Bissell. [L. S.] Signed, sealed, and delivered in the presence of A. Cohen, J. D. Perry." Duly recorded.

The following is a copy of the two deeds of Henry Edward Bissell, assigning his debt under the trust deed to his sister-in-law Sarah Bissell:

"The State of South Carolina, Charleston County. Know all men by these presents that I, Henry Edward Bissell, for good and valuable consideration, and for divers good and sufficient causes me thereunto moving, do hereby release, assign, transfer, and set over unto Sarah H. Bissell, the wife of my brother J. Bennett Bissell, the debt named, described, provided for, and secured in and by the foregoing deed, due and owing to me by my said brother, for the sum of ten thousand three hundred and seventy-four dollars and fifty-

two cents (\$10,374.52), exclusive of interest at the date of said deed; to have and to hold the same, to and for her sole and separate use, to her, and her administrators and assigns, forever. Witness my hand and seal this 13th day of January, A. D. 1883, and in the 107th year of the Independence of the United States of America. H. E. Bissell. [Seal.] In the presence of J. B. Bissell, L. O. Blocker."

"State of South Carolina, Colleton County. Whereas, on the 13th day of January, A. D. 1883, I, H. E. Bissell, did release, assign, and transfer unto Sarah H. Bissell the within-described debt of my brother J. B. Bissell, inclusive of all interest; and whereas, the word 'inclusive' in said release was by mistake in said release written 'exclusive': Now, know all men by these presents that I, H. E. Bissell, for the purpose of correcting said error, and in consideration of one dollar to me paid, do hereby release, assign, transfer, and confirm unto the said Sarah H. Bissell, her heirs, executors, and administrators, the said debt as described herein, together with all interest now due and to become due thereon. Witness my hand and seal this 4th day of January, A. D. 1886. H. E. Bissell. [L. S.] In presence of J. B. Bissell, M. S. Fripp."

These deeds are written on trust deed of 25th September, 1876, and also duly recorded.

To this complaint the defendant Henry Edward Bissell made the following answer:

"(1) Answering the first article of the said complaint, he denies that the plaintiff, George W. Egan, on the 21st of December, 1896, became the purchaser from the defendant Sarah H. Bissell, and is now in possession, of that plantation or tract of land known as 'Bonny Hall Plantation,' situate in Beaufort county, but, on the contrary, shows and alleges that the plaintiff, Geo. W. Egan, on the 21st December, 1896, was well aware that the said Sarah H. Bissell could not sell or convey to him the said plantation known as 'Bonny Hall Plantation,' and that she was not in possession thereof; and this defendant further shows that the said Geo. W. Egan was not, at the date of the bringing of this said action, in possession of the said plantation, but that this defendant was in sole and exclusive possession thereof.

"(2) In answer to the allegations of the second article of the said complaint, this defendant shows and alleges that, being informed that the said Geo. W. Egan contemplated a purchase from the said Sarah H. Bissell of the said plantation or tract of land known as 'Bonny Hall Plantation,' he duly notified the said Geo. W. Egan that this defendant was in possession thereof, and also held the legal title to the said plantation, and that the said Sarah H. Bissell could not convey the same to him, and that for greater certainty, on the 19th of December, 1896, anterior to the purchase by the said Geo. W. Egan from the said Sarah H. Bissell of the

said plantation, this defendant, in writing, duly notified the plaintiff that he possessed the legal title to the said Bonny Hall plantation, and held the same, and was in possession of the same, in trust for the payment of the debt of \$10,374.52, with interest thereon, mentioned in the trust deed of Bonny Hall plantation from J. Bennett Bissell to this defendant, dated 25th September, 1876; and that the said Geo. W. Egan, notwithstanding the said notice, and with full knowledge of the same, and with the full knowledge that this defendant was in exclusive possession of the said Bonny Hall plantation, as trustee under the terms of the said deed, and, further, with the full knowledge that this defendant claimed that he was entitled to the payment of the said sum of \$10,374.52, with interest aforesaid, out of the said plantation, still proceeded, and thereafter, on the 21st December, 1896, received from the said Sarah H. Bissell the conveyance of the said property, with the intention to defeat the claim of this defendant.

"(3) In answer to the allegations of the third article of said complaint, this defendant respectfully shows that he has no knowledge or information sufficient to form a belief as to what statements or information have been given by the said Sarah H. Bissell to the said Geo. W. Egan; but this defendant respectfully shows and alleges that the history of the transaction and of the instruments in writing referred to in the said third article is as follows, to wit: That the relations between this defendant and his brother, the late J. Bennett Bissell, were of the most friendly, close, and intimate character; that this defendant was employed by his brother, the said J. Bennett Bissell, to act as manager of his planting business on the several rice plantations in the counties of Colleton and Beaufort, including the said Bonny Hall plantation; that at the time of the making of the said trust deed, on the 25th September, 1876, the said J. Bennett Bissell was indebted to this defendant for salaries, and other moneys to him then due, in the sum of \$10,374.52, and that the said J. Bennett Bissell, for the protection and security of this defendant, made, executed, and delivered to him the said trust deed of the 25th September, 1876, to secure the said amount; that thereupon the said J. Bennett Bissell placed this defendant in possession of the said Bonny Hall plantation, both as trustee having charge thereof and as manager of the same, but, by agreement between the said J. Bennett Bissell and this defendant, it was understood and agreed that the said J. Bennett Bissell should be allowed to plant the said plantation, for the purpose of supporting his family and of paying over the amount due and becoming due to this defendant, and that this defendant should remain in possession and act as the manager in charge of the same, and that this defendant should receive from the said J. Bennett Bissell a fair

and proper remuneration for so acting as manager, to be paid to him per annum, in addition to the amount mentioned and secured to him in the said trust deed; that thereafter the said J. Bennett Bissell, finding it necessary to raise funds for the purpose of carrying on the planting of the said Bonny Hall plantation, requested of this defendant that he should assign his claim for the amount still due to him as mentioned and secured by the said trust deed of the 25th September, 1876, so that the said plantation could be mortgaged for raising that amount; and this defendant shows and alleges that both the said instruments of writing referred to in the said third article were executed by him without valuable consideration whatsoever, but at the request of his said brother, and solely for the purpose of allowing the said plantation to be used temporarily for raising sums of money needed by the said J. Bennett Bissell, and for that purpose only, and that, where the same were paid, the said assignment to said Sarah H. Bissell became invalid, null, and inoperative; and this defendant further shows and alleges that the amounts to secure which he agreed to waive the priority of payment for the amount so secured to him, and executed his assignment to the said Sarah H. Bissell, as he is informed and believes, have all been paid.

"(4) This defendant, further answering, shows that thereafter his business relations with this said brother continued as aforesaid, up to the time of the death of his said brother, on the 2d day of May, 1892, during the whole of which period he was in possession of the said Bonny Hall plantation; that no settlement ever was had between his brother and himself, but that there existed a continuous mutual reciprocal running account between his said brother and himself, wherein he was entitled to credit for the amount due him as set out in the said deed of September 25, 1876, and to the annual amount due him for his services to his said brother, as well as for sundry amounts by him at various times loaned to his said brother, and he was to be debited for the amounts drawn by him from what was known as the store upon the said Bonny Hall plantation, and such will appear to his debit upon the books of said store, but this defendant cannot exactly state the amounts, as the said books are not in his possession, but were in the possession of the said J. Bennett Bissell; and that, upon the ascertainment of this balance, this defendant will appear to be largely the creditor of the said J. Bennett Bissell for the said original amount mentioned and secured to him in the deed of the 25th September, 1876, with interest, notwithstanding the payments from time to time made to him on the store account as aforesaid, and, by agreement, to be credited on account of the interest due on the said amount secured by the deed of the 25th September, 1876, if sufficient to do so.

"(5) In answer to the allegation of the

fourth article of the said complaint, this defendant has no information sufficient to form a belief as to what said plaintiff may be informed by his co-defendant, the said Sarah H. Bissell, but saith that no appointment or conveyance made by the said Sarah H. Bissell at any time after the death of the said J. Bennett Bissell could be operative to defeat the just claims of this defendant, whereof the said Sarah H. Bissell and the said Geo. W. Egan were fully informed.

"(6) And, further answering the said complaint, this defendant shows and alleges that he has sole and exclusive possession of the said plantation, and holds a legal title to the same, and prays that an issue in due form be framed for the trial of his right and title to the said premises, as herein alleged."

The answer of the defendant Sarah H. Bissell admits all the allegations of the complaint, and alleges that she is the sole executrix, legatee, and devisee of her husband, who died testate on 2d May, 1892, and holding, as she does, the bonds and mortgage of the plaintiff for \$20,000, the credit portion of the Bonny Hall plantation, she is most concerned as to the claim set up by the said Henry Edward Bissell; that said claim is fictitious, since the said Bissell assigned all his claims to her under his two deeds therefor; that no sum is due by the estate of her testator to said Henry Edward Bissell; that, even if the claims of said Henry Edward Bissell were assigned to her, they are barred by the statute of limitations, and not enforceable in a court of equity, because the same are stale claims; and that said Henry Edward Bissell has never accounted to her as trustee under the deed of 25th September, 1876; and she now demands a strict accounting thereunder.

At a hearing before Judge Witherspoon, at the circuit court for Beaufort, at its September, 1897, term, there was a motion noticed to have an order passed by the judge, under the provisions of section 274a of the Code of Civil Procedure, whereby the jury would pass upon the issues as to whether the original debt of \$10,374.52 referred to in the deed of trust executed on 25th September, 1876, has ever been paid, or if the same, or any part thereof, was at the date of the death of J. Bennett Bissell still due and owing by him to the said Henry Edward Bissell, and is still due and owing; and also as to whether the assignments from the said Henry Edward Bissell indorsed upon the said deed of trust had not been made without any consideration therefor, but only for the temporary purpose of assisting J. Bennett Bissell to raise money, which money so raised had been fully paid; with a provision that Henry Edward Bissell should be the actor in the trial of such issues. The complaint and summons were served in January, 1897, and the answer of Henry Edward Bissell was served on the 20th February, 1897, and that of Sarah H. Bissell on the 23d February, 1897.

Section 274a of the Code reads as follows: "In all equity causes the presiding judge may in his discretion cause to be framed an issue or issues of fact to be tried before a jury. * * * Upon the first day of the term immediately after the call of calendar three, the presiding judge shall call for cases in which issues are desired, and if any are presented in which such issues are, in his judgment, proper, he shall at once cause the issues to be framed and placed upon the proper calendar for trial, and the findings of fact upon such issues by the jury shall be conclusive of the same. * * *

This notice was only served upon the plaintiff. However, when the cause was called up, and the complaint and answers were read, the plaintiff and the defendant Sarah H. Bissell interposed a demurrer to the answer of the defendant Henry Edward Bissell, on the ground that such answer, by its allegations, did not state a valid defense to the cause of action set up in the complaint. Judge Witherspoon heard both the demurrer and the motion, and thereafter passed two orders,—one overruling the demurrers, and the other settling the issues, as proposed by the defendant Henry Edward Bissell, to be tried by a jury, under section 274a of the Code of Civil Procedure. From both orders an appeal was taken.

It must be apparent, however, that, if there was error in the circuit judge in overruling the demurrer to the answer of Henry Edward Bissell, the appeal as to the order settling the issues for trial by a jury must be sustained; for, in that event, there is no propriety in such an order for issues. Therefore we will first direct our attention to the matter of appeal from the order of Judge Witherspoon overruling the demurrer.

It may be observed that any pleading to which a demurrer is interposed must, for the purpose of testing the validity of such demurrer, be assumed to be true, so far as its facts are well pleaded. The demurrers in the case at bar being directed against the answer of Henry Edward Bissell, we ought, in the first instance, to see what allegations of fact in the complaint are admitted by it. In this view, it appears that the answer has admitted that J. Bennett Bissell executed the deed of 25th September, 1897, whereby he conveyed the Bonny Hall plantation to Henry Edward Bissell, in trust to secure the payment, in their order, of the debts of the grantor to Charles H. Simonton, referee, to Charles S. Bennett & Co., and to Henry Edward Bissell; that the debts held by Charles H. Simonton, referee, and Charles S. Bennett & Co., have been long since paid; and, further, that said Henry Edward Bissell did execute deeds in 1883 and in 1886 whereby he assigned to the said Sarah H. Bissell his debt for \$10,374.52, and all interest thereon, to her heirs and assigns; and he further admitted that, by the terms of the trust deed of 25th September, 1876, said Bonny Hall

plantation was to be held by him in trust for Sarah H. Bissell, with power of appointment for her by deed or will, or, in lieu thereof, for her, her heirs and assigns, forever, after the payment of the debts named in the deed. By his said answer he does not deny the fact that Sarah H. Bissell has conveyed the tract of land known as "Bonny Hall" to George W. Egan, nor that Sarah H. Bissell did execute the deed of appointment to him as her trustee. Now, let us see what these admissions amount to in law.

First, the deed of trust itself should be construed: (a) It is evident that his deed of trust is not a "mortgage," in the sense that term is used, certainly so far as the grantor J. Bennett Bissell is concerned; for he not only conveyed the Bonny Hall plantation to Henry Edward Bissell, his heirs and assigns, forever, but he provided, further, that the fee-simple estate, after the payment of the indebtedness to Charles H. Simonton, as referee, to Charles L. Bissell & Co., and to Henry Edward Bissell, should vest in the person or persons named in the deed of appointment, if made in the lifetime of the said Sarah H. Bissell, or as set forth in her last will, and, in the event she should not make such appointment by deed or will, then the said lands should vest in the said Sarah H. Bissell, and her heirs and assigns, forever. There is no provision in the said deed wherein or whereby the said J. Bennett Bissell remains vested with any estate whatsoever in said Bonny Hall plantation. (b) It is also evident, by the terms of the trust deed, that no estate is provided in said Bonny Hall plantation for the said Henry Edward Bissell, except as a trustee. As to him, as an individual, it is only provided that the said Bonny Hall plantation is to secure his specific debt of \$10,394.52, and the interest thereon from the 25th September, 1876. It will be noticed that his power as trustee is simply to hold the title until the three debts named in the deed are paid, and then solely for the said Sarah H. Bissell, in fee simple. (c) It is also manifest that Sarah H. Bissell is not to be entitled to the Bonny Hall plantation until the three debts are paid or discharged, but, upon the payment of said debts, the said lands are to be hers in fee simple. These are our views as to the trust deed in question.

Next, we will consider what effect the admitted allegations of said complaint will have, in view of our construction of the trust deed. In the answer of Henry Edward Bissell it is not denied that the debt to Charles H. Simonton, as referee, and the debt of Charles S. Bennett & Co. are not fully paid, and also that the plain legal effect of the two deeds, executed in 1883 and in 1886 by Henry Edward Bissell, was to vest the ownership of said claim for \$10,394.52 in Sarah H. Bissell absolutely. Now, unless this ownership of said claim can be defeated, it is manifest that all the conditions contained in the deed of trust of 25th September, 1876, have been per-

formed whereby a deed of appointment or disposition by will of the fee-simple estate in the Bonny Hall plantation may be made by Sarah H. Bissell, or, in lieu thereof, that the said plantation vests in the said Sarah H. Bissell, in fee simple. The deed of the said Sarah H. Bissell executed in May, 1896, whereby she executed her power of appointment, by vesting the title in the said Henry Edward Bissell in trust for herself, her heirs and assigns, forever, would be operative for the purpose of vesting the fee-simple title in herself, so that her deed of 21st December, 1896, to the plaintiff for said Bonny Hall plantation would be valid, unless the claim of Henry Edward Bissell was not truly assigned to her in 1883 and 1886. So now we must consider the effect of the allegations of the answer of the said Henry Edward Bissell, by which it is sought to render inoperative and void his assignment of his claim secured by the trust deed of September 25, 1876. First and foremost, we observe an entire absence, even by implication, of any allegation that the said Sarah H. Bissell has ever, verbally or in writing, by herself or through any agent, made any agreement, or had any understanding, that the deeds of assignment of his claim for \$10,374.52, made to her by Henry Edward Bissell, should not mean exactly what upon their face they purport to mean. The answer only alleges that J. Bennett Bissell procured Henry Edward Bissell to execute these assignments in order that he might raise money to make crops upon the said Bonny Hall plantation, by placing the temporary mortgage upon the said lands for that purpose. We cannot understand how J. Bennett Bissell could mortgage these lands. By his deed of 25th September, 1876, he had divested himself of all power over said lands. Indeed, by the deed of trust such a mortgage would have invaded the purposes of such deed. We cannot appreciate the force of the suggestion that these mortgages were for a temporary purpose, except as all mortgages are executed in the belief that the sum secured by them will be paid without a foreclosure, but the chapter of accidents in this life, as to mortgages, is too palpable in the results there recorded to allow us to speak of a temporary use of a mortgage in connection with agricultural lands. The fact that those temporary loans have been paid will not answer any purpose, unless Sarah H. Bissell was a party to the agreement of Henry Edward Bissell and J. Bennett Bissell. It must be manifest, therefore, that the circuit judge was in error in overruling these demurrers, but, in abundance of caution, while we overrule the demurrers, we deem it proper to state that the defendant Henry Edward Bissell should be allowed to answer over, provided the allegations of his answer present allegations of new facts.

Both orders appealed from must be reversed. My opinion is that it should be the judgment of this court that the orders of the circuit court be reversed, and that the action be remanded to that court for such further proceedings as may be necessary; but, the justices being equally divided, under the constitution of this state the circuit judgment is affirmed.

JONES, J., concurs. GARY, A. J., dissents.

McIVER, C. J. (dissenting). Not being prepared to assent to the conclusion reached by Mr. Justice POPE, I propose to state briefly my own views. There can be no doubt that, under the express terms of the deed of 25th September, 1876, the title to Bonny Hall vested in Henry Edward Bissell, for the purpose of performing certain trusts therein declared, and that, until all of those trusts were performed, Mrs. Sarah H. Bissell would have no interest in or right to Bonny Hall. Passing by the first two trusts declared in that deed, as they are conceded to have been performed, the real inquiry in this case is whether the third trust has been performed. That trust is "to secure and pay unto the said Henry Edward Bissell" the debt mentioned in the deed, amounting to something over \$10,000. As I understand it, there is no claim, on the part of appellants, that this \$10,000 debt has ever been paid in money, but their claim is that such debt has been extinguished or discharged by the two assignments from Henry Edward Bissell to Sarah H. Bissell of that debt. The defendant, while admitting the formal execution of these assignments, alleges in his answer that such assignments were without consideration moving from Mrs. Bissell, the person named as assignee, but were executed at the request of J. Bennett Bissell, the person who created the trust for a temporary purpose, which has been accomplished, and that said assignments thereby became inoperative, null, and void. If these allegations in the answer be true in point of fact (and they must be so taken to be, in considering the demurrer), then I am inclined to think that the third trust cannot be regarded as performed, and hence that the legal title still remains in Henry Edward Bissell, and will there continue, until the debt to him has been paid or otherwise legally discharged. It seems to me, therefore, that there was no error in overruling the demurrers, and none in the order framing issues to determine the fundamental fact upon which the respondent's claim of title rests. The cases of *Kaphan v. Ryan*, 16 S. C. 357, *Moffatt v. Hardin*, 22 S. C. 26, and *Groesbeck v. Marshall*, 44 S. C. 544, 22 S. E. 743, cited by counsel for respondent, are sufficient to show that it is competent to introduce parol evidence to show the purpose for which an obligation under seal, or other like instrument, was given.

(123 N. C. 740)

STATE v. LAWSON et al.

(Supreme Court of North Carolina. Nov. 28, 1898.)

FORMER JEOPARDY—FORCIBLE ENTRY AND DETAINER—EVIDENCE.

1. The only distinction between forcible trespass and forcible entry and detainer being that the former is as to personal property and the latter as to realty, and the distinction not always being observed, acquittal of the former is bar to prosecution for the latter, it being admitted that it was "the same transaction," and there being no evidence of personal property.

2. Evidence that prosecutor was in possession of land, which he sowed to grain, and that, while he was away, the three defendants came with plow, hoe, axe, and mattock, and commenced plowing up the grain, and that he, learning this, went and ordered them to desist, but they refused, and continued to plow it up, and he, being "afraid to say much to them," did not stay long, and they continued to work the land, and held it that year, authorizes a conviction of forcible entry and detainer.

3. An acquittal of two persons on trial for forcible entry and detainer is not evidence, on the trial of a third, that they were not present with him.

Appeal from superior court, Stokes county; Coble, Judge.

John W. Lawson and W. J. Cheatham were convicted of forcible entry and detainer, and appeal. Reversed as to Lawson.

A. M. Stack, for appellants. The Attorney General, for the State.

CLARK, J. Cheatham, Lawson, and Collins were indicted for forcible entry and detainer. Lawson and Collins pleaded former acquittal, as well as not guilty. The solicitor admitted that they had been tried for forcible trespass at last term for this same transaction, and acquitted. The court erred in refusing the prayer of defendants Lawson and Collins to instruct the jury to sustain the plea of former acquittal as to them, though the jury cured this as to Collins by acquitting him. It is true, the same act, with an additional circumstance, may be an offense against two statutes (State v. Stevens, 114 N. C. 873, 19 S. E. 861; State v. Robinson, 116 N. C. 1047, 21 S. E. 701), but the only distinction between forcible trespass and forcible entry and detainer is that the former is as to personal property and the latter as to realty, which distinction is not always observed. State v. Davis, 109 N. C. 809, 13 S. E. 883. There being in evidence nothing of personal property, on the admission of the solicitor that it was "the same transaction" we must take it that it was the same offense. State v. Nash, 86 N. C. 650.

The defendant Cheatham further contends it was error to refuse the prayer for instruction that there was no evidence to warrant a conviction as to him. There was evidence by the state that the prosecuting witness was in possession of the land, had sowed rye thereon, and in March the three defendants came on the land, and began plowing up the rye; that he was not present

when they entered, but when he learned of it he went where the defendants were, and ordered them to desist, but they refused, and went on, and plowed up the rye, and he was "afraid to say much to them," and did not stay long; that they worked there that day, and Cheatham held and worked the land that year. In the defendants' evidence it appeared that they three went on the land with plow, hoe, axe, and mattock, and acted as prosecutor stated. It is true, defendants denied possession of the land by prosecutor, and asserted that there was no demonstration of force. Upon this conflict of evidence the court properly submitted the case to the jury, and, we presume, under proper instructions, as the charge is not sent up, not being excepted to. The appearance of defendants in such force, with axe, mattock, hoe, and plow, with the avowed and executed purpose to plow up the rye the prosecutor had sown, and in spite of his personal protest, was reasonably calculated to put him in fear, and he says he was in fact put in fear,—was "afraid to say much,"—and left the invading host in possession then and for the balance of the year, which was some evidence of the truth of his statement. Indeed, in State v. Davis, 109 N. C. 809, 13 S. E. 883, it is said: "It is not necessary that the party shall be actually put in fear. State v. Pearman, 61 N. C. 371. It is sufficient if there is such demonstration of force as to create a reasonable apprehension that the party in possession must yield to avoid a breach of the peace. State v. Pollok, 26 N. C. 305; State v. Armfield, 27 N. C. 207. Such demonstration of force may be a 'multitude' or by weapons. State v. Ray, 32 N. C. 29, citing State v. Flowers, 6 N. C. 225; State v. Mills, 13 N. C. 555." It was not necessary that the prosecutor should be present at the very moment of entry. He could not be present at every point in his premises. The defendants did not enter with his permission, and when he found they were there he ordered them off; but, relying on their numbers, they intimidated him, and remained in forcible possession. State v. Webster, 121 N. C. 586, 23 S. E. 254; State v. Woodward, 119 N. C. 836, 25 S. E. 868; State v. Davis, supra; State v. Lawson, 98 N. C. 759, 4 S. E. 134.

The defendant Cheatham further relies on State v. Simpson, 12 N. C. 504, that the entry of three, though without violence (if against the prohibition of the party in possession who is present), is a sufficient demonstration of force; and that, Lawson and Collins having been acquitted on a former trial, he alone could have been present on this occasion, and, there being no physical violence, threats, or weapons, he could not be guilty. But this case must be tried by the evidence in this case, and by the evidence of the state—and, indeed, according to defendants' own evidence—all three defendants were present. If, in the former trial, Lawson and Collins

had been convicted, that verdict could not have been produced on this trial against Cheatham to prove that two others were present. *E converso*, the verdict of acquittal cannot be produced in Cheatham's favor as evidence that they were not present. The former verdict of acquittal as to them may have been procured by absence of witnesses, or for other reasons. It can have no bearing in this case which depends upon the evidence of the transaction itself as laid before this jury. It is available to Lawson and Collins, but not to Cheatham, who was not a party to it. A similar case and ruling is that in indictments for fornication and adultery, though that is necessarily an offense committed by two, if the parties are tried at different times, or even at the same time, the acquittal of one is not a bar to the conviction of the other; as there may be more evidence against one,—as his or her confession, for instance, which would not be evidence against the other (if not made in that other's presence). *State v. Cutshall*, 109 N. C. 764, at page 771, 14 S. E. 107. Besides, there may be a demonstration of force by less than three. *State v. McAdden*, 71 N. C. 207. For failure to give the instruction asked upon the plea of former acquittal, there must be a new trial as to Lawson. There is no error as to Cheatham.

(123 N. C. 396)

WISEMAN v. GREEN.

(Supreme Court of North Carolina. Dec. 6, 1898.)

REAL ACTION—DESCRIPTION OF PROPERTY—NONSUIT.

1. In an action for the recovery of land, a nonsuit on the ground that plaintiff had shown no title out of the state cannot be sustained, where both parties claimed under a common source of title.

2. A nonsuit on the ground that the description in the deed under which plaintiff claims is so uncertain as to be incapable of location, and, if capable of location, plaintiff's evidence is contradictory to the description in the deed and complaint, and insufficient to locate the land, cannot be sustained, where defendant in his answer has admitted plaintiff's ownership of the land described in the complaint.

Appeal from superior court, Mitchell county; Starbuck, Judge.

Action by J. L. Wiseman against Jesse Green. From a judgment of nonsuit, plaintiff appeals. Reversed.

S. J. Ervin, T. A. Love, and W. O. Newland, for appellant.

FURCHES, J. From the complaint and trial of this case, it is difficult for us to determine what the plaintiff complains of,—whether it was for possession of land, or for a trespass on land, or for stopping up the plaintiff's mill road. Nor are we able to determine the grounds of the plaintiff's complaint from the evidence introduced, or from the map filed,

which shows as near nothing as it could well do, though made under order of the court. It seems not to have been made upon the calls in the deed, nor by the allotment of the homestead; nor does it show the contention of the parties, nor the locus in quo. If the action is for defendant's stopping up the road, it cannot be maintained, as it is not claimed that it is a public road (*Boyden v. Achenbach*, 79 N. C. 539, cited with approval in *Collins v. Patterson*, 119 N. C. 602, 26 S. E. 154; *State v. Fisher*, 117 N. C. 733, 23 S. E. 158), unless the point at which it was closed is on the plaintiff's land. It would then be a trespass *quare clausum fregit*. The complaint alleges a trespass upon the plaintiff's mill property by tearing down one house and by damaging other buildings. But these trespasses are denied by the defendant, and the plaintiff fails to offer any evidence to sustain either of these alleged trespasses. The plaintiff asked that he be adjudged the owner of the mill and two acres of land, and that he be put in possession of the same. But the defendant in his answer admits that plaintiff is the owner of this mill and two acres of land, and alleges that plaintiff is in possession; and plaintiff offers no evidence to show that he is not in possession. But, singular as it may appear, after the defendant had admitted that plaintiff was the owner of the mill and the two acres of land, he contends that it cannot be located; that the description in plaintiff's deed is too indefinite; and asks the court to nonsuit the plaintiff upon the following grounds: "(1) That plaintiff had shown no title out of the state; (2) that the description in the deed under which plaintiff claims is so uncertain as to be incapable of location; (3) that, if capable of location, the plaintiff's evidence is contradictory to the description in the deed and complaint, and is insufficient to locate the land." The court allowed the motion, and the plaintiff excepted, and appealed.

We do not think the judgment of nonsuit can be sustained upon the first cause assigned, as it appears (though not very distinctly) that plaintiff and defendant claimed under a common source,—under A. Wiseman.

We do not think it can be sustained under the second assignment, as defendant in the first paragraph of his answer admits the plaintiff's ownership, as follows: "That he denies paragraph 1 of the complaint, but admits that plaintiff is the owner of two acres of land on Toe river, including an old dilapidated and unused saw and grist mill." After this admission, it is too late to dispute its location.

We do not think it can be sustained under the third assignment, as defendant had admitted the location in his answer; and, had this not been so, the sufficiency of the evidence was a question for the jury.

This case, from start to finish, seems to us to be wanting in clearness of conception, and not to have been tried upon any of the issues that might possibly have been presented upon the pleadings. New trial.

(123 N. C. 780)

STATE v. ROBBINS et al.

(Supreme Court of North Carolina. Dec. 6, 1898.)

FORCIBLE ENTRY AND DETAINER — INDICTMENT — SEPARATE COUNTS — SUFFICIENCY OF EVIDENCE — JUDGMENT ON GENERAL VERDICT.

1. An indictment was not objectionable on the ground that it consisted of two papers, pinned together and returned as one bill, where it contained two charges, designated, respectively, as "First Count," and "Second Count."

2. Where the indictment, in separate counts, charged forcible entry and detainer on certain premises in possession of the owner, and on the same premises in possession of tenants of such owner, such counts were not repugnant.

3. Though it was sufficient to prove, on a trial for forcible entry and detainer, that prosecutrix was in peaceable possession of the premises in question, defendants were not prejudiced by evidence that prosecutrix was the owner and had been in possession of such premises for many years.

4. Where defendants, by intimidation, or through indifference on the part of the tenants in possession, took possession of the premises in dispute, and, on being ordered off by prosecutrix, in the presence of such tenants, refused to go, and proceeded to plow the land, under claim of ownership as against prosecutrix, their entry thereupon became forcible as to her.

5. A general verdict of guilty, under an indictment in two counts, as to one of which there was no exception, was sufficient to support a judgment thereon, though the instruction as to the other was erroneous, where there was no demand for a separate verdict on each count.

Appeal from superior court, Randolph county; Allen, Judge.

George Robbins and others were convicted under an indictment for forcible entry and detainer, and they appeal. Affirmed.

Wiley Rush, for appellants. The Attorney General, for the State.

CLARK, J. The indictment consisted of two papers, pinned together, and returned into court as one bill, the two charges being numbered "First Count" and "Second Count." We see nothing objectionable in this. Even if they had been returned as separate indictments and at different terms, they could be treated as different counts in the same bill, if germane. *State v. Perry*, 122 N. C. 1018, 29 S. E. 384.

The charge in the first count was forcible entry and detainer upon the premises in the peaceable possession of Caroline Haroldson, and the second count was for the same offense upon the premises in possession of Betsy Black. The transaction alleged was one and the same, Mrs. Haroldson being the landlord, and Betsy Black her tenant. The court properly refused to quash, or to compel the solicitor to elect, or to arrest judgment; for the two counts were not repugnant, but "a mere statement of the same transaction, to meet the different phases of proof." *State v. Harris*, 106 N. C. 682, 11 S. E. 377, and numerous precedents cited at page 686, 106 N. C., and at page 378, 11 S. E. In *State v. Eason*, 70 N. C. 88, the indictment for forcible entry and detainer

was sustained, though there were four counts, laying the possession in different persons.

The state showed by the testimony of the prosecutrix that she was the owner and in possession of the premises, and had been such for 17 years. It was not necessary to prove this much, as proof of peaceable possession, by one not a mere intruder or trespasser himself, would have been sufficient; but we do not see how the defendants were hurt by proving more than was necessary.

The court charged the jury: "If the defendants went upon the premises, then in possession of Betsy Black and Tom Black, peaceably and by their permission, and their possession was as tenants of Mrs. Haroldson, and afterwards Mrs. Haroldson, the landlord, came, and, in the presence of the tenants, ordered the defendants from the premises, and they refused to go, and their numbers or conduct was such as was calculated to put her in fear, they would be guilty. The possession of the tenant was the possession of the landlord." In this there was no error. The possession is sub modo in the tenant, but it remains in the landlord certainly to the extent that he can warn off intruders and trespassers. The defendants were not mere visitors on premises by consent of the tenant, but took possession, plowing the land up under claim of ownership against the landlord in possession. They could not avoid an action of ejectment by this forcible way of taking possession. The tenant could not give such intruders the right of possession by actual attornment; still less could he do so, as here, by silence that was caused by intimidation, as the tenant stated on the direct examination, or by indifference, as intimated on the cross-examination.

The prosecutrix was not at the precise point of entry at the identical moment,—she could not be everywhere,—but went the same day, on learning of the entry, and ordered the defendants off, and they refused to go, and plowed up the land. The entry became forcible after being forbidden, if not so in its beginning. *State v. Webster*, 121 N. C. 587, 28 S. E. 254; *State v. Lawson* (at this term) 31 S. E. 667, and cases there cited. The entry of three persons, their remaining and plowing up the land after being forbidden by the landlord, a woman, was sufficient force. *State v. McAdden*, 71 N. C. 207, *State v. Armfield*, 27 N. C. 207, *State v. Pollok*, 26 N. C. 306, and other cases cited in *State v. Lawson* (at this term) 31 S. E. 667.

There were two counts, and a general verdict on both, which is a verdict of guilty on each (*State v. Cross*, 106 N. C. 650, 10 S. E. 857), as the defendants did not exercise their right to require a separate verdict on each count. There being no exception as to the other count, the verdict thereon would have sustained the judgment, even had there been error in the instruction on this count, it being surplusage. *State v. Toole*, 106 N. C. 736, 11 S. E. 168, which has been cited and approved in *State v. Brady*, 107 N. C. 822, 12 S. E. 325; *State v.*

Hall, 108 N. C. 776, 13 S. E. 189; State v. Edwards, 113 N. C. 653, 18 S. E. 387; State v. Perry, 122 N. C. 1018, 29 S. E. 384; and in other cases. No error.

(123 N. C. 534)

**COMMISSIONERS OF IREDELL COUNTY
v. WHITE et al.**

(Supreme Court of North Carolina. Dec. 6, 1898.)

ACCOUNT—PLEA IN BAR—REFERENCE—COMPROMISE AND SETTLEMENT.

1. A plea of full and final settlement to a suit for an account against a tax collector to surcharge his settlement for specifically alleged errors therein need not be disposed of before ordering a reference, because such plea is not a bar.

2. On a bill by a county to surcharge a settlement with its sheriff as tax collector for errors specifically pleaded, such errors may be corrected, but the settlement will not be set aside.

Appeal from superior court, Iredell county; Allen, Judge.

Action by the commissioners of Iredell county against Moses A. White and others. There was a judgment for plaintiffs, and defendants appeal. Affirmed.

B. F. Long and W. G. Lewis, for appellants. Armfield & Turner, for appellees.

FURCHES, J. The plaintiffs are the commissioners of Iredell county. The defendant Moses A. White was elected sheriff of said county in November, 1894, and inducted into said office on the first Monday of December, 1894. As such officer, he gave the bond declared on for the faithful discharge of his duties as tax collector, with the other defendants as his sureties. As such sheriff and tax collector, he received the tax lists of said county for the years 1895 and 1896, for collection, and proceeded to collect said taxes, and from time to time to pay them over to the treasurer of said county. In September, 1896, he had a final settlement with the plaintiffs, at which time he paid them all that he was found to be due on said taxes, and this settlement was accepted by the plaintiffs as a final settlement, and recorded by them in the book of records of settlements of final accounts. And in November, 1897, he had another final settlement with the plaintiffs, through a committee appointed by the plaintiffs, and he then paid the plaintiffs all that was found to be due them on account of all taxes collected or collectible by him. The defendant pleads these settlements in bar of plaintiffs' action. But the plaintiffs in their complaint set forth these settlements (or attempts to settle, as they call them), and then proceed to allege that, by inadvertence and mistake, there were many errors committed in said settlements, which they point out specifically in their complaint, and ask that the whole matter be referred to some good accountant to ascertain the truth of the matter,

and report. This prayer of plaintiffs was granted by the court, and an order of reference made. To this order the defendants objected, upon the ground that they had pleaded a final settlement with plaintiffs for the taxes of 1895 and also for 1896, and this plea had not been disposed of; that the court could not refer the case where there was a plea in bar, until that was disposed of. This is the only point presented by the appeal.

The general rule is that, where there is a plea in bar, it must be disposed of before a reference for an account can be made. *Royster v. Wright*, 118 N. C. 152, 24 S. E. 746; *Grant v. Hughes*, 96 N. C. 177, 2 S. E. 339. The reason of this rule is that it would be useless to take an account if the plea in bar would defeat the plaintiffs' action, if found for the defendant. But it is otherwise where the matter pleaded in bar would not defeat the plaintiffs' action, if found for the defendant. *Humble v. Mebane*, 89 N. C. 410; *Grant v. Hughes*, supra. This is so for the reason that what is pleaded in bar is not a bar. The fact that there had been, as the parties thought at the time, a full and final settlement between the plaintiffs and the defendant, creates a presumption, and makes a *prima facie* case in favor of the defendant. This is so under the revenue act of 1895 (chapter 119, § 110), and the act of 1897 (chapter 169, § 113). But it would have been so upon legal principles, without this special legislation.

If plaintiffs had alleged that defendant White, as sheriff and tax collector of Iredell county, had collected the taxes, and failed and refused to pay over and account for the same, the defendant's plea of final settlement and payment would have been a bar to plaintiffs' action, and must have been disposed of before the court would have been authorized to make the order of reference. But that is not this case. The plaintiffs recognize the settlements as creating a presumption—a *prima facie* case—for defendants, and proceed to allege specific errors in said settlements, and seek to surcharge and falsify the account and settlement. This was the equitable mode of relief. *Pom. Eq. Jur.* § 871. Where fraud is alleged and shown, the whole account may be reopened; but, where errors only are alleged and specifically pointed out, the account as stated on the settlement will not be set aside. The party alleging error will be allowed to show the same, but this burden is on him. *Daniell, Ch. Pl. & Prac.* *663. This was substantially held in *Worth v. Stewart*, 122 N. C. 258, 29 S. E. 579, and *Jordan v. Farthing*, 117 N. C. 181, 23 S. E. 244, although these cases do not fall directly within the doctrine of surcharging and falsifying a settled account. This action seems to have been brought under a clear conception of what was the equity practice in cases of this kind. The errors complained of are specifically stated in plaintiffs' complaint, which entitles them to an order of reference, that

they may show the errors complained of, so as to correct the account and settlement, under the direction of the court, but not to have the settlement set aside. There was no error in the court's making an order of reference, as pointed out in this opinion. Affirmed.

(123 N. C. 398)

HEATON v. WILSON et al.

(Supreme Court of North Carolina. Dec. 6, 1898.)

**REPLEVIN—CO-PARTNERS — PARTIES — DEFENSE—
HOW PRESENTED.**

1. In an action of claim and delivery, to recover chattels owned by partners, all partners are necessary parties.

2. A defense of defect of parties plaintiff to an action of claim and delivery may be made under the general issue.

Appeal from superior court, Mitchell county; Starbuck, Judge.

Action by W. H. Heaton against A. E. Wilson and others. There was a judgment for plaintiff, and defendants appeal. Reversed.

S. J. Ervin, W. C. Newland, and T. A. Love, for appellants.

MONTGOMERY, J. This was an action brought by the plaintiff, Heaton, against the defendants for the recovery of certain personal property (18 figured birch logs) specified in the complaint. On the trial there was evidence going to show that Heaton was not the sole owner of the property, but that it belonged to him and W. W. Avery, as partners or tenants in common. In this connection his honor instructed the jury that, "if the relationship between Avery and the plaintiff was that of partners in the transaction, then the plaintiff and Avery are owners of the logs, and the fact that Avery is not a party would not prevent the plaintiff from recovering possession of the logs in this action, and you should answer 'Yes' as to the number of logs which you may find were severed by plaintiff and taken possession of by defendants." There was error in the instruction. The plaintiff under that charge got all of the logs, the whole of the personal property sued for (the value thereof, as the defendants had converted them), and, if he was a partner, he got more than he was entitled to. The objection could have been taken advantage of by demurrer, or by motion in arrest of judgment, or upon the general issue, as was done here. *Cain v. Wright*, 50 N. C. 282. It is said in *Holmes v. Godwin*, 60 N. C. 467, that the old action of replevin is but a shorter name for the action of claim and delivery, and one of several tenants in common could not maintain an action of replevin. *Cain v. Wright*, supra; *Hart v. Fitzgerald*, 2 Mass. 509. Certainly it is the general rule that in all suits relating to a partnership all the partners are necessary parties, either as plaintiff or defendant. *Bank v. Carrollton R. R.*, 11 Wall. 628;

McKaig v. Hebb, 42 Md. 231; *Durham v. Bischof*, 47 Ind. 214. There are other and more important questions involved in this appeal, but we have concluded, for satisfactory reasons, to make no decision upon them at this time. For the error pointed out there must be a new trial. New trial.

(123 N. C. 398)

CAROLINA INV. CO. v. KELLY et al.

(Supreme Court of North Carolina. Dec. 6, 1898.)

**DEFAULT JUDGMENTS—REQUISITES—APPEAL—
NOTICE—ABSENT PARTY.**

1. Under Code, §§ 385, 386, entitling plaintiff to enter judgment by default when defendant has "failed to answer," if an answer is on file a default judgment cannot be taken, although defendant is absent from court, and is not represented by counsel.

2. Under Code, § 550 (amended by Laws 1889, c. 161), providing that notice of appeal shall "be given to the adverse party unless the record shows an appeal taken or prayed at the trial which shall be sufficient," a recital in the case on appeal and in the record that "plaintiff gives notice of appeal in open court, neither defendant nor counsel for defendant being present," brings up the appeal regularly.

Appeal from superior court, McDowell county; Coble, Judge.

Action by the Carolina Investment Company against Hiram Kelly and others. From an order refusing to enter a judgment by default, plaintiff appeals. Affirmed.

A. O. Avery, for appellant.

CLARK, J. The defendant filed his verified answer, denying all the allegations of the complaint, save the formal one of the incorporation of the plaintiff. This devolved upon the plaintiff the burden of proving them. The allegation of ownership of the lands described in the complaint being denied, an order of survey was made. At the next term the defendant did not appear either in person or by counsel, and his former counsel stated he had retired from the cause a year before, by leave of the court. The plaintiff's counsel then moved for judgment by default and inquiry. This was refused by the court, on the ground that the answer was on file. From this refusal the plaintiff appealed.

The appeal lay from a refusal of judgment by default and inquiry. *Kruger v. Bank* (at this term), 31 S. E. 270, and cases there cited. But we see no error in the refusal. Neither the withdrawal of counsel, nor the failure of the defendant to retain other counsel, nor to be present in person, could have the effect to strike out the answer. As long as it was on file, a judgment by default could not be given, since that is only allowed when the defendant has "failed to answer." Code, §§ 385, 386. The statute is too explicit to admit of discussion as to its meaning. No reason is shown why the plaintiff did not go on with the trial, and prove his allegations.

The absence of defendant, and his failure to provide counsel, could not prejudice the plaintiff in any wise.

The record and also the case on appeal settled by the judge state, "Plaintiff gives notice of appeal in open court, neither defendant nor counsel for defendant being present." Formerly, the Code (section 550) required notice of appeal "to be given to the adverse party"; but chapter 161, Laws 1889, amended this by adding "unless the record shows an appeal taken, or prayed, at the trial which shall be sufficient." See Clark's Code (2d Ed.) § 550; *Howell v. Jones*, 109 N. C. 102, 13 S. E. 889. The appeal, therefore, is properly here. It lacks, not regularity, but merit. No error.

(123 N. C. 371)

BROWN v. MIENSSET et al.

(Supreme Court of North Carolina, Dec. 6, 1898.)

CORPORATIONS—POWER OF OFFICERS — EVIDENCE.

Plaintiff admitting that his right to recover the rent depended on the power of the officers of a corporation to make the assignment of the lease contract to him, defendant was entitled to show a release and discharge from the same officers, without showing their power.

Appeal from superior court, McDowell county; Starbuck, Judge.

Action by R. W. Brown against S. Miensset and another. Judgment for defendants. Plaintiff appeals. Affirmed.

R. O. Burton, for appellant. S. J. Ervin and A. C. Avery, for appellees.

MONTGOMERY, J. In 1893, the Carolina Investment Company leased to the defendants the Round Knob Hotel and grounds, in McDowell county, for five years, for a certain annual rental. The property had been sold by J. W. Wilson to the company for stock in the same, but the deed had not been registered. The plaintiff claimed to be the owner of the contract of lease, and this action was brought to recover an amount then alleged to be due under it. On the trial J. W. Wilson, a witness for the plaintiff, had proceeded to testify concerning an agreement he had had with the company, by which he came into the possession of the lease contract, when the defendant Frisard objected, and insisted that the witness should show with whom the agreement was made and their authority to bind the company. The objection was sustained, and the witness testified, in substance, as follows: "That he first spoke to all the officers of the company, except the president, upon the matter of agreement hereinafter mentioned, and that they all expressed their consent; that the agreement was finally made and carried out by and between the witness on the one hand, and J. R. Ervin, vice president, and S. T. Pearson and W. C. Ervin, directors, of the company, on the other, by which said deed was surrendered to Wilson, and

Wilson surrendered his stock to the company, and the contract of lease was assigned and delivered without written indorsement to Wilson, who was to receive the rents under, and assume the obligations imposed upon the company by, said contract of lease. Said lease was transferred by Wilson by the following indorsement: 'Pay R. W. Brown. Jas. W. Wilson.'" The plaintiff rested his case upon that evidence, without offering to show, further, the authority of the vice president, and the two directors of the company, Pearson and Ervin, to act for and bind the company in the transaction; nor did the defendants ask the court to exclude the evidence on that ground. The defendant Frisard proposed to show that, at a time prior to the delivery of the lease to Wilson, he agreed with the same officers who made the agreement with Wilson that if he (Frisard) would procure one C. C. Miller to sign the lease contract, and notes therein referred to, and to pay \$250, then due under the contract, the defendant should be discharged from all liability on the lease contract, and that this agreement was prior to the delivery of the lease to Wilson, carried into effect by defendant Frisard on the one hand, and the said officers (Ervin, vice president, and Pearson and Ervin, directors, claiming to act in behalf of the company) on the other hand. There was objection to the proposed evidence on the part of the plaintiff, on the ground that the authority of the officers to bind the company had not been shown by the witness. "The court inquired of plaintiff's counsel whether he did not, in order to recover, contend that these officers had the power to make the contract with Wilson by which the lease was assigned, and counsel stated that he did. Thereupon the court stated that, if plaintiff relied upon the assignment of the lease by said officers without authority to act for the company, the defendant should be permitted to show that he had been released from liability by the same officers, and admitted the proposed evidence." The plaintiff excepted.

The objection to the evidence complained of is founded on the decisions of this court in the cases of *Edwards v. Phifer*, 121 N. C. 388, 28 S. E. 548, and *Phifer v. Railroad Co.*, 122 N. C. 940, 29 S. E. 578. In the latter case, on the cross-examination of the plaintiff as a witness for himself, the defendant's counsel asked the witness if he was careful while at work on the bridge, and he answered that he was. On the re-examination of the same witness he was asked by his own counsel if he was careful, and the answer "Yes" was allowed, over the objection of the defendant, on the ground that the defendant had drawn precisely the same evidence from the witness, and that that was only a repetition of the same evidence. This court, however, held on the appeal that the objection ought to have been sustained. But the case before us presents a much larger question than one of evidence. The plaintiff's right

to recover rests upon the power of the vice president and the two directors named to make the agreement by which the lease contract was assigned and delivered to Wilson. This is apparent from the evidence of the plaintiff as well as by the manner in which the evidence was brought out. The counsel of the plaintiff on the trial below, as we have seen, admitted that the plaintiff's right to recover depended upon the power of the officers above named to make the assignment and delivery of the lease contract. That being so, the court below was clearly right in allowing the defendants to show a release and discharge by the same officers who had made the contract with Wilson, the assignor of the plaintiff. No error.

(53 S. C. 533)

PARKER et al. v. CAROLINA SAV. BANK et al.

(Supreme Court of South Carolina: Dec. 18, 1898.)

CORPORATIONS — EXISTENCE — JUDICIAL NOTICE — BANKS — STOCKHOLDERS — PERSONAL LIABILITY — EQUITY — EXECUTION — LIMITATIONS — SET-OFF — ASSIGNMENTS — EQUITABLE MORTGAGES — ULTRA VIRES.

1. In an action against a domestic corporation created by public act, its corporate existence need not be alleged, since the court will take judicial notice of its existence.

2. Under Act Dec. 24, 1885 (19 St. at Large, p. 212) § 4, making stockholders of a bank liable to the amount of 5 per cent. of their stock in addition thereto for its debts, every creditor has an interest in the liability of every stockholder; and hence equity has jurisdiction of a suit for an accounting of the assets, and to enforce the liability, in the absence of a statute pointing out a different course, though a legal remedy also exists, since a resort to the legal remedy would entail a multiplicity of suits.

3. Under Act Dec. 24, 1885 (19 St. at Large, p. 212) § 4, making stockholders of a bank liable to the amount of 5 per cent. of their stock in addition thereto for its debts, a return of execution nulla bona is not a condition precedent to a suit to enforce the liability, where the bank is insolvent, since execution would be a useless proceeding.

4. And such return is not necessary in any event, since the statutory liability is primary.

5. Creditors of an insolvent bank are not barred from enforcing the stockholders' liability under the two-years limitation of the general corporation act (19 St. at Large, p. 540), since section 22 (Rev. St. § 1500) exempts banks from its provisions, and the banking act (19 St. at Large, p. 212) prescribes no limitation as to actions against stockholders, and Code, § 130, fixes a limitation of six years as to such actions, to enforce a liability created by law.

6. Const. 1868, art. 12, § 6, making stockholders of a bank liable to the amount of their stock for its debts, does not limit the liability to the loss of the stock, but makes it an addition thereto.

7. Const. 1868, art. 12, § 6, provides that the general assembly shall grant no banking charter, except on condition that the stockholders shall be liable to the amount of their stock for the bank's debts; section 4 provides that dues from corporations shall be secured by such individual liability and other means as may be prescribed by law; and section 5 provides that all laws passed pursuant to it shall provide for fixing the personal liability of

stockholders under proper limitations, etc. *Held*, that section 6 does not prohibit the legislature from imposing a greater liability than the amount of stock, since the provision is not self-executing.

8. Under Act Dec. 24, 1885 (19 St. at Large, p. 212) § 4, making stockholders of a bank liable to the amount of 5 per cent. of their stock in addition thereto for the bank's debts, stockholders cannot set off claims due them by the bank against their statutory liability, since their liability is to the creditors.

9. And for the further reason that such set-off would result in a preference.

10. Under Rev. St. § 1529 (20 St. at Large, p. 47), providing that no transfers of stock shall be valid, except between the parties, until regularly entered on the books, a stockholder does not escape his statutory liability by transferring his stock without so entering it.

11. A general assignment by a bank, executed by proper officers by resolution of the directors, is not governed by Rev. St. § 1524 (19 St. at Large, p. 543), providing for a corporation's securing debts by mortgage by vote of the stockholders.

12. Under Rev. St. § 1524 (19 St. at Large, p. 543), authorizing a corporation to secure its debts by mortgage by vote of the majority of the stock, the deposit of title deeds by the president without authority does not create an equitable mortgage.

13. A mere deposit of title deeds as security for a debt does not create an equitable mortgage on the land.

Appeal from common pleas circuit court of Abbeville county; O. W. Buchanan, Judge.

Suit by William H. Parker and others against the Carolina Savings Bank and others. There was a decree for plaintiffs, and defendants appeal. Modified.

Graydon & Graydon, Bulst & Bulst, Frank B. Gary, Tribble & Prince, De Bruhl & Lyon, Simons, Selgling & Cappelmann, and L. W. Perrin, for appellants. W. H. Parker, Quattliebbaum & Cochran, and J. N. Brown, for respondents.

JONES, J. This is an action by certain creditors, suing on behalf of themselves and all other creditors, against the assignee of the Bank of Lowndesville and its stockholders, for an accounting of the assets of the bank, and to enforce the statutory liability of stockholders for the debts of the bank. From the decree of the circuit court the defendant stockholders appeal, on numerous exceptions, which mainly raise questions which will be considered and disposed of as follows:

1. The circuit court properly overruled the oral demurrer of the Carolina Savings Bank, that the complaint did not state facts sufficient to constitute a cause of action, in not setting out in the body of the complaint that said bank is a corporation doing business under the laws of this state. In the title of the case the defendant is styled, "Carolina Savings Bank, a Corporation under and by Virtue of the Laws of the State of South Carolina"; and in the 20th paragraph of the complaint it is alleged that "the defendants above named * * * were, as appears from the books of said bank, stockholders in said Bank of Lowndesville, each in the amount

set out as follows, to wit: Carolina Savings Bank, 50 shares," etc. The circuit court held that this was a sufficient allegation of corporate existence. Whether this would be so in a case wherein it is essential to allege corporate existence, may be doubtful; but in this case, clearly, the ruling is correct. There are numerous authorities or cases to the effect that in an action by or against a corporation, in which it was designated by a corporate name, there was no necessity to allege the creation or existence of the corporation. See note to *Miller v. Mining Co.* (Idaho) 35 Am. St. Rep. 291, 292 (s. c. 31 Pac. 803). In this case it appears that the "Act to amend and renew the charter of Carolina Savings Bank," approved December 20, 1893, is made a public act. The validity of the act not being in question, the court would take judicial notice of the fact of defendant's corporate existence. Such fact, not being issuable, need not be alleged. The rule which requires that, in an action by or against a corporation, its corporate existence be shown, does not apply to a domestic municipal corporation or a domestic private corporation created by a public act. *Bliss, Code Pl. § 246.*

2. The court of equity has jurisdiction to entertain this suit, and the pleadings show a case for equitable relief. The Bank of Lowndesville was incorporated February 16, 1891, under the provisions of the act of December 23, 1886 (19 St. at Large, p. 540), and thereby became subject to the act to provide for and regulate the incorporation of banks in this state, approved December 24, 1885 (19 St. at Large, p. 212). Section 4 of this act provides, "The stockholders of said bank shall be liable to the amount of their respective share or shares and five per cent. thereof in addition thereto for all its debts and liabilities upon note, bill or otherwise." Under this statute all the stockholders are liable to the extent named for all the debts of the corporation. Every creditor has an interest in the liability of every stockholder. Thus, a common fund is created, in which all the creditors are interested. Unless there is something in the statute authorizing a different course, the natural and appropriate remedy is in equity, to realize and distribute this common fund. The Bank of Lowndesville is alleged and shown to be insolvent, and its creditors and stockholders are numerous. Even if it be conceded that a remedy at law exists under this statute, still jurisdiction in equity is concurrent. To leave each creditor to single out for suit one or more stockholders at law would entail a multiplicity of suits, and result in an unequal distribution of the assets for creditors, all of which is prevented by entertaining this proceeding in equity. The case of *Hall v. Klinck*, 25 S. C. 352, which held that any creditor might bring his individual action at law against any stockholder, was based upon the peculiar language of the statute involved in that case, which the court construed as fixing a liability

to a specified amount upon each stockholder to pay the demand of any creditor. Hence it was held that an action at law might be maintained in that case, but the court did not hold that even under that statute an action in equity might not also be sustained in a proper case. Where the statute provides a remedy in law or equity, that remedy alone should be followed; but, where the statute does not prescribe the remedy to be in law or equity, the remedy may be in either, according to the circumstances of the case, or the nature of the relief desired. In this case not only is there a fund, in which all the creditors are interested, to be collected and distributed, but it appears that some of the stockholders are also creditors; thus presenting conflicting rights and equities for adjustment. It was not necessary that the complaint should show return of *nulla bona* against the corporation before proceeding to enforce the statutory liabilities—First, because the statutory liability is primary; and, second, because, insolvency being alleged and shown, *nulla bona* would be a useless proceeding. *Bird v. Calvert*, 22 S. C. 292.

3. The claims of creditors, who came in under the order of the court and proved the same, are not barred under the two-years limitation of the general corporation act (19 St. at Large, p. 540). The banking act (19 St. at Large, p. 212) prescribes no limitation to actions against stockholders, and in the general corporation act, § 22 (appearing as section 1500, Rev. St.), railroad and banking corporations are expressly exempted from the provisions which include the two-years limitation. By section 130 of the Code it is provided that actions against stockholders of a banking corporation to enforce a liability created by law must be brought within six years after the creation of the liability, unless otherwise provided in the law under which such corporation is organized. It is not contended that the claims were not established within six years after the creation of the liability.

4. The defendant stockholders are liable to the creditors of the bank for a sum equal to the amount of their respective shares, and 5 per cent. in addition thereto. In other words, the measure of the stockholder's liability is a sum equal to 105 per cent. of the amount of his stock. Section 6, art. 12, of the constitution of 1868, provides that "the general assembly shall grant no charter for banking purposes, nor renew any banking corporations now in existence, except upon condition that the stockholders shall be liable to the amount of their respective share or shares of stock in such banking institution for all its debts and liabilities upon note, bill or otherwise." Section 4 of the banking act, already quoted, uses the language of the constitution in providing for the liability of stockholders. It is contended that the stockholders' liability, as expressed by the words, "to the amount of their respective share or shares of stock," is limited to the mere loss of

their stock. But this construction would give no force to the provision of the constitution and act pursuant thereto, since without any such provision all the corporate property represented by the stock would be liable for the debts of the corporation. Evidently, therefore, the intention was to provide for a liability beyond the mere loss or forfeiture of the stockholder's interest in the corporate property, as this interest is necessarily involved in the liability of the corporation for its debts. By the common law a stockholder is not individually or personally liable for the debts of the corporation; hence the object of such provisions was to create a personal liability of the stockholder, beyond and cumulative to the liability of the corporation itself, thus affording additional protection to the public dealing with the corporation. The extent of this personal liability is not the stock, but the amount of the stock, or the amount equal to the amount of the stock; the stock being referred to merely as a certain and convenient method of designating or measuring the sum for which each stockholder is liable. With few exceptions, this is the construction generally placed upon similar constitutional or statutory provisions. *Morse, Banks*, § 675; *In re Empire City Bank*, 18 N. Y. 199, citing *Briggs v. Penniman*, 8 Cow. 387, and *Bank v. Ibbotson*, 24 Wend. 473; *Root v. Sinnock*, 120 Ill. 350, 11 N. E. 339; *Pettibone v. McGraw*, 6 Mich. 441; *Willis v. Mabon*, 48 Minn. 140, 50 N. W. 1110; 23 Am. & Eng. Enc. Law, 867. We have no case in our own Reports directly decisive of the question before us, but see *Bank v. Blake*, 3 Rich. Eq. 225; *Terry v. Calnan*, 13 S. C. 225. It is also contended that the provision in section 4 of the said banking act, for the 5 per cent. in addition to the amount of the stock, is unconstitutional. There would be much force in this contention, if section 6, art. 12, of the constitution of 1868, was self-executing, and stood alone as fixing the liability of the stockholder at a specified sum, in which case the legislature could neither increase nor diminish the liability. But the above provision of the constitution was not self-executing. It was expressly addressed to the general assembly to regulate its action in granting charters for banking purposes. Section 4 of that constitution provided that "dues from corporations shall be secured by such individual liability of the stockholders and other means as may be prescribed by law"; and section 5 provided, "All general laws and special acts passed pursuant to this section shall make provisions therein for fixing the personal liability of stockholders under proper limitations," etc. Reading these sections together, the general assembly had no power to grant a charter for banking purposes without providing for the personal liability of stockholders, at least in a sum equal to the amount of their respective shares, but had power to provide for a greater liability. Section 4 of the banking act, therefore, does not conflict with the provisions

of the constitution of 1868. We may add here that the provisions of the constitution above quoted, emphasizing the duty of the legislature to secure the debts due by the corporation by providing for the individual liability of the stockholder, clearly show an intention that the liability should go beyond the mere loss of the stockholder's interest in the corporate property.

5. The Carolina Savings Bank and the estate of A. J. Clinkscales cannot set off the claims due them by the Bank of Lowndesville against their statutory liability as stockholders. The statutory liability is exclusively for the benefit of the creditors, and is enforceable by the creditors, and not by the corporation. Creditors sue in their own right, and not by or through the corporation. 2 Mor. Corp. § 869; *Thompson v. Bank (Nev.)* 3 Am. St. Rep. 847 (s. c. 7 Pac. 68). The claims of the Carolina Savings Bank and of the estate of Clinkscales are not against the plaintiffs or other creditors, but against the Bank of Lowndesville. Under our construction of the statute creating the liability, each creditor may not pursue any stockholder for his debt. On the contrary, the statute provides a fund for ratable distribution among all the creditors. It follows from the foregoing that the respective claims lack the essential element of mutuality in order to warrant either a legal counterclaim or an equitable set-off. If each creditor had the right to enforce his claim against any stockholder, some authorities hold that, when creditor and stockholder unite in the same person, equity would not take from the stockholder what he was entitled to receive and had in possession as creditor, merely to give to another creditor, with no greater equity. But our statute is not so. But, further, since our statute creates a fund for distribution among all creditors, to allow a stockholder in an insolvent bank to set off his claims against the corporation against his statutory liability is inequitable; for this would give him a preference. Equality here is equity. The stockholder must pay in his dues under the statute, and then share in the common fund ratably with the other creditors. Authorities are very numerous to the effect that, in a suit in equity to compel payment of subscriptions for capital stock, a stockholder cannot set off a debt due him by the corporation. This is so held because stock subscriptions are treated as a trust fund, in case of insolvency, for the benefit of the corporation creditors, and equity requires its ratable distribution. The same rule should prevail when the statute creating the individual liability of stockholders is construed as providing a common fund for all the creditors. See note to *Thompson v. Bank (Nev.)* 3 Am. St. Rep. 326 (s. c. 7 Pac. 68); *Thomp. Liab. Stockh.* § 381; 2 Mor. Corp. § 861; 2 *Morse, Banks*, § 691; 2 *Beach, Corp.* § 727; 23 Am. & Eng. Enc. Law, 846.

6. F. W. Wagner & Co. and G. A. Wagner are not exempt from liability as stockholders

by reason of the attempted transfer of stock (27 shares) to J. D. Kelly. It is conceded that they were holders of the stock when the Bank of Lowndesville failed and made an assignment for creditors, March 1, 1894. After this, on June 6, 1894, they sold their stock, executing an assignment or transfer thereof in blank on the certificates of stock, and delivering the same; but it is not claimed, and there was no evidence to show, that such stock was transferred on the books of the bank. Section 1529, Rev. St. (20 St. at Large, p. 47), provides that "no transfers of stock shall be valid except as between the parties thereto, until the same shall have been regularly entered upon the books of the company," etc. This statute not having been complied with, so far as creditors of the bank are concerned, these appellants were stockholders when the action was commenced. The evidence further shows that they were stockholders when the debts established in this case were contracted. As there was no transfer of stock in this case, we need not consider under what circumstances a transfer of stock would exempt the transferror from liability under the statute.

7. The assignment for the benefit of creditors by the Bank of Lowndesville is not invalid for want of the vote of the stockholders therefor, it having been executed by the proper officers by resolution of the board of directors. We do not construe section 1524, Rev. St. (19 St. at Large, p. 543), as regulating the manner of executing an assignment for the benefit of creditors by a corporation. It provides as follows: "Any company organized under the provisions of this article may borrow money for the purpose of carrying out the object of its charter, and may make notes, bonds, or other evidences of debt, and by a vote of a majority of the stock, had at a meeting called for the purpose, by advertisement as provided in the preceding section of this article, may secure the payment of said notes, bonds or evidences of debt by mortgage or deed of trust on all or any of its property and franchises both real and personal." An assignment for the benefit of creditors is a transfer of all of the insolvent debtor's property for the purpose of applying the same to the payment of his debts, without preference. The mortgage or deed of trust on all or any of the debtor's property to secure the payment of notes, etc., referred to in the statute quoted, could not fairly be construed as embracing a deed of assignment for the benefit of creditors. The statute relates to the conduct of the corporation's business as a going concern. In the absence of legislation prohibiting or regulating the same, an insolvent corporation may make an assignment for the benefit of creditors, as a natural person may do, by virtue of its general power to contract and acquire and transfer property. 1 Morse, Banks, § 120; 1 Beach, Corp. §§ 357, 358; Dabney v. Bank, 3 S. C. 156. The bank, as a corporation, acts through its governing body, the board of directors, unless otherwise provided

by law. The assignment, therefore, having been executed by the proper officers by authority of the directors, is valid.

Up to this point, we concur with the decree of the circuit court. We come now to the only question as to which we disagree with the circuit court.

8. The Carolina Savings Bank did not acquire an equitable mortgage on the Mathews land by reason of the deposit of the title deeds thereof by the president of the Bank of Lowndesville to secure its debt to the Carolina Savings Bank. In holding to the contrary, the circuit court erred. In the first place, the deposit of the title deeds by the president, if intended as a mortgage, was *ultra vires*. The testimony shows that the title deeds were deposited without any authority from directors or stockholders. Section 1524, already quoted above, is a limitation on the power of the bank to mortgage its property. The power to mortgage must be exercised in the manner prescribed by the act. If the president of the Bank of Lowndesville was without power to execute a legal mortgage, for want of compliance with the statute, his act in depositing the title deeds without the requisite authority could not create an equitable mortgage. But, in the second place, the deposit of title deeds as a security for debt does not, in this state, create an equitable mortgage on the land. The evidence does not satisfy us that there was any written agreement showing a purpose to create a mortgage by the deposit of the deeds. We treat the case, therefore, as a mere oral deposit of title deeds as a security for debt. There are cases in this state containing dicta to the contrary of the view now announced by this court, as in *Harper v. Barab*, 10 Rich. Eq. 154; *Boyce v. Shiver*, 3 S. C. 528; *Hutzel v. Phillips*, 26 S. C. 146, 1 S. E. 502. But it has never been decided in this state that the mere deposit of title deeds to secure a debt creates an equitable mortgage. See the separate opinion of the present chief justice in the case last above cited. While Chief Justice Simpson expressed such a view in his opinion, the other members of the court did not commit themselves to that view. The rule is well established in England, and has received some support in this country, that an equitable mortgage on the land is created by the deposit of title deeds as security for debt, but the doctrine is generally rejected in the United States. The rule as administered in England grew out of the fact that there was no general system of registration, as in this country, and the system of conveyancing rendered it necessary to have possession of the muniments of title. Under our system of registration and conveyancing, possession of the original title deeds is of little consequence, as the records or certified copies may take their place. The reason of the rule therefore does not exist in this country. It is the general policy here to spread liens upon property upon the public records, and thus avoid the great

danger of secret liens. See 6 Am. & Eng. Enc. Lav., 683; 1 Jones, Mortg. § 185, and authorities cited. The judgment of the circuit court is modified in the particular last above discussed, but in all other respects it is affirmed.

(54 S. C. 1)

SEGARS et al. v. PARROTT et al.¹

(Supreme Court of South Carolina. Dec. 3, 1898.)

COUNTIES—ESTABLISHMENT—ELECTIONS—POWER OF LEGISLATURE—USURPATION OF JUDICIAL DUTIES—CONSTITUTIONAL LAW.

1. Const. art. 7, § 2, in regard to the establishment of new counties, provides that no section of a county proposed to be dismembered shall be cut off without the consent, by a two-thirds vote, of those voting in such section. Act March 9, 1896 (22 St. at Large, p. 64), passed in pursuance of such constitutional provision, provides that in an election for such purpose the commissioners of elections for each old county to be cut shall appoint three managers for each voting place in the area of the old county proposed to be cut off, and shall deliver to them the books of registration, and the election shall be conducted in the same manner as general elections. Section 4 provides that the commissioners of elections for each old county proposed to be cut shall canvass the returns of the managers at each precinct in their county at which such election has been held as such returns in general elections in this state are canvassed, and shall certify the result thereof, in a tabulated statement of the vote at each precinct, to the secretary of state, who shall transmit a tabulated statement of the vote at each precinct to both branches of the general assembly at its next session. Section 5 provides that the general assembly at its next session shall create such new county, if two-thirds of the qualified electors voting at such election shall vote in favor of the establishment of the new county, and "if all the constitutional requirements for the formation of new counties have been complied with, of all which such general assembly must judge." *Held* that the latter section does not constitute the general assembly the judge of whether the necessary two-thirds vote has been cast, but that fact must be ascertained from the tabulated returns.

2. If section 5, Act March 9, 1896 (22 St. at Large, p. 64), be construed as investing the general assembly with full power to finally determine, on evidence and argument, whether the constitutional requirement of a two-thirds vote has been complied with, it is void, as an attempt to usurp and exercise judicial power, in violation of Const. art. 1, § 14.

3. The fact that there is possibly no right of appeal from the return made by the commissioners of elections as to the result of an election under Act March 9, 1896 (22 St. at Large, p. 64), to decide as to the establishment of a new county, does not give the general assembly power to set aside or disregard the return by usurping judicial powers, in violation of the constitution.

Jones, J., and Townsend and Buchanan, Circuit Judges, dissenting.

Original petition by J. R. Segars, Jr., and others against J. L. Parrott and others for an injunction. Decision by the judges of this court and by all of the circuit judges as to the issues of fact which should be referred to a referee to hear and determine.

The following is the report of the referee in favor of petitioners:

"To the Supreme Court: The undersigned referee, to whom, by an order of this court bearing date August 2, 1898, entitled in this proceeding, it was referred to hear and determine: First, whether the board of commissioners of elections for Darlington county certified the result of the election held in those portions of said county proposed to be cut off for the purpose of forming the proposed new county of Lee, under the order of his excellency the governor, in tabulated statement of the vote at each precinct, and transmitted the same to the secretary of state; second, if so, whether it appears from such statement that two-thirds of those voting at such election were in favor of the establishment of Lee county, —respectfully reports that on the 2d of November, A. D. 1898, a reference herein was held by said referee for the purpose of hearing and determining the questions referred to him by said order, and that at the request of both parties the reference was held in the city of Columbia, at the office of the secretary of state, and that Mr. R. W. Shand, in behalf of the petitioners, and Messrs. Youmans, Moorman, and Purdy, in behalf of respondents, were present. At the hearing, testimony in behalf of the petitioners only was offered. Mr. L. Motte Ragin, sworn as a witness, testified that he was the chief clerk of the secretary of state; that he has held such position since the 4th of March, 1897; that the papers relating to the Lee county election were then (while the witness was testifying) in the office of the secretary of state. Some papers were then produced in a bundle, by the witness, and the attorney for petitioners offered in evidence one of such papers; the same being entitled on its face, 'In re New County to be Established Out of Portions of Sumter, Kershaw, and Darlington Counties,' and purporting to have been signed by E. E. Kirven, H. J. Nettles, and O. L. Reynolds, 'Board of Canvassers.' Respondents objected to the admission of this paper on the grounds specified as follows: That under the order of reference this paper is not a paper in which the commissioners of election for Darlington county certify the result of the election held in those portions of said county proposed to be cut off for the purpose of forming the new county of Lee, under the order of the governor, in tabulated statement of the vote at each precinct: (1) Said paper not being a certificate; (2) the same not showing the result of the election in tabulated statement of the vote at each precinct. After hearing argument the referee admitted said paper in evidence for what it might be worth, subject to being ruled out in case its relevancy should not appear in the progress of the hearing. To this ruling respondents excepted. Hon. D. A. Tompkins, secretary of state, being called and sworn as a witness, testified that he had been secretary of state for about four years past; that as such officer he received from the board of canvassers of election for

¹ For subsequent opinion, see 81 S. E. 865.

Darlington county the papers relating to the Lee county election; that Mr. Ragin is the clerk for the secretary of state. The witness was then asked: 'Are the papers produced here the papers referred to by you in your previous testimony?' This question was objected to by respondents, no grounds being assigned for such objection. The referee overruled the objection, and the witness answered, 'Yes.' The papers shown by the witnesses, and identified as the records of the election (or purporting to be such) held in that portion of Darlington county included in the proposed new county of Lee, and filed in office of the secretary of state, including the paper first offered and conditionally admitted in evidence, and shown to form a part of said record, were then offered in evidence as a whole, as a record in its entirety. Its admission as such was contested by the respondents upon the grounds of incompetency and irrelevancy, and upon the further ground that the referee should inspect such papers, and give respondents opportunity to make specific objections to each paper, and that the record does not contain the certificate of the commissioners of election for Darlington county, nor a tabulated statement. The referee, desiring the aid of whatever light this record might be supposed to throw on the issues referred to him, admitted it, together with the first paper introduced, as a part of the same. A copy of this paper, marked 'A,' will be annexed to this report. After the last-mentioned objection was passed upon, the referee was asked to note the following objection to the consideration by him of said record, to wit: That the only paper that the commissioners of election could transmit to this office was a certified tabulated statement, and this officer, the secretary, could only receive and have such tabulated statement. While the referee himself was inclined to view as correct the proposition contained in the first clause of this objection, he was unable to discover by what method he would arrive at a conclusion, one way or the other, on the issues referred to him, without examining and considering the contents of said record. In response to a question propounded by respondents' attorneys, Mr. Tompkins testified as follows: 'The papers introduced are the only papers I have in the Lee county matter. I do not know whether you call them "tabulated statements" or not.' The further questions (two in number) asked this witness were objected to by counsel for petitioners; and, such objections having been sustained, the questions and the answers thereto are appended at the end of this report, on a separate sheet of paper, marked, 'Testimony Ruled Out by the Referee.' No further testimony having been offered, the petitioners having closed, and the respondents having announced that they would offer no testimony, a recess was taken for the purpose of allowing the referee time for making an examination of said record;

and after such recess, and the hearing by the referee of arguments on both sides of the controversy, the reference was adjourned. The examination by the referee of the papers composing said record showed that but few of them were relevant to the questions at issue; and in fact the distinguished counsel for the petitioners, in his argument, stated that only four of the papers or documents contained in said record had any bearing on the question before the referee; and to them the latter's attention was specially directed. These papers are as follows: (1) Papers in said record marked 'Testimony.' (2) Paper purporting to be return of board of managers at Cypress precinct. (3) Paper purporting to be return of board of managers at Ashland precinct, on which was a statement that the ballot box, votes, returns, and other evidences of the election had been stolen directly after the counting of the votes. (4) Paper hereinbefore referred to, and annexed to this report, designated by the letter 'A.' An examination of these papers, to which the attention of the referee was specially directed, as stated, showed that as to the first the testimony therein set forth was taken in a contest wherein the legality of the elections at the Cypress precinct and at the Ashland precinct was challenged. The documents numbered 2, 3, above, are not, in the opinion of the referee, relevant to the inquiry and the finding which he is directed to make. Each of these documents was found isolated in the package of papers making up said record, and forming no part, by reference thereto or otherwise, of Exhibit A, hereto attached, and neither of them appears to have any connection whatever with any other paper or document found in said record; and the referee is led by inference to the conclusion that these two papers were intended for use in one or the other of said contests, and doubtless were so used. As the referee has not been directed to consider whether there is secondary evidence of the legality of the election claimed to have been held in Darlington county at the places and on the occasion referred to, it appears to him that these papers numbered 1, 2, 3, if they have any connection whatever therewith, are too remotely connected with the matter at issue to have any weight in leading the referee to a proper conclusion. The last document brought to the attention of the referee in behalf of the petitioners, as bearing upon the question at issue, is the said Exhibit A, already adverted to in this report, and which appears to be the decision of certain individuals, styling themselves 'Board of Canvassers,' in a protested election controversy, and which was found in the said record totally disconnected with any other document or paper. The first paragraph of this document, commencing 'We,' and ending with the word 'decide,' and its concluding paragraph, together with many other expressions found in the body of the document, lead the referee

to the conclusion that such paper was never intended for, nor formulated as, an election return or statement, such as would come within the requirements of section 4 of the act of 1896 (22 St. at Large, p. 65), under which the disputed election was held. This paper, as will be seen, is not a certified tabulated statement; neither does it purport to be such; and if these defects, by any sort of construction, could be brushed away, the paper is not authenticated by the commissioners of election for Darlington county, nor does it purport to emanate from them, but from certain persons styled 'Board of Canvassers.' And this paper is the nearest approach to a certified tabulated statement which could be found in the said record. It seems to the referee that, in reference to the authentication of the results of an election held under the act just referred to above, the requirements thereof are mandatory, and that a certified tabulated statement of the result of such an election is indispensable, and such statement, to be valid, must be the result of a canvass made by the commissioners of election, as such; no board of canvassers being provided for in the said act. In conclusion the referee finds and reports that the board of commissioners of election for Darlington county did not certify the result of the election held in those portions of said county proposed to be cut off for the purpose of forming the proposed new county of Lee, under the order of his excellency the governor, in tabulated statement of the vote at each precinct, and transmit the same to the secretary of state. This finding dispenses with the necessity of any inquiry or finding by the referee on the second issue referred to him. Joseph F. Rhame, Referee. November 17, 1898."

Exhibit A:

"The State of South Carolina, Darlington County. In re New County to be Established Out of Portions of Sumter, Kershaw, and Darlington Counties.

"We, E. E. Kirven, H. J. Nettles, and C. L. Reynolds, composing the board of election commissioners for Darlington county, now organized as the board of canvassers for the said county, having heard with attention and interest the testimony in this matter, and having carefully reviewed the same, which we had carefully taken down, and having heard the able and full arguments made by the attorney for the contestants and the attorneys for the contestees, after careful deliberation, do hold and decide:

"That the election at Ashland precinct was honest and fair, with the exception of two votes; those being cast by Smith, in favor of the new county, who lived out of the territory to be incorporated in the proposed new county, and by Best, who voted against the new county, and who lives out of the territory to be incorporated in the proposed new county. We hold that there was no secrecy, but that this

election at this poll was public, as the testimony shows that a tally was kept on the outside, and that the vote was ascertained as quick on the outside as it was known on the inside. Further, this board having uncontradicted evidence as to the destruction of the Ashland box, which was stolen from the house of P. W. McKenzie, who was in favor of the new county, and who testifies that the election was fair and honest, and the sworn return from this poll, signed by all the managers, as to the result at this election, shows the total number of votes cast to be 196 ('Yes' votes, 114; 'No' votes, 82), we find the total vote cast to be 194 (the 'Yes' votes, 113; 'No' votes, 81); having thrown out, as illegal, the ballots cast by Smith and Best, one being for and one against the new county. We think that we are legally bound to receive this return, upon the showing made, and therefore the contestants have failed to poll the two-thirds majority required by the constitution. This board considers the election held at Cypress to have been fairly and honestly conducted, but, under a misapprehension, illegally conducted; the managers of election having testified that they did not require a tax receipt for taxes, including poll tax, and no evidence, as required under the constitution, that the said tax had been paid, and the managers having testified that this was done for the convenience and accommodation of the voters,—all of said facts being undisputed; and this board, considering the constitutional requirements mandatory, do hereby declare the election at this precinct null and void.

"In the opinion of this board, this election should not have been held, as substantially the same area was voted upon in the election for the formation of Salem county, and, as this board understands it, the constitution requires that a period of four years should elapse.

"E. E. Kirven,

"H. J. Nettles,

"C. L. Reynolds,

"Board of Canvassers."

Testimony ruled out by the referee on the reference held at Columbia, S. C., November 2, 1898,—this paper forming a part of the report, to which it is attached:

"At said reference Mr. Tompkins was asked by respondents' attorney: 'Did you transmit to the general assembly a tabulated statement of the result of the election held in Darlington county on the question of the formation of Lee county; that is to say, such statement of the vote cast at Ashland and Cypress?' This question was objected to on the ground that what the secretary of state transmitted to the general assembly is not in issue before the referee. The objection was sustained. Question addressed to the same witness: 'Please show to the referee, in the bundle of papers introduced, the paper which is a certified tabulated statement of the said election,—of the vote at each precinct.' This question objected to on the ground that all

the papers in said bundle have been introduced, and it is for the referee, and not the witness, to pass upon their purport and effect. The objection was sustained. Joseph F. Rhame, Referee. November 17, 1898."

Boyd & Brown and E. Keith Dargan, for petitioners. Le Roy F. Youmans, Thos. S. Moorman, and R. O. Purdy, for respondents.

McIVER, C. J. This was a proceeding instituted in the supreme court, in the exercise of its original jurisdiction, mainly for the purpose of testing the legality of the establishment of Lee county, formed from certain portions of territory cut off from the counties of Sumter, Kershaw, and Darlington. In the petition it is alleged, among other things, that "the result of the election ordered by the governor in those portions of Sumter and Kershaw counties cut off from said counties and embraced within the area of the said new county was, as reported by the managers of elections within said areas and as declared by the commissioners of election for said two old counties, favorable to the creation of said new county; but the result of said election in that portion of the county of Darlington embraced within the area of said new county was, as returned by the managers of election within said last-named area and as declared by the commissioners of election for said old Darlington county, unfavorable to the creation of said new county, in that, as reported and declared, it failed to obtain two-thirds of the qualified electors of said embraced area of Darlington county in favor of such new county." These allegations are made in the fifth paragraph of the petition; and in the twelfth paragraph it is again alleged that the proposition to establish Lee county "did not receive the favorable vote of two-thirds of the qualified electors voting in each section of said proposed new counties, as reported by the managers of election, and as determined by the commissioners of election for the several old counties from which this new county was proposed to be taken." In the sixth paragraph of the petition it is alleged "that the result of said last-mentioned election was certified in legal form by the commissioners of election for said three old counties to the secretary of state, and by him was submitted to the general assembly at its next session." The respondents in their amended return say "that the statement as to the election made in paragraphs 5 and 6 of the petition is incomplete and incorrect, and respondents aver that not only in the Sumter and Kershaw sections, but also in the Darlington section of Lee county, more than two-thirds of the votes cast were cast in favor of the formation of Lee county; that they admit that the election so prayed for, as alleged in paragraph 5 of the petition, was held, and the name proposed for the new county was 'Lee County,' but they deny each and every other allegation contained in said paragraph of the petition." And they then proceed to allege that in Darlington coun-

ty there were only two precincts at which an election was held, to wit, Cypress and Ashland; that the managers at Cypress duly held said election, and duly delivered to the commissioners of election the poll list, the box containing the ballots, and a written statement of the result of the election at that precinct, showing that more than two-thirds of the votes there cast were in favor of the new county, and that the commissioners of elections for Darlington county at their first meeting thereafter canvassed the return of the managers for that precinct, and declared the result of the election there in accordance with said return; that the managers of election at Ashland precinct did not deliver to the commissioners of elections the poll list, the box containing the ballots, or the written statement of the result of the election, as required by statute, nor did they return the vote there cast, but two days after the election, at Darlington Court House (not at Ashland), they prepared an illegal, unauthorized, and incorrect paper, alleging it to be a statement of the vote cast at that precinct, and attached thereto an affidavit of the managers, stating that a written statement of the result of the election had been put in the ballot box, and that the box and contents were stolen on the night of the election; that upon such paper presented by the managers the commissioners of elections at their subsequent meeting declared the result of the election at Ashland to be against the formation of Lee county, notwithstanding that protest had been made against the making of such declaration, and notwithstanding the fact that more than two-thirds of the votes cast at Ashland precinct had been cast in favor of the formation of Lee county, which fact was fully proved before the general assembly, "and the truth of which these respondents here allege and aver." It is further alleged in the return of respondents that at the second meeting of the commissioners of elections they illegally declared the election at Cypress to be null and void, and never certified to the secretary of state the result of the election at such precinct in tabulated statement of the vote cast thereat, as required by law, nor in any other form. In that portion of the original return of respondents which has not been amended, they say, in answering the twelfth paragraph of the petition, that "they admit that the petitioners are citizens, electors, freeholders, and taxpayers in Lee county, opposed to its creation, but they deny each and every other allegation of said paragraph."

After hearing the petition and return as amended, and after full argument of counsel it appearing that certain issues of fact were presented by the pleadings, which it was necessary should be referred to a referee to hear and determine, a question thereupon arose as to what issue or issues of fact should be referred to the referee; and there being a difference of opinion among the members of the supreme court as to that question, and two of the justices of this court having expressed a

desire that all of the circuit judges should be called to the assistance of the supreme court, for the purpose of determining that question, in accordance with the provisions of section 12 of article 5 of the present constitution, an order to that effect was accordingly passed on the 8th of June, 1898; and in pursuance of that order the circuit judges have been called in by the Chief Justice.

For a proper determination of the question thus presented to the court as at present constituted, it will be necessary to consider briefly what is the law with respect to the formation of new counties in this state. It seems that prior to the adoption of the constitution of 1868 there was no constitutional limitation upon the power of the general assembly to provide for the formation of new counties. But by section 3 of article 2 of the constitution of 1868 the general assembly was specifically vested with the power to organize new counties, with these limitations, however: That "no new county shall be hereafter formed of less extent than six hundred and twenty-five square miles, nor shall any existing counties be reduced to a less extent than six hundred and twenty-five square miles." The present constitution, in article 7, places still further limitations upon the power of the general assembly to establish new counties. The only one of these additional limitations necessary to be considered for the purpose of determining the question now before us is that contained in section 2 of that article, whereby it is provided that "no section of the county proposed to be dismembered shall be thus cut off without consent by a two-thirds vote of those voting in such section." But the constitution nowhere provides how the election for this purpose which is required by section 1 of the same article shall be held, or how its result should be ascertained, and hence that must be provided for by the general assembly. Accordingly, that body, at its first session after the adoption of the present constitution, passed "An act to provide for the formation of new counties, and the changing of county lines and county seats and consolidation of counties," approved March 9, 1896 (22 St. at Large, p. 64). That act, after providing in the first and second sections for the holding of an election to determine whether any proposed new county shall be established, proceeds, in the third section, to provide as follows: "For the purposes of such election the commissioners of elections for each old county proposed to be cut shall appoint three managers for each voting place in the area of the old county proposed to be cut off, not more than two of whom shall be in favor of the proposed new county or against it, and shall deliver to them the books of registration for those voting places, which the registration officers shall turn over to the commissioners on demand. Such election shall be conducted in the same manner as general elections in this state, and all persons entitled

to vote under the constitution and laws of this state, at general elections, shall be entitled to vote at such election." The provisions of the fourth section of said act are as follows: "The commissioners of elections for each old county proposed to be cut shall canvass the returns of the managers at each precinct in their county, at which such election has been held, as such returns in general elections in this state are canvassed, and shall certify the result thereof in tabulated statement of the vote at each precinct, to the secretary of state, who shall transmit a tabulated statement of the vote at each precinct of an old county proposed to be cut off, to both branches of the general assembly at its next session." Then follows the fifth section, in these words: "The general assembly at its next session shall create such new county if two-thirds of the qualified electors voting at such election shall vote in favor of the establishment of such new county, and if all the constitutional requirements for the formation of new counties have been complied with, of all which such general assembly must judge."

From this review of the legislation, both constitutional and statutory, it is apparent that one of the essential constitutional requirements for the formation of a new county is that "no section of the county proposed to be dismembered shall be thus cut off without consent by a two-thirds vote of those voting in such section." Article 7, § 2. But as the constitution makes no provision whereby it can be ascertained whether such consent has been manifested by a two-thirds vote of those voting in the section of an old county proposed to be cut off, in favor of the formation of the proposed new county, it was necessarily left for the general assembly to make such provision. This has been done by sections 3 and 4 of the act above quoted, whereby it is substantially provided, in section 3, that managers of election shall be appointed for each voting place in the area of the old county proposed to be cut off, by the commissioners of elections for such old county; that such elections shall be conducted in the same manner as general elections in this state; and that all persons who, under the constitution and laws of this state, are entitled to vote at general elections, shall be entitled to vote at such election. And in the fourth section it is further provided, substantially, that the commissioners of elections for each old county proposed to be dismembered shall canvass the returns of the managers at each precinct in their county, where such election shall be held, as such returns in general elections are canvassed, and shall certify the result thereof, in tabulated statement of the vote at each precinct, to the secretary of state, who shall transmit a tabulated statement of the vote at each precinct of an old county proposed to be cut off to both branches of the general assembly at its next session. This, it seems to us, is the only mode pre-

scribed by law whereby the essential fact can be ascertained, to wit, whether two-thirds of the vote cast at such election in that portion of an old county which it is proposed to cut off for the purpose of forming a new county were cast in favor of the formation of such new county; and it is therefore the only mode by which that essential fact can be properly ascertained. Hence the only issues of fact necessary to be referred to the referee for his determination are whether the commissioners of elections for the county of Darlington (no question having been raised as to the result of the election in the counties of Sumter and Kershaw) have certified the result of the election, in tabulated statement of the vote at each precinct of said county at which such election has been held, to the secretary of state, and whether such tabulated statement has been transmitted by him to the general assembly at its session next following the election, and whether it does or does not appear from such tabulated statement that two-thirds of the votes cast in that portion of the county of Darlington proposed to be cut off for the purpose of forming the new county of Lee were in favor of the formation of such new county; for, until this essential fact is ascertained in the only mode prescribed by law, the general assembly would have no power to pass an act for the formation of Lee county.

It is contended, however, that by the terms of the fifth section of the act above quoted the general assembly has constituted itself the final judge of whether the necessary two-thirds vote was cast in the county of Darlington in favor of the formation of Lee county, and that by "An act to establish Lee county," approved the 19th of February, 1898 (22 St. at Large, p. 908), it has finally determined that question. In the first place, it seems to us that the language used in section 5 of the act of 1896, above copied, is susceptible of two constructions, one of which would be in accordance with the provisions of the constitution, and the other would bring that section into direct conflict with the provisions of that instrument. In this state of things, the rule is well settled that such a construction of an act should be adopted as would avoid any conflict with the constitution, rather than a construction which would bring about a conflict with the constitution. It may be that the general assembly only intended, by the language used in that section, to declare that it should have the power to determine whether the result of the election had been ascertained in the manner prescribed by law, to wit, by the mode prescribed by the two preceding sections (3 and 4, hereinabove copied), and this is the construction which must be adopted. The construction contended for by the respondents is that by the terms of the fifth section the general assembly has been invested with full power to determine finally whether this constitutional requirement as to the two-thirds vote, as well

as all the other constitutional requirements, has been complied with. If this be the proper construction of the language used in section 5, then it is a manifest attempt on the part of the general assembly to assume and exercise judicial power, which is plainly forbidden by the constitution (section 14, art. 1); for it is alleged in paragraph 7 of the original return "that all the allegations of the petition as to the matters occurring prior to the passage of the act to establish Lee county were duly presented to the general assembly by those opposed to the creation of this county, and full testimony and full argument of counsel heard in support of their force and effect; and it was after such presentation, evidence, and argument that the act to establish Lee county was enacted by the general assembly, upon full debate and consideration had." That this was an exercise of judicial power on the part of the general assembly is obvious, and it is equally obvious that it is in open violation of the section of the constitution last cited, which reads as follows: "In the government of this state the legislative, executive and judicial powers of the government shall be forever separate and distinct from each other, and no person or persons exercising the functions of one of said departments shall assume or discharge the duties of any other." Indeed, if the hearing and deciding a question as to the result of an election, upon evidence and argument, is not the exercise of judicial power, it would be difficult to conceive what would constitute the exercise of such power. It necessarily involves the hearing of evidence, and the determination of questions both of fact and law arising out of such evidence. We have no idea, therefore, that the general assembly ever intended, by the terms of section 5 of the act of 1896, above referred to, to invest itself with judicial power; and, if it did, then that section of the act is clearly unconstitutional, and therefore null and void. That this was the view of the framers of the constitution is clearly shown by the fact that by section 11 of article 3 of the constitution it was thought necessary to invest the general assembly, in express terms, with power to pass upon the election returns and qualifications even of its own members; for that section provides as follows: "Each house shall judge of the election returns and qualifications of its own members." And again, by section 4 of article 4, to confer upon the general assembly the power to determine "contested elections for governors." In these two cases, and in these two only, are the general assembly invested with power to determine the result of any popular election; and they are not only not invested with any power to determine the result of any other popular election, but they are forbidden to assume or exercise such a power in any other case, by the terms of section 14 of article 1, above quoted.

If it should be said that, under the view

above presented, the board of commissioners of elections would be invested with the power to determine finally the result of any election such as that which is under consideration here, without any right of appeal to any other tribunal, and that the general assembly could scarcely have intended any such result, to this several answers may be made: First. If the language used in sections 3 and 4 of the act of 1896, above quoted, requires such a construction, then "*Ita lex scripta est*" would be a complete and sufficient answer. Second. If, however, the language used in those sections is susceptible of the construction that the general assembly intended to confer a right of appeal to the board of state canvassers, as in other elections, then the objection falls to the ground, as there was in this case no appeal to the board of state canvassers. While, for the reason just stated, it is not necessary now to decide whether the construction suggested is the proper one, it may be not amiss to say that there is much in the language used to warrant such a construction. By section 174 of the Revised Statutes of 1893 the commissioners of elections are declared to be the county board of canvassers; and by section 175 it is declared that such board of county canvassers "shall have the power, and it is hereby made their duty, as judicial officers, to decide all cases under protest or contest that may arise, subject to appeal to the board of state canvassers"; and in section 186 the board of state canvassers, it is declared, "shall have power, and it is made their duty, as judicial officers, to decide all cases under protest or contest that may come before them on appeal from the decisions of the county board of canvassers." And in several cases it has been held that the decisions of the board of state canvassers are final, and not reviewable by appeal to this or any other court, and at most can be reviewed under a writ of certiorari issued by this court for errors of law. *Ex parte Riggs* (S. C.) 29 S. E. 645. It is true that the statutory provisions just cited originally applied only to the election of certain officers therein specified, but by an act approved 2d March, 1896 (22 St. at Large, p. 55), it is declared "that all laws now of force relating to the formation of county and state boards of canvassers, and defining their powers, duties and liabilities, * * * be and the same are hereby continued of force, and applicable to all elections [italics ours] held under the constitution ratified on the fourth day of December eighteen hundred and ninety-five, until repealed or amended by the general assembly." The election now under consideration being an election held under the present constitution, it seems clear that the powers and duties conferred upon the county boards of canvassers and the state board of canvassers by those sections of the Revised Statutes which have been cited are applicable to this election. It seems to us that the words used in the third section of the act of

1896, "Such election [that is, this election] shall be conducted in the same manner as general elections in this state," and the words used in the fourth section of that act, requiring that the commissioners of elections, who, as we have seen, constitute the board of county canvassers, "shall canvass the returns of the managers of each precinct in their county at which such election has been held as such returns in general elections in this state are canvassed," may be construed as implying an intention on the part of the general assembly that an election of this kind shall be conducted in all respects as general elections are conducted, in which, as we have seen, the right of appeal from the decision of the board of county canvassers to the state board of canvassers is secured. See *Blake v. Walker*, 23 S. C., at page 525, where similar language has been construed. But, even if there is no right of appeal from the return made to the secretary of state by the commissioners of elections, it does not follow that there is no remedy for a grossly erroneous or perhaps fraudulent return of the commissioners of elections; and, least of all, it does not follow that this remedy is in the action of the general assembly, by assuming and exercising a power which the constitution, in express terms, prohibits it from exercising. It may be that, if the return of the commissioners of elections is illegal or erroneous as matter of law, the remedy would be by writ of certiorari, as in the case of *Ex parte Riggs*, supra; or it may be that, if such return is alleged to be fraudulent, it might be set aside and declared void by an action for that purpose. But, however this may be, it seems to us clear that the general assembly has no power either to set aside or disregard such return, and that, until it is set aside or annulled in some form of proceeding recognized by law, it must be regarded as showing conclusively the result of the election.

For the foregoing reasons we cannot adopt the construction of section 5 of the act of 1896, contended for by the respondents, as such a construction would bring the act into direct conflict with the constitution; and, on the contrary, we must adopt the construction of section 5 hereinabove first suggested, as that will avoid any conflict between the act and the constitution. From this it follows that the only questions of fact necessary to be referred to a referee are: (1) Whether the board of commissioners of election for Darlington county certified the result of the election held in those portions of said county proposed to be cut off for the purpose of forming the proposed new county of Lee, under the order of his excellency the governor, in tabulated statement of the vote at each precinct, and transmitted the same to the secretary of state. (2) If so, whether it appears from such statement that two-thirds of those voting at such election were in favor of the establishment of Lee county. The

judgment of this court (as at present constituted), in accordance with the foregoing views, has heretofore been announced, in a short order heretofore filed.

GARY, A. J., and POPE, J., and ALDRICH, GARY, KLUGH, BENET, and WATTS, Circuit Judges, concur. TOWNSEND, Circuit Judge, dissents.

JONES, J. I am unable to concur in the opinion of the Chief Justice in this case. It is grounded on the proposition that the legislature must accept as final and conclusive the result of an election upon the question of creating a new county as certified by the returns of the commissioners of elections. If, therefore, the result as returned by such commissioners is against the formation of Lee county, then the act establishing Lee county is absolutely void, no matter how incorrect, false, or fraudulent such return may have been, and no matter if in fact the requisite number of electors did really vote for the formation of such new county. The theory is that, if such returns are incorrect, false, or fraudulent, the decision of the legislature thereon goes for naught, but an appeal might lie to the state board of canvassers, or certiorari might lie to correct mere error of law, or possibly an action might be sustained in the courts to set aside such returns for fraud; but, until reversed according to law by some tribunal other than the legislature, the legislature must accept such returns as final and conclusive, and is powerless to determine for itself whether, in fact, the requisite number of legal voters voted in favor of the establishment of the new county. This view, it seems to me, is clearly erroneous. By article 7 of the constitution it is provided, among other things, that if two-thirds of the qualified electors voting at an election upon the question of the formation of a new county shall vote "Yes" upon such question, then the general assembly at the next session shall establish such new county. This article provides for other requisites for the formation of new counties, not necessary to be mentioned here. It is manifest from this article of the constitution that the legislature not only has the power, but it is its duty, to ascertain for itself the existence of the conditions upon which it is required to establish a new county. The power to ascertain for itself the existence of conditions is necessarily implied from the power and duty to act when such conditions exist. It is argued that it is a judicial function to ascertain the result of an election, and that, therefore, under section 14 of article 1 of the constitution, which provides for the separation of the legislative, executive, and judicial powers of the government, and forbids any person exercising the functions of one of said departments to discharge the duties of any other, the legislature has no power to determine for itself the result of such election; that such deter-

mination would be an usurpation of judicial power. This argument, it will be readily seen, ignores the principle that the constitution must be read as a whole. It may be granted that it is in some respects a judicial function to ascertain the result of an election, yet it does not follow that it is beyond legislative power to ascertain the true result of an election upon the formation of a new county, for the reason that the same constitution which forbids encroachment by one department on the powers of another also makes it the duty of the legislature to ascertain the existence of all conditions preliminary and requisite for the creation of a new county, because, as said, the power to create new counties on specified conditions by implication carries the power to ascertain for itself whether the necessary conditions exist. Therefore you may call the exercise of such power a judicial function; it is nevertheless a legislative power under the constitution. This is made very clear when considered in reference to other constitutional conditions necessary for the formation of a new county, whether the proposed new county contains the necessary population, the necessary taxable property, the necessary area, whether the proposed new county line runs within eight miles of the court house of any old county, whether the formation of the proposed new county would reduce any old county to less than 500 square miles in area, or less than \$2,000,000 of taxable property, or less than 15,000 of population. Must not the legislature ascertain for itself whether these conditions exist? It can, in ascertaining the facts, use its agents and committees, but, as the creature is not superior to its creator, no report of agent or committee on these facts is final and conclusive as to the legislature. Why should the report of commissioners of election in the matter of the condition as to the requisite two-thirds vote be final and conclusive? It is conceded that it is essential to have a special election to ascertain the existence of the requisite vote, but the power to ascertain the result of the election according to the truth must still be in the legislature as a preliminary to its action.

But it is argued that in the "Act to provide for the formation of new counties," etc., approved March 9, 1896, the legislature had manifested an intent that the return of the commissioners of elections shall be final and conclusive. It is extremely doubtful whether the legislature could abrogate its duty to ascertain for itself the existence of conditions preliminary to the formation of new counties; but pass that by. I contend that in the act supra the legislature clearly meant to reserve to itself the ascertainment whether the requisite vote was had in the steps to form a new county. The requirement in section 3 that "such election shall be conducted in the same manner as general elections in this state," may fairly be construed as relating solely to the manner of conducting elections as provided in

sections 166 to 173, inclusive, of the Revised Statutes; such as the regulations for opening and closing the polls, the administering of oaths, the keeping of poll lists, the counting of the ballots by the managers, the statement of the result, and the delivery of the poll lists, the boxes containing the ballots, and a written statement of the result to the commissioners of election. So the language in the fourth section requiring the commissioners of election to canvass the returns "as such returns in general elections are canvassed" can be fairly construed as relating to the manner of canvassing and certifying the result to the secretary of state, and not as conferring on the commissioners of election the powers of the board of county canvassers in general elections. The exercise of the powers of the board of county canvassers in general elections is subject to the right of appeal to the board of state canvassers. But the legislature expressly required the commissioners of election to certify the result to the secretary of state, who in turn should transmit to the general assembly. This seems to eliminate the board of state canvassers as a tribunal to which an appeal might be taken from the commissioners of election, and it is impossible, without express language to that effect, to conceive that the legislature meant to confer upon the commissioners of election such powers as contended for without having provided for an appeal, unless the legislature intended to reserve for itself the right to ascertain the true result of the election. It is not at all probable that the legislature would make the commissioners of election of established counties, who, according to human nature and experience, would be expected to be opposed to the dismemberment of these counties, the sole and final arbiters on the question of dismemberment, but it is easy to understand why the legislature would authorize such commissioners of election to canvass the returns in the manner such returns are canvassed in general elections, with the provision that the returns, or a statement thereof, be sent to the secretary of state, to be by him transmitted to the legislature, which, by the constitution, must decide for itself whether conditions exist which are necessary for the formation of a new county. No one would contend that the decision of a board of county canvassers is final as to an election of governor or a member of the general assembly. Why? Because, by the constitution, contested elections for governor are to be determined by the general assembly, and because, by the constitution, each house shall judge of the election returns and qualifications of its own members. It follows that no one ought to contend that the decision of the commissioners of election is final and conclusive in the matter of an election for the formation of a new county. Why? Because, under the constitution, it is the duty of the legislature to ascertain for itself whether constitutional requirements for the creation of a new county have been complied with; the power to create upon

conditions necessarily implying power and duty to ascertain the existence of such conditions. But, further, the fifth section of said act of 1896 makes it perfectly manifest that the legislature did not intend to make the decision of the commissioners of election final and conclusive. It reads: "The general assembly at its next session shall create such new county if two-thirds of the qualified electors voting at such election shall vote in favor of the establishment of such new county, and if all the constitutional requirements for the formation of new counties have been complied with, of all which such general assembly must judge." I will not lay stress on the fact, but I call attention to it, that this section does not say that the general assembly shall create the new county if the result of the election as returned by the commissioners of election is in favor of the establishment, as it would have said naturally if such had been the legislative intent. On the contrary, the new county is to be created if two-thirds of the qualified electors voting at such election shall vote, etc. But what I do wish to emphasize is this language of the section: "of all which such general assembly must judge." This most distinctly and positively affirms that the decision of the commissioners of election is not final, and that the legislature will judge for itself as to compliance with all constitutional requirements. I confess my inability to see how this can be doubted. It is said that to give this construction would place the act in conflict with the constitution, which, if possible, should be avoided. By the same reasoning, ought we not to avoid a construction, the effect of which will inevitably result in declaring the act to establish Lee county void, if perchance the result of the election as returned by the commissioners of election is different from the result as declared in the act? But I do not think the fifth section conflicts with constitution. The legislature, as I construe the section, did not mean to make itself the final judge whether all constitutional requirements have been complied with, but meant to reserve its right of ascertaining for its own guidance whether constitutional requirements have been in fact complied with. The language certainly negatives the idea that the decision of the commissioners of election was intended to be final. I agree fully that the legislature is not the final judge of the existence of conditions essential under the constitution for the creation of a new county. My view in this matter is that the legislature must, in the first instance, determine for itself whether constitutional requirements for the formation of new counties have been complied with, in order that it may exercise its power and discharge its duty in the premises; but, when the act creating a new county is passed, it is within the power of the courts to declare such act unconstitutional, if it clearly or beyond a reasonable doubt appears that some constitutional requirement has not, in fact, been complied with. The presumption is that

the act of the legislature is valid, and is consistent with the facts appertaining to the discharge of its duty and exercise of its power. On those who assail it rests the burden of showing clearly some constitutional vice. As against an act of the legislature deciding to the contrary, the return of commissioners of election in the matter of forming a new county is not final and conclusive. If I am correct in these views, then the reference of issues in this case should go further than provided for in the order of the court, so as to allow the parties to show the true state of facts under the issues of fact raised in pleadings, independent of the return of the commissioners of election, and independent of the action of the legislature thereon. But, in any event, the limitation of the reference to the mere ascertainment of the result of the election as returned by the commissioners of election should not be based on the ground that such returns of the commissioners are final and conclusive. Under my view, a reference merely to ascertain what was returned by said commissioners is of no avail, since such return in no way concluded the legislature on the question whether the requisite vote was had for the formation of Lee county.

BUCHANAN, Circuit Judge. The constitutional convention of 1895, in article 7, provided for the formation of new counties, empowering the governor, on the petition of one-third of the qualified electors within the area of each section of an old county proposed to be cut off to form a new county, setting forth the boundaries and showing compliance with the requirements of the article, taxable property, requisite population, that election had not theretofore been held within four years last past, etc., to order an election in which the qualified electors of the proposed area shall vote upon the question. Section 2 provides: "If two-thirds of the qualified electors voting at such election shall vote 'Yes' upon such questions then the general assembly at the next session shall establish such new county." The general assembly at the next session (1896), for the purpose of carrying out this provision of the constitution, passed "An act to provide for the formation of new counties," etc. Acts 1896, p. 64. Section 5 of said act declares, after laying down the procedure: "The general assembly at its next session shall create such new county if two-thirds of the qualified electors voting at such election shall vote in favor of the establishment of such new county, and if all the established requirements of the formation of new counties have been complied with, of all of which such general assembly shall judge." Such a petition required by the constitution was presented to the governor, who, being convinced of the truth of the matters therein contained, ordered an election in the territory set out in the petition. Immediately after the election there were charges of irregularities, of the

theft of the box, etc. The returns (if they may be so termed) of two boxes—Ashland and Cypress—were counted against the formation of the new county, making the result in favor of the opposition to the new county. Those in favor of the formation of Lee county protested against such a declaration, and satisfied the general assembly that the requisite number of ballots had been cast in favor of the formation of the new county; whereupon the act of 1898 was passed in response to the constitutional requirement, declaring "that a new judicial and election county to be known as Lee county is hereby formed"; the petitioners claiming that the act of 1898 was "null and void" (but nowhere alleged it was contrary to the constitution), because it had declared that two-thirds of the qualified electors had voted for the establishment of the new county, which was not the fact, and because there had been an election in the same territory within four years last past. The traverse to the return does say that the general assembly was not so empowered to pass upon the returns, but were bound to adopt the returns of the managers of the election, and pray for an injunction against the respondents, who are commissioners for the new county. The purpose sought is to enjoin the carrying out of certain duties devolved by the statute upon certain officers, who it is alleged, are attempting to set up, improperly, another political subdivision of the state, to be called "Lee County." The main question to be considered refers to the establishment, formation, and organization of Lee county. Was it properly and legally constituted? And, as necessary to a full understanding of this matter, what is necessary to the establishment of a new county under the constitution of 1895 and the Acts of 1896 and 1898? Who is to determine when and how the new county is and has been established? Who is to determine when and how the requisite provisions have been complied with? Is it merely a question affecting the exercise of political powers, and therefore belonging to the legislative department; or is it a "judicial" question, requiring resort to the courts for the determination of the effect of the evidence upon which the legislature sees fit to act, and necessitating the oversight and guardianship of the judiciary as to the manner in which the general assembly discharged its duty in the premises? Who is to say when the requirements of the law have been fulfilled? As incidental to the power of the legislature to organize new counties, does not there reside in that body the power to decide the conditions to be present upon which the power so to create new counties is to be exercised? If so, is this determination under the constitution and laws upon the matter to be subject to the review of the judiciary, who may look into the record, and, in the face of the legislative determination that certain facts exist, decide that these facts do not exist? These are questions for grave and

serious consideration. That a court should be clothed with power to inquire into the evidence upon which the legislature acts in passing an act looking to the creation of a political division of the state is a proposition most unusual, but that it should not only look into and weigh the evidence, but actually reverse the action of the legislative body upon a matter required by the constitution to be passed upon by that body is most startling. Whether a particular thing is required by the constitution to be done, is a question of law, but whether the particular matter has been done, and has been proven to exist, involves a question of fact. As some fact must appear to have been considered before the act could be passed, the passage of every such act necessarily implies that the evil to be remedied or the right to be declared was before the legislator's mind, and by him considered and determined. But does this determination necessarily mean this was a "judicial" determination, and necessarily touching upon the domain of the judiciary? Certainly not. If this is not obnoxious to the constitution in the individual legislator, how can it be said to be obnoxious to the constitution when it is made by all members collectively, with written evidence before them? Having the right to decide upon and be convinced of certain election results, have they not the right to say what evidence shall convince their minds? The constitutional convention and legislature knew that the law of elections was never fully carried out with technical nicety, and that it is the result—the kernel, not the shell; the substance, not the form—that is to be valued, and did not intend to put more value upon the box, or certain returns, than the expression of opinion of the voters whose ballots should be placed in the box. Having required that the public expression shall be evidenced by votes put into a certain box, and that then it should be returned, now, because of its purposed destruction, should it be said the legislature was deprived of the right to inquire into the result in any other manner? If so, the destruction of ballot boxes would be a serious obstacle to the formation of new counties, and the will of the people would be overthrown. I think the right to decide the result of an election necessarily implies the authority to effectuate the duty to penetrate through all masks, subterfuges, and pretenses, fraud and chicanery of all sorts; for, as fraud is counterfeit, there is no real obstacle. The trouble comes from a failure to distinguish between the exercise of a legitimate power and the employment of necessary means for exercising that power. The powers apportioned to one of the departments of government carries with it the right to use means appropriate to the exercise of that power. The constitution (article 7, § 1) provides for beginning the machinery looking to a vote upon the subject of a new county. It provides for the petition to the governor, "setting forth the boundaries,

and showing compliance with the requirements of this article," and that "the governor shall order an election within a reasonable time thereafter by the qualified electors within the proposed area, in which election they shall vote 'Yes' or 'No' upon the question of creating such new county, and at the same election the question of a name and a county seat for such county shall be submitted to the electors." Let us stop here, and see what the governor is to do. He is to judge and determine whether the "requirements" of this article (article 7) have been performed. What are the requirements of this article? (1) That one-third of the qualified electors within the area of each section of an old county proposed to be cut off has petitioned him for the creation of the new county. (2) That no election upon the question of forming the same proposed new county has been held within four years last past. (3) That the proposed new county to be formed will contain at least the one hundred and twenty-fourth part of the whole number of the inhabitants of the state. (b) That it will contain assessed taxable property of the value of one and a half million of dollars, (c) and area not less than four hundred square miles. Section 4. (4) That no old county will be reduced to less area than five hundred square miles, (b) nor to less assessed taxable property than two millions of dollars, (c) nor to a smaller population than fifteen thousand inhabitants, (5) nor will an old county be cut within eight miles of its court-house building. Logically and necessarily he must determine whether these conditions have been complied with. He must be satisfied and must determine from the evidence before him that the area is properly surveyed, the inhabitants counted, and the various requisites so mentioned have been complied with; that no election upon the question of formation of the same new county has been held within the last four years, etc. There is no appeal. If the constitutional convention intended to give an appeal to another body, it would have been very easy to have said so. This is the power given the executive, and it is given in the same instrument which says (article 1, § 14) "the legislative, executive and judicial powers of the government shall be forever separate and distinct from each other," so that the necessary means for carrying into effect the general scheme for the organization of new counties as laid down in article 7 cannot be considered as touching on the powers of the judiciary. The power given in article 7 not being in derogation of the independence of the three departments of government, the exercise of such powers in whatever way the legislature may see fit cannot be in derogation of the judiciary,—one of these departments. Nor can the judgment of the executive be controlled or regulated by another department while following the powers laid down in section 1, art. 7, for the power given to one department is exclusive of and alto-

gether free from the other branches of the government. This view is illustrated by the lines of authority which construe the powers of the executive to remove officers for certain derelictions of duty, in which it is held that: "The grant of power to the executive to remove an officer for a certain cause implies authority to judge of the existence of that cause." "Here the law invested the governor with a discretionary power, which could alone be employed by him. The decisions of all the courts of the state could not compel him to make the removal." *State v. Doherty*, 13 Am. Rep. 132, 25 La. Ann. 119. See chapter 3 of "Executive Power" by Charnburne (translation by Mr. Dahlgreen, Preface by James A. Garfield, afterwards president). *Noble v. Railroad Co.*, 147 U. S. 165, 13 Sup. Ct. 271; *New Orleans v. Paine*, 147 U. S. 261, 13 Sup. Ct. 303,—term of office decisions; *Greir v. Taylor*, 4 McCord, 206. If this view be the one held where there is no special provision pertaining to the subject in the constitution, how much stronger must it be when the constitution has declared that these powers shall be possessed by the governor and the legislature, notwithstanding the general rule of construction of the powers of the co-ordinate branches of the state government? The constitutional convention must be taken to have known the decisions as to the enforcement of election laws. Doubtless they knew that there had never been (and it was improbable, if not impossible, that there should ever be) a technical compliance in any election with any provision of the statute. Doubtless they were practical men, and knew that frequently the voice of the people was responsive, notwithstanding the fact that in some precinct or precincts the votes cast were not sent up. Elections were never avoided for such a matter where the wishes of the people had been thus expressed and registered. Having the power to determine what facts shall satisfy their minds, for convenience can they not appoint an agency whereby such facts may be the easier taken? Having the power, have they not the right given them to exercise all those incidentals of power whereby its intelligent exercise may be promoted? If that body has the power to procure information through a specially appointed commission, has it not a right to reserve its action and judgment upon the sufficiency of the matters reported to it? No attempt is made here to deny the right of the judiciary to declare an act unconstitutional for nonconformity to the constitutional requirements. To do this is one thing. To determine that the matters asserted by the general assembly to have existed in order to the carrying out of their purpose, and bring into operation their power, constitutionally given, did not exist, is quite another thing. To do the one is wholesome and proper, and a necessary guaranty of a republican form of government with an equilibrium maintained; a protection of rights and property. To do

the other is to reverse the lawfully expressed opinion of the people through the only channel provided for such expression.

The significance of the right to interfere and weigh the evidence that may have been before the legislature, the existence of which started the exercise of its functions, cannot be exaggerated when it is remembered that the right to give judgment upon this feature necessarily carries with it, and logically presumes, the power to carry the judgment into effect. Execution differs from judgment, not in the quality of its power, but only in the time and manner of its employment. The power given for convenience to a commission or tribunal (by whatever name called) to gather the evidence is that of the legislature itself, and does not differ in kind from the exercise, in open house, of legislative functions. To fetter the one is to fetter the other. To dam up its powers anywhere is to deny its right to proceed everywhere. There is no difference in principle from enjoining the house committee on elections and a special committee or tribunal to take testimony for legislative action; nor is there any more jurisdiction to inquire into the duties of one than into the duties of the other, and no difference in principle from enjoining the benefit of such legislation than enjoining the general assembly itself. The respondents represent but the fruit of the tree.

In the beginning, let me call attention to the fact that this is an attempt by injunction to decide, through the courts, that the election held for the formation of the political division known or to be known as "Lee County" was not carried by the popular vote, in the face of the declaration of the general assembly that it was so carried by the adherents of that county, and in the face of the authoritative declaration by the representative branch of the sovereign people of South Carolina "that a new judicial and election county, to be known as 'Lee County,' is hereby formed,"—not that Lee county is to be formed upon compliance with certain conditions, but that Lee county "is formed," having complied with the conditions required. So, the writ of injunction is sought to be used, not to prevent the doing of some improper act merely, but to undo, tear up, and throw aside something already done. The process of injunction is sought to restore the status existing before the act of 1898 was passed. Surely, this use of the writ of injunction is novel enough. But a still more impressive and novel feature is the allegation of rights alleged to be in danger by the threatened admission of Lee county into countyhood. Driven to the last analysis, it means that the organization of the new county, somehow or somewhere, will injure the petitioners. There is nothing specific to show how or why they should suffer more than others who will be placed in a new county. The gross want of equity is so flagrant in the relief sought that the artificial statement of the alleged appre-

hension takes the shape of saying that the formation of the new county, with its incidental requirements and accessories, will necessarily injure them. In other words, the formation of a new county will necessarily injure all persons in the territory covered by it,—a proposition not borne out by facts; a proposition the members of the constitutional convention of 1895 emphatically denied when they indicated the public policy of smaller counties; a proposition we are expected to assent to, if we decide the petitioners have any injury to complain of. If we are prepared to say that the formation of a new county per se works an injury to private property, then possibly they may have a standing in court. But who gives the court this right? By what power are we authorized to inquire into the discretion and judgment of the constitutional convention, and in one act to override both that convention and the general assembly of the state of South Carolina? Courts are to enforce the laws, unless they are plainly opposed to the constitution, not to suggest another and different policy for the state. I am not prepared to say that the formation of a new county per se works an injury. I am not prepared to say the petition shows any injury to the private and property rights of the citizen. I think it affirmatively shows that such a right does not exist. See *Alexander v. McKenzie*, 2 S. C. 81.

Another most important matter to be noticed is that there was no similarity between the power of the election officers in the election upon the formation of Lee county and the powers wholly exercised by the board of canvassers under the general election laws. In the former case, while there is some general language employed indicating a purpose that such elections "shall be conducted in the same manner as general elections in this state," it specifically reserves the power and discretion of judging if all the requirements for the formation of new counties "have been complied with, of all of which such general assembly must judge." They evidently did not intend to be made to affirm the doubtful action of the officers who held the elections. Doubtless, as practical men, they realized the influence of the environments of the men who might be appointed to hold elections under that act. In many cases local interests would be overpowering. They said that such local officers should not be the ultimate judges of the ballots, and for that reason made a rule different from the one which prevailed in general elections. Therefore there is no analogy to be drawn from the decisions applicable to a board of canvassers or commissioners of elections and the procedure here. It is very different. Here is an attempt to regulate the discretion and inquire into the judgment of the legislature in a case where a violation of the state constitution is not charged. True, the traverse of the returns does not undertake to restate and extend the charge of alleged nullity of the act of 1898, but

even the traverse, if allowed to have any weight as a new assignment, would not make the charge free from ambiguity, as it should be made in a matter of such gravity. The petition and returns are the pleadings. The office of a traverse is not to set up or amend the petition. It is based upon the validity of the matters set up in the petition, and its denial of contrary or antagonistic allegations of excuse, evidence, or justification set up in the return. The traverse means a denial, not a new assignment or recital of the matters complained of in the petition. Matters of second thought and independent allegations—allegations necessary to make out a case or complaint—cannot make their appearance for the first time in a traverse. The plaintiff must stand or fall on what he states in his complaint or petition. Remembering that the charge made in the petition is substantially that the decision of the legislature was contrary to the weight of the evidence, the ineffectiveness of the attack is seen and recognized. We are to review the conclusion of the legislature upon the question of fact, not of law. The legislature did not act independently of the constitutional requirements, but said the constitutional requirements had been fulfilled. They recognized (and did not deny) that the constitutional requirements must be enforced. The act said so. There cannot be any dispute about this. The objection here made is that they erred on a question of fact, i. e. that the evidence showed that the constitutional requirement of two-thirds of the ballots had not been complied with,—not that it was unnecessary to obtain the two-thirds, but that the evidence showed the two-thirds had been obtained. The error, if one, surely is not one of jurisdiction, but of judgment; for every one must admit the legislature has the right and authority to provide for the formation of new counties. Indeed, they are required to do it. They have a right to say when the agitation and formation has evolved into a full and complete new county. Bear in mind that this is no attempt to show that the legislature had no power to declare a new county formed, but an attempt to show that the legislature had no power to decide other than as the weight of evidence preponderates, and then it may be questioned in the courts by showing the evidence was the other way. Stripped of all attempt to confuse this question of fact with a question of law and plausible phraseology, the charge is that the legislature erred in weighing the evidence. It is charged that this is a question of law. The legislature must be satisfied by the evidence, from the quantity and quality, that the election was carried; and that, inasmuch as some boxes were stolen and the returns were not in their integrity produced before that body. It necessarily could not and did not have before it evidence on which to act. Can a judicial tribunal review a question of fact, and see if the discre-

tion of the legislature was properly exerted? Not in our form of government. The legislature says the evidence before them was of a complete compliance with the constitutional requirements. Are we to say that this statement was not true? Are we not to presume that everything necessary to form such a conclusion was before them? Are we to presume the absence of evidence in order to nullify the act? The legislature, by the act of 1898, has provided for the election of representatives. The governor, by his signature, has recognized the existence of the new county. We are told that the representatives of one of the great parties in the new county have elected delegates to a political convention. Elections have been held or nominations made to the various offices. The people are going ahead, evidently basing their faith on the act of the legislature, which declared, not that Lee county should be formed in the future, but that "Lee county is hereby formed." They had a right to presume the act was a constitutional exercise of the power vested in the legislature. They have acted on it. There are at least two ways of bringing up the constitutionality of this act, and, if it had been passed in violation of the constitution, it could be shown without an appeal to the process of injunction. Quo warranto would be the common-law procedure. This is the plan most usually used (*People v. Morrell*, 21 Wend. 563), except in states where a peculiar extension of equity jurisprudence permits them to use injunction, as in *Bradley v. Commissioners*, 2 Humph. 428; but even there the court said "that the writ of quo warranto, as the common-law mode of redressing such grievances, is admitted,"—an action in the nature of quo warranto in this state (*Alexander v. McKenzie*, 2 S. C. 81). In *Rumsey v. People*, 19 N. Y. 41, the question was made as to the venue necessary to be proved in a criminal case; while in *Lanning v. Carpenter*, 20 N. Y. 448, it was brought up in the attempt to show that the confession of judgment was not made before a county clerk, as there was no such county. In *Smith v. People*, 47 N. Y. 330, the question of irregular organization of the city and county of New York was brought up in a criminal case, in an objection to the organization and jurisdiction of the court; while in *People v. Morrell*, 21 Wend. 563, an information in the nature of quo warranto was the procedure. These are remedies at law, and all question the creation of a new county. There was therefore no necessity to resort to equity if there had been an injury to be redressed or a right to be protected. There was an adequate remedy at law.

I have adverted to the hardship that the declaring unconstitutional the act of 1898 would do to the people who now fondly suppose they are organized into a new county. This hardship and embarrassment was met by the court in *Rumsey v. People*, 19 N. Y. 41, which said that the organization of a new

county will not be declared invalid, even where it was originally and perhaps unconstitutionally introduced, when the existence thereof has been recognized by the legislative power, and it has been so incorporated into the state system that it cannot be severed without seriously embarrassing the whole. Can it be truthfully said that the state is not interested in this matter, when the representation of the old counties is cut down, in order that the new county shall send representatives in proportion to area and population, and the new county is then not allowed such representation for such territory and population? The state is without the influence and services of the representatives she is entitled to rely upon in the general assembly, and the proposed territory has taxation without representation. A political organization, being for the benefit of a community as such community exclusively, a private person has no property rights in it. This results from the fact that government exists for the common benefit, and its powers cannot be appropriated to the exclusive benefit of individuals, except by violence destructive of its principles. *Alexander v. Alexander*, 2 S. C. 90. The political power concerning so nearly the public policy of the state, the exercise of that part of the statehood and sovereignty of the people so peculiarly legislative should not be interfered with, unless the incompatibility be clear and unequivocal. It is a matter of serious importance. I am of the opinion that, if the other rule is to be considered the law in the formation of new counties in South Carolina, none will ever be formed. It is scarcely possible to hold an election without some noncompliance with the technical requirements. The constitutional convention and legislature contemplated that the result of the election was the thing desired, not the rule of technical compliance,—substantial compliance, a compliance showing the expression of opinion of the requisite number. They did not intend to have one rule by which to judge the results of a general election, and a stricter rule (an almost impossible one) in elections for new counties,—a rule that any manager in hostile territory may defeat, and be allowed the benefit of the wrong done to the credit of the old county's territory.

The case is brought in the original jurisdiction of the supreme court. The constitution of 1868 gave to the supreme court the power to issue writs of injunction when "necessary to give it a general supervisory control over all other courts in the state." Const. art. 4, § 4. The constitution of 1895 gives such court the power to issue such writ as an "original and remedial" writ. The language is striking: "The supreme court shall have power to issue writs or orders of injunction, mandamus, quo warranto, prohibition, certiorari, habeas corpus and other original and remedial writs." Const. art. 5, § 4. The right is original. It is jurisdictional. It is considered as "original" and "remedial" with

mandamus, quo warranto, prohibition, and habeas corpus. It is as "original" and "remedial" as, and no more than, habeas corpus, quo warranto, prohibition; which expression means to say that as a remedy it shall be applied at the instance of persons who apply for and in whose name the writs of habeas corpus, quo warranto, etc., run. The purpose was to give the court power to issue the writ as a jurisdictional writ, as contradistinguished from the ordinary writ of injunction in aid of jurisdiction otherwise acquired. The purpose could never have been to authorize that court to take original jurisdiction in ordinary suits in equity by granting the common orders or writs of injunction. The extraordinary writ—the prerogative writ—was the only original writ of injunction given the supreme court by this section; an original writ of the same character as the other writs mentioned, as habeas corpus, quo warranto, etc. The framers of the constitution could never have given the supreme court original jurisdiction in the trial of equity cases where the ordinary writ of injunction was to issue, or they would never have given to the circuit county courts, of original and general jurisdiction, the right to try all civil cases. To be more accurate, "they shall have jurisdiction in all civil cases." Const. art. 5, § 15. In the same section they are also given "original jurisdiction, subject to appeal to the supreme court, to issue writs or orders of injunction, mandamus, habeas corpus and such other writs as may be necessary to carry their powers into full effect." Then follows the sentence above quoted, empowering the court of common pleas with jurisdiction in all civil cases. Can it be thought for one moment that a great part of the equity practice was thus to be transferred to a court of appeal? I cannot bring myself to think so. The quality or grade of the writ is declared when it is associated with well-known prerogative writs, which are so (in like manner) other "original and remedial." "Noscitur a sociis." I need not cite, in addition, section 29, art. 1, Const. 1895, which declares that the provisions of the present constitution shall be construed to be mandatory, and not merely directory. I think the purpose of the constitutional convention was to give the supreme court power to issue this extraordinary writ in a proceeding which discloses some public right,—involving some right of the sovereign, as contradistinguished from matters of private or individual concern, where the state must be plaintiff upon the relation of the party aggrieved. It should be brought by or with the consent of the attorney general. If not so brought, some showing should be made that application was made to the attorney general, who refused to permit the use of the name of the state, wherefore the petition is brought in the name of the petitioner. The writ issued by the court in the name of the state. See *People v. McClees*, 1 Am. & Eng. Dec. Eq. 570 et seq. I do not think

the supreme court had any jurisdiction to entertain this case, and I think this constitutional court has the right to look into and consider the whole case. This court is not bound by any decisions made heretofore in this cause. I have tried to show that the supreme court has no right to issue the writ of injunction in controversies between citizens,—in an ordinary suit for injunction. I have shown that such court has not any supervisory jurisdiction as it formerly possessed under the constitution of 1868. The constitution of 1895 took away such supervisory or incidental power, and gave it original jurisdiction. Its authority to issue the writ, therefore, is to be justified under the right of original jurisdiction. If it has not supervisory jurisdiction, and is not confined to the exercise of the writ as a prerogative writ in aid of some public right, then there is but one other right under which it could claim to act, i. e. as a court of equity, hearing and determining matters in the first instance as a circuit court does by summons and complaint and answer. Summons and complaint must be served, and, jurisdiction thus obtained, 20 days are allowed the defendant to answer, etc. I need not say that the supreme court is as much bound by the Code of Procedure as the other courts are bound, and, if the jurisdiction in this case is entertained under the theory that the court can try cases between citizens in which injunction is asked, then the conclusion cannot be avoided that such cases must be tried under the rules and proceedings applicable to courts which try such cases. The Code says that a summons and complaint are necessary to obtain jurisdiction, and 20 days must be given to answer. This was not done in this case, and I do not find in the record any evidence of any waiver,—indeed, if it were possible to waive the defect. I will refer to this again further on in this opinion.

The right of Lee county to exist as a county, with the right of its people to participate by their representatives in the legislature, is sought to be put in issue. The question of the constitutionality, if in issue here at all, is in issue directly, as in only that manner can it be in issue here. In discussing this phase of the case, it is well to announce, at the start, that I do not doubt the power and authority of the court sitting here in equity to pass upon the constitutionality of an election, where such matter arises collaterally, if the court has power to enjoin in a suit. The authorities are not entirely agreed upon this point, but I think the greater weight is in favor of such proposition. It must, however, be brought into the discussion collaterally, as necessary to the settlement of the property right which is the main feature of the cause. The issue must not be a political or governmental or electoral right. Equity does not consider such matters. To give the court of equity jurisdiction, the issue upon the constitutionality must be really collateral,—not

the main issue,—and it must not be pre-
tensive. It must not be nominally collateral
merely; it must be really collateral. Can
any one say that, in fact and in deed, a
property right is really involved? I need
hardly say that there is hardly a claim, cer-
tainly not a well-founded claim, that any
property right is here involved. The scarcely
nominal assertion of the property right is
hardly answered. The attempt is to put in
issue directly the alleged unconstitutionality
of the act whereby Lee county became a dis-
tinct territorial and electoral division of the
state. As I will show further on, this ques-
tion should not be considered, as the plead-
ing upon which this question is sought to be
predicated, and upon which pleading alone
the jurisdiction of the court is founded (if
founded at all), doubtless framed to avoid
the objection that the constitutionality of the
act is the main issue, is so argumentative
and indefinite as not to raise any question at
all, unless the formation of a new county
is per se injurious and harmful, and fur-
nishes a ground for injunction. In fact, it
would seem to appeal to the court, if at all,
upon the ground that such an act per se
injures them, giving the petitioners a right
to the remedy. Devoided of all useless
phraseology, it is an attempt to directly (not
indirectly nor collaterally) bring in issue the
constitutionality of the act for the formation
of Lee county, and, while the pleading is
vague, the object and purpose is not veiled
nor denied. If the court accedes to the
prayer of the petition, it will not only be
an innovation in equity practice, but would
be as harmful and disturbing to the political
body as it would be new and discordant. I
deny utterly the doctrine, as inconsistent
with the co-relation that must arise in the
three departments through which the people
act. It is subversive of all government.

The founders of constitutional government
in America were apprehensive of the effect
of the power and impulse of legislative ac-
tion, and barriers were erected to confine
this power to wholesome confines. Such
was the fear of the founders of the American
system, and a proper co-ordination and equi-
librium are enjoined. In our day the pendu-
lum has swung back, it has gone to the other
extremity, and the law of injunction, in its
exercise as now sometimes used, shows dan-
ger. The United States supreme court has
lately done much towards dissipating this
excess upon the equity practice. The time-honored
refusal of equity to interfere with political
affairs has been sustained. The attempt to
interfere with the franchise has been repelled
in the United States circuit court of appeals
in a case that went from this state really.
This condition exists when we are asked to
issue an injunction against the formation of
a new county. I need not say that the right
to make subdivisions of its territory involves
an element of sovereignty, and, in the absence
of any constitutional

regulation, could be exercised at the will
of the sovereign. It is a political question,
pure and simple. It involves no question
of property. It is solely political, territorial
and electoral, and equity has nothing to do
with such matters. Are the courts thus to
hold elections for the people, and, at the
instance of (if the legislature be right) a de-
feated minority, reverse the will of the peo-
ple expressed at the polls? The question car-
ries its own answer. This is not the office
of a court of equity. If "power seeks its
own exercise," when militated by a legisla-
ture, it should be remembered that the
maxim is not inapplicable to mankind, under
whatever form power exists. If the lower
courts exceed their powers, certiorari, pro-
hibition, appeal, and exceptions lie to the
appeal court, and plain and adequate rem-
edy is had for their errors and excesses.
But if an error is made by the appeal court,
what shall be the remedy? For where there
is a wrong there must be a remedy. Is it
to be supposed that they do not commit er-
rors? The different deliverances of the
courts of last resort upon the same subject
show us how frequently the courts of one
state do not agree with those of another. All
do not agree in their conclusions. Some ap-
peal courts must necessarily have erred. All
cannot be right. If this cause be based upon
a right of property, an appeal to the federal
courts, under the provision guarantying tak-
ing of property by due process, might, in an
appropriate case, be invoked; but here there
is no property right involved. These de-
feated parties are without remedy. This
should be employed when this court is sit-
ting as a court in the first instance upon this
particular cause, and there is no appeal from
it.

It seems to be thought that the mere ex-
ercise by the legislature of what is called "ju-
dicial powers" stamps the particular act as
an encroachment on the judicial department
of government, and bespeaks its invalidity.
Nothing is oftentimes further from the fact.
The legislature has at all times exercised ju-
dicial powers, and will doubtless continue to
do so. It has tried contests over election
of its members, decided whether an officer
ought to be removed, and has power to ex-
ercise the function of a court of impeachment
in proper cases. Truly, these are judicial
acts. The fact that the chief justice here
(or the senior associate justice, in his absence
or on his disqualification) must preside when
the governor is impeached does not make
that department any the less a legislative
department. It may with as much truth be
said that the court, in making rules and reg-
ulations of courts, is exercising the power of
legislation. The legislature in the one in-
stance does exercise judicial powers, and the
courts in the other instance do exercise leg-
islative powers, but in neither instance are
such powers prohibited; for courts must
make rules and the legislature must decide

questions before any act is passed. There is no such magic or mystery in the use of the word "judicial" as to indicate that its use, in connection with legislative action, invalidates such action. The question should be, is the act such an exercise of judicial action as is prohibited to it by the constitution? If it is, such exercise is unconstitutional; if it is not such an exercise of judgment, it is valid. It is not that the act is judicial so much as it is that it is such a judicial act as would make its exercise an encroachment upon the territory given the judiciary department. It is harmful only where it interferes with the duties given the other departments.

In *Ex parte Lynch*, 16 S. C. 32, the court says: "It is a delicate thing to declare an act of the legislature unconstitutional. * * * Implied limitations of legislative power are only admissible where the implication is necessary. * * * The constitutionality of a law must be presumed until the violation of the constitution is proved beyond all reasonable doubt, and a reasonable doubt must be solved in favor of legislative action, and the act be sustained." In other words, to be in doubt is to be convinced of its validity. In *Railroad Co. v. Gibbes*, 24 S. C. 68, Mr. Justice McGowan, in delivering the opinion of the court, said: "It is an axiom in American jurisprudence that a statute is not to be pronounced void on this ground, unless the repugnancy to the constitution be clear, and the conclusion that it exists inevitable. Every doubt is to be resolved in favor of the enactment. The particular clause of the constitution must be specified, and the act admit of no reasonable construction in harmony with its meaning. The judicial function involving such results is one of delicacy, and to be exercised always with caution." The requirements for the returns of ballots and poll lists are directory. *McBee v. Hoke*, 2 Speer, 144; *State v. Harmon*, Cheves, 265; *State v. Nerland*, 7 S. C. 241; *Trimmier v. Bomar*, 20 S. C. 354. The statute contemplates there will be irregularities and omissions, for provision is made for contests and protests in the general law of elections. The authorities say: "To meet the objection of irregularities which the grounds suppose, it may be observed that the end of popular elections is to discover which of the candidates has the greatest number of votes from among qualified voters. The polls are of necessity holden by many persons at different places, and such elections are, of course, subject to irregularities. * * * It follows irresistibly that we are to construe the rules for the regulation of popular elections with a constant direction to that end, and not to be deterred by minute objections and mere irregularities of manner or form." Judge Richardson, speaking for the court in *State v. Harmon*, Cheves, 269. Judge O'Neill, speaking for the court of appeals in discussing the statutory requirements relating to the appointment and

duties of coroners, contained in 2 Stat. at Large, p. 269, says: "The first observation to be made on those statutory provisions is that they are directory merely." *McBee v. Hoke*, 2 Speer, 144. In *Trimmier v. Bomar*, 20 S. C. 354, there had been an election upon a certain proposed county subscription to a railroad, and an injunction was sought to restrain the county commissioners from issuing the bonds. Judge Witherspoon, on the motion to show cause, among other things, said: "The sole question, therefore, is whether, upon a technical irregularity which itself is disputed, and is not satisfactorily established, the will of the qualified voters of Spartanburg county upon the question of subscription to the railroad company shall be defeated. On this question I can have no doubt. The purpose of this election was to discover the will of the voters of the county in the premises. That has been conclusively shown, and it ought not to be defeated by minute objections and mere irregularities of manner and form, even when well established." *Id.* 356. The supreme court says that the principle applies to both classes of elections, i. e. political and under taxing power. *Id.* 362. In *State v. Nerland*, 7 S. C. 241, the ballot boxes, ballots, poll lists, and statements of the managers of election had been destroyed. It was held that the county board of canvassers had authority to receive secondary evidence. There was a total destruction of the evidence of the election. Chief Justice Moses declared: "If a statute which concerns the public is to be so strictly construed as to give effect to the form of the proceedings by which the purpose of the legislature is to be attained, at the sacrifice of the only object they proposed to accomplish by their enactment, it may well be said that the court conceded greater consequence to the shadow than to the substance. The policy of the statute shall be respected by the courts, and strictly enforced, if it can be, conformably to law. In a government founded on the will of the people, their voice is not to be stifled by fraud, or their high behests frustrated by wrong and violence. If the purpose of the state, expressed in constitutional form, to provide a county seat through an election of qualified voters, is to be set at naught by the destruction of the ballots, those charged with the ascertainment of the result of such election must resort to secondary evidence to enable them to determine it."

If the manner in which the popular will is determined be immaterial, the means through which that will is announced is certainly less material. Brightly, *Elect. Cas.* 126. See, also, *Cooley*, *Const. Lim.* 761. The constitutional convention knew this was the law. They knew that the ascertainment of the result of the election was the real thing to be determined, and that the matters occurring subsequently to the election—the destruction of the ballot boxes, refusal to send up poll

lists, etc.—would not be allowed to defeat the will of the people voting. The legislature, indicating that this was their intention, declared, in the “Act to provide for the formation of new counties,” etc. (Acts 1896, p. 65): “Such elections shall be conducted in the same manner as general elections in this state.” Under the laws, as “general elections” have been held (and will doubtless continue to be held), where ballot boxes have been destroyed, poll lists lost, and irregularities otherwise committed, the legislature would see to it that no advantage would be allowed to those in favor of whom the destruction or omission to conform to the law was made, and secondary evidence would be allowed to show the will of the people. If the will of the people could be thwarted by any act of those interested in the retention of the old organization, it would be a reflection on the integrity and manhood of the legislature. They passed upon the irregularities as to the Ashland and Cypress boxes, as was to be expected. They said that, in the respects complained of, the grievances were well founded. After coming to this conclusion, they decided to act in such a way as to leave no doubt, if the means there resorted to should be used in the future, what their action would be. Here were two polls, where the requisite two-thirds had been legitimately obtained in favor of the new county, deliberately made to show a decision against it in one box by an unlawful return, and practically against it in the other, by declaring the election at Cypress null and void. Doubtless, they reasoned, these boxes were in the hands of the officers of the old county, who doubtless had their own reasons for the disappearance of the ballot boxes and irregularities charged. It was doubtless taken to be a striking coincidence that the poll list, ballot box, and ballots had been stolen, and therefrom there was a claim that the result there had been given against the proposed new county. The protest against the declaration of the result of the Ashland box but emphasized the persuasive coincidence of the disappearance of the box and the result claimed to be in opposition to the formation of Lee county. The declaration of the officers of election charged with the custody of the ballot boxes, poll lists, and incidentals of election were made in the face of the fact that the legislature, by the fifth section of the act of 1896 (page 65), had reserved to themselves the right to pass upon the ultimate result of the election, when it said: “The general assembly at its next session shall create such new county if two-thirds of the qualified electors shall vote in favor of the establishment of such new county and if all the constitutional requirements for the formation of new counties have been complied with, of all of which such general assembly must judge.” They heard evidence, they deliberated, and passed the act of 1898 (“An act to establish Lee county,”

p. 988), deciding that all requirements and conditions had been complied with, and appointing the respondents commissioners to have boundaries of the new county set off and marked. The act of 1896 provided for the formation of new counties thereafter, and said that at the next session of the general assembly thereafter the new county shall be created. The act of 1898, establishing Lee county, was in response to the act of 1896. If one is unconstitutional, the other is also. The one is the suggestion; the other the answer.

Both acts contemplate the same plan,—to appoint a referee to inquire into the facts reported to the legislature traversing their determination, and consequently reversing their action holding their action erroneous must be based upon the alleged unconstitutionality of the acts of 1896 and 1898. To appoint a referee to report what was returned by the officers at Ashland and Cypress boxes may be to decide this political question adversely to the determination of the legislature upon evidence before that body. There is no question as to what the referee under such an order would have to report. The officers holding the election at these precincts declared the result of such election to be against the formation of the new county. The determination of the legislature was that the returns from these two precincts were not true; that the election as to the new county was in favor of its establishment. This court practically says that the legislature was mistaken in declaring that the new county was established. This court cannot prevent the formation of Lee county, nor will its action in enjoining the respondents prevent the exercise of the rights of the people of the county, since these respondents are not charged with the organization of the county, but are commissioners for certain purposes, their duties arising from the fact that Lee county has been established. The act of 1898 does not say that, upon a return of certain commissioners, the new county shall be established, but “that the new judicial and election county, to be known as Lee county, is hereby formed.” Section 1. We have seen that the constitutional convention which provided for the independence of the judicial, legislative, and executive departments of government, in the same instrument providing for the formation of new counties, saying: “If two-thirds of the qualified electors voting at such election shall vote ‘Yes’ upon such questions, then the general assembly at the next session shall establish such new county” (Const. art. 7, § 2),—intended to give the legislature the power to decide the means to be used in satisfying their judgment that “two-thirds of the qualified electors voting at such election” did vote in favor of the formation of the new county. Having to be convinced, they had the right to say what amount and quality of evidence should convince them. They were properly made the final arbiters upon this question of the division of the state in the

general policy of the state upon such matters.

I do not see how the constitutionality is properly in issue here. It is true, in section 12 the petitioners do say: "And they further submit that the said act of the general assembly is null and void, for the reason that the said Lee county did not receive a favorable vote of two-thirds of the qualified electors voting in each section of said proposed new county, as reported by the managers of election, and as determined by the commissioners of election for the several old counties from which this new county was proposed to be taken; and for the further reason that an election on the formation of Lee county was held less than four years after the four-fifths of the territory embraced therein has voted upon the formation of a new county, as hereinbefore set forth [in section 2]." This last objection, being so exclusively and plainly within the province of the governor, which cannot be controlled by process against him (*Greir v. Taylor*, 4 McCord, 206), need not be considered. Null and void for what reason? Because obnoxious to some provision of the constitution? No; not null and void because unconstitutional (setting out plainly what section it violates), but because its decision was against the evidence. Who will have the hardihood to assert that such an allegation in the court of common pleas would bring into issue the constitutionality of any act? In fact, the supreme court has declared over and again that an exception charging that the decision of the lower court was "contrary to the law and the evidence" was too vague, indefinite, and general to be considered. Void by reason of the unconstitutionality of the act of 1898? The petition does not charge that. Null and void for undertaking to pass upon the questions of election or no election? No; null and void, not because it undertook to pass upon such questions at all, but because the legislature decided in favor of the evidence of the new county having been established. For that reason the act of 1898 was null and void. Who can say the act is attacked as unconstitutional? Where is "the particular clause of the constitution" specified that must be obnoxious to "a reasonable construction in harmony with its meaning," as required by the decisions of the supreme court? An allegation that the decision "was contrary to the law and evidence" has been too indefinite and general on appeal from the lower courts, the supreme court saying it stated no particular error. *State v. Branham*, 13 S. C. 389. "The constitutionality of a law must be presumed until the violation of the constitution is proved beyond all reasonable doubt." *Ex parte Lynch*, 16 S. C. 32. It is impossible here to prove it, as there is no sufficient allegation, and the proof can go no higher than the allegations.

I need not say, what is known to every lawyer, that the supreme court has only the power given it by the constitution and the acts for its organization, and the means incident to the exercise of such powers. As an

appeal court, it is confined to the matters brought up for its consideration by assignment of errors, as provided for appeals in the constitution and Code, with the exceptions there laid down. If it were to decide a cause not properly before it, or upon a point not properly raised by exception to it, there would be a taking of property or rights of the loser, without due process of law. As a court of original jurisdiction, it may issue "orders of injunction, mandamus, quo warranto, prohibition, certiorari, habeas corpus, and other original and remedial writs." It must be taken that these powers are to be exercised as such powers are usually exercised by courts, and consistent with the provisions of the Code of Civil Procedure, where its provisions are applicable. Under the power to issue injunctions if jurisdiction were given it, it would have the power to issue a rule to show cause why an injunction should not issue, for the lesser is included in the greater. Supposing, for illustration, that such court has the right to issue the writ in ordinary cases; I do not think it will have the power to issue an order of injunction in the absence of a suit for such a purpose. There must be a summons and complaint served on the defendant, for only in such manner can an action be commenced in this state. "Civil actions in the courts of record of this state shall be commenced by service of a summons." Code Civ. Proc. § 148. "There shall be in this state but one form of action for the enforcement or protection of private rights and the relief of private wrongs." *Id.* § 89. The answer or demurrer is required in 20 days, as in cases before the common pleas. After such a beginning of the action, a rule to show cause would be within the power of the supreme court, if it had power in the first instance, and, in its discretion, a preliminary order of injunction until the issues were tried. A perpetual injunction could not be ordered before the final hearing of the case on its merits. *Hornesby v. Burdell*, 9 S. C. 303. The matter of omission of summons, being a matter pertaining to the jurisdiction of the court, could be raised at any time. This requirement is based upon the view that the supreme court can entertain a suit for injunction between citizens. It is true that the notice from the supreme court may serve as the vehicle to bring the court to its destination,—to a consideration of the cause; but, when the constitutional court arrives and enters, the members of that tribunal are entitled to traverse the whole domain,—not confined to one nook or corner in the territory of jurisdiction. If its members are bidden by the constitution when once they enter the gates, they are unrestrained, save by the boundaries of the power that bids them,—the constitution. They are invited to traverse the whole field,—the whole "cause or question,"—in all its width and length, by the constitution; and they cannot be confined to such a part of this territory by the resolutions of the justices of

the supreme court, who are now required to sit as a part of the constitutional court. Did the framers of the constitution mean to say that a part of the constitutional court should have more power and authority and jurisdiction than all of it put together? If such power had been given, the framers of the constitution would have said so. If the supreme court had the power to call the constitutional court together to consider the whole cause, and, instead of submitting the whole cause, suit, or case, had indicated the submission of certain propositions growing out of the consideration of the case upon the convening of the justices and the judges as the highest court, the order could be rescinded or revoked, and the whole cause considered. Every member of such constitutional court has the right, and it is made his duty, by the constitution, to consider the whole matter or cause; and the cause must consist of its parts and whatever is necessary and incidental to a proper consideration of the whole case. If such highest court has the right to begin the consideration of the case, it has the right and jurisdiction to complete and finish its consideration. If compelled by the constitution to enter, it is constrained to traverse the whole territory. If it begins such consideration, it must end it. "It is as much the duty of a court to exercise jurisdiction where it is conferred as not to usurp it where it is not conferred." It surely was not the intention of the members of the constitutional convention that the convention of the justices of the supreme court and circuit judges should be called together to consider some material or immaterial matter in connection with constitutional questions that might be named by the justices of the supreme court, when the main or other part of the same matter should be reserved for them, separate and distinct from the convention of justices and judges sitting in the higher court. They were never authorized to cut off so much territory (so to speak) to consider, and so much to set aside for the circuit judges to consider, for that is what the present practice amounts to. If so, the constitutional convention would have said so.

This view is not only in accord with the spirit and reason of the constitution, but harmonizes with its language. Const. art. 5, § 12, reads (second sentence): "Whenever, upon the hearing of any cause or question before the supreme court," etc., it shall appear that a constitutional question is involved. Again, in same section: "When any two of them desire it, or on any cause or question so before the court," etc.; thus referring to the cause or question before the court,—meaning the whole "cause or question" before the supreme court. So that if there was before the court only a "question" under consideration equally with the consideration of "a cause," the constitutional court might be called together. The constitutional convention meant to use the word "question" so as to

cover all legal procedure that might not be covered by the use of the word "cause." Doubtless, it was meant to cover every controversy (and all of it) which might develop or bring up a constitutional matter for determination, whether it came up by a regular action, special proceeding, motion, or otherwise. The language is not to be construed to restrict the scope of the power, but to extend the field so as to embrace all involving construction that might be brought before it. The purpose was to place before all the justices and all the circuit judges all questions of constitutional law, however (and just as) they may be raised in their fullness and completeness whenever called upon. The experience of the circuit judges who are accustomed to determine matters at once as they are presented in their fullness, looking more to matter and substance and practice, was to be combined with the experience of the more deliberate, thorough, and matured consideration of the appellate court. The constitutional convention contemplated that these matters should be considered by a convention of all the judges, supreme and circuit, jointly, not a part of them by the supreme court, and another part by the higher, or constitutional, court, separately,—the consideration of all of them upon every part of the controversy touching the constitutional interpretation or application in the whole case, suit, or proceeding. The call for the convention of the justices and judges issued by the supreme court designated only part of the cause referring to the Lee county controversy for consideration of the constitutional court; and it may be said such matters only were considered by the majority of the court. It seemed to be taken for granted that this court was restricted to a consideration of the designated questions. Of course, a designation of these questions was necessarily a prohibition of the consideration of other questions not designated and submitted. The supposition doubtless was that the decision as to the constitutionality or unconstitutionality of the matters would turn upon the solution of the question of reference or no reference,—into the matters of fact the legislature had before it at the time of its determination. If an example was wanted to show how impractical and useless the court would be if the contrary contention were adopted, the present case would furnish it.

Here the matter is made to turn upon a question that (if our view be adopted) might be conceded, and yet the integrity of the legislature might remain unimpaired; for the acts upon the subject, and the records of the case and the supreme court, show that a reference is not only necessary to determine this matter, but that, upon the consideration of the matters from the records and acts before the order of reference was signed. It must have been determined that the act was unconstitutional. Indeed, if it were determined that the act for the organization of

Lee county was obnoxious to the constitution, the power of the general assembly to carry out the provisions of the constitutional provision upon the subject remains unimpaired. Having the power, it had a choice of means to create or recognize its existence. Can it be said that a reference is needed to show what the officers charged with the holding of the election did? What does this amount to when the general assembly expressly and wisely reserved to themselves the authority to determine how the election was carried? While the elections are held after the manner in which general elections are held, yet, unlike in cases of general elections, the officers charged with holding this election were not clothed with any power to conclude any one by any determination they could declare, inasmuch as the act specifically takes that power from them, and reserves it to the legislature. They were not given such powers as are ordinarily given to similar officers at general elections. There is no analogy. Their conclusions were not required or expected. They could not determine how the election was carried, and their declarations were not subject to appeal from a subordinate to a county board of canvassers; nor could there be any analogy in the procedure of determining this question to the duties of county canvassers and county commissioners in general elections, for the act on this question reserves specially and expressly the decision to the general assembly, as if to say this temptation should not be put before the officers who shall conduct this election, and their wisdom in this regard is now apparent. And now, when two of these officers, in violation of their duties, make a declaration they had no right to make, as to the election, we are called upon to say there was imported into this cause this extraneous matter, never contemplated, which has affected the election, because, forsooth, the legislature refused to adopt the usurpations of certain officers as to the result of the election in the very teeth of their reservation of such matters for their own determination. Such reference could not throw any light upon the subject. A reference is not necessary, for which reason I voted against the order for a reference. If, however, a reference is to be ordered, it should go into the whole matter, and ascertain the whole result, whether there has been a real and substantial (not merely a technical) compliance,—not merely to examine the matter from the outside, not merely to read the tabulations and the papers made out, but to the contents; as substantial results, not forms, are desired in elections. The will of the voters is the matter desired. To this all else should be secondary and unimportant.

The different acts provide for the diminutions of the representation of the old counties which have contributed territory to the new county, by reason of which such representation is cut off. Such representation tak-

en from the old counties is given to Lee county. Now, if the organization of Lee county is unconstitutional and improper, the persons elected from that territory to the general assembly have no status, and the state will be deprived of their services in the general assembly. Now, no provision can be made by the courts for the restoration to the old counties of the representation to which they were entitled before the passage of the act for the organization of Lee county. It will scarcely be disputed that if there was no Lee county, and those electors supposed to be voters of Lee county were really voters of the old counties, the old counties were entitled to their votes; and, if they did not participate in the election for members of the general assembly, it may become a grave question whether the persons recently termed by them as members of the general assembly were indeed elected at all. If these gentlemen so returned as members elected from the old counties were not, indeed, elected by reason of the disorganization of Lee county, any measure passed by their votes in the general assembly might properly be questioned, for, if not elected, they would not have a right to sit and vote. If the territory proposed to be organized into Lee county was improperly organized, it can hardly be disputed that the elections in the old counties from which the territory was taken were invalid; and there was no valid election in them for county officers as well as members of general assembly. If Lee county has no existence, there may be grave doubts if any officer, legislative or county, was elected in the old counties. It can scarcely be denied that the whole state has an interest in the service and votes of every member of the general assembly from every county; and yet the attorney general is not made a party to this proceeding. Each of the old counties is concerned as such in this proceeding if this legislation be unconstitutional, and yet, as such, they are not made parties to this cause. Who represents all these citizens? Who will be affected by this procedure? I need not allude to the disarrangement of the assessment and collection of taxes, etc., in the new territory. It might well be asked what necessity is there to inaugurate such demoralization. The mere unconstitutionality of a statute does not give a cause of action. There must be shown that an unconstitutional statute has inflicted some injury upon the petitioners. A court of equity never enjoins by reason of a theoretical or speculative injury. "Injunction will not lie at the instance of a taxpayer and elector to enjoin the submission to the vote of the people of a constitutional amendment because the submission is invalid, as such taxpayer would receive no substantial injury from such submission." *State v. Thorson* (S. D.; July 29, 1896) 68 N. W. 202. "Any additional burden which might result to relator, as a taxpayer, by reason of submitting this question at a general

election, is too trifling, fanciful, and speculative for serious consideration." Id. There must be a real injury, and the petition does not show any injury, unless, forsooth, the formation of a new county is per se an injury. This view the constitution, by providing for the organization of new counties, negatives. Even, however, if the petitioners were injured, and the statute was unconstitutional, an injunction should not issue, for the additional reason (among others) that greater wrong would be done than would be prevented by the injunction,—the remedy prayed for from the evil apprehended. Under such circumstances, equity never issues the writ. 10 Am. & Eng. Enc. Law, 783, and authorities there cited. The apprehended injury by reason of increased taxation, if charged properly, would probably not exceed, for the handful of petitioners, ten cents each. The harm that would be done by the writ cannot be overestimated. The anticipated and speculative damage, probably not exceeding a dollar at the outside, is to be used as a pretext to create untold harm, turmoil, and political demoralization in the state, to becloud the title of many officers elected at the last election, to deprive the state of the service of persons returned for the general assembly, possibly throw a doubt over beneficial legislation, and to establish a precedent and innovation most mischievous and unnecessary. Indeed, if the principle contended for be carried to its logical conclusion, government as now known, consisting of three departments, may be dissolved. Once admit that an election for members of the general assembly, or the fruits of it, can be enjoined, even under an unconstitutional statute, and you have no legislature. One branch destroys the other. The right to enjoin the election or reverse its verdict in one county implies the right to do it in all, if similar circumstances arise. He must be a bold man, indeed, who will contend that such an exercise of power could be justified under our system of government. And yet the finger could not be placed on any provision in the constitution forbidding it. Nevertheless, such a contention would militate against the very existence of sovereignty itself, and would negative the right of a state to exist deducible from existence itself. The right of a state to exist in this advanced age implies the right to be composed of the three co-ordinate branches of government, with their checks and counterchecks. This court has no authority to entertain a petition to thus dissolve the government which protects the life, liberty, and property of the petitioners.

If the practical application of injunction in this case makes for disaster, the historical view of its creation and exercise is equally conclusive of its inapplicability here. The writ ran in the name of the sovereign; in theory issued and was exercised in his name, to prohibit the lawful action. It was a prerogative writ. It is none the less a sovereign writ with us. The

state (by its people) is sovereign with us. The sovereign is asked to enjoin himself. One member of the body is to enjoin another member of the same body. This statement is argued against its use here. The effect is not lessened when it is recalled that, in cases of impeachment of the governor, the chief justice himself presides in such legislative trial and court. I do not think the petitioners have shown any injury, apprehended or real, that appeals to a court of equity. There cannot be a vested right in any political division of state organization. There is not any vested right in any particular political office. Chancery protects property, not political, rights. It is not to be invoked to enjoin the formation or creation of a political agency and subdivision of the state. It is believed by many that a new county works a real benefit, instead of an injury, to the residents of the proposed territory. The framers of the constitution of 1895 evidently thought so. The different subdivisions of the state serve as instrumentalities of the state for the more convenient administration of public affairs, and form a constituent part of the state and a part of the governmental machinery of the sovereignty which creates them. When the general assembly formed Lee county, and said it should have certain representation in the general assembly, and should unite in the exercise of the rights of sovereignty representing the sovereign people of South Carolina, it exercised a political right and sovereign duty, that could not be affected by any court. It was the highest expression of a sovereign people as to what would the better effectuate that sovereignty. Can it be imagined that the constitutional convention intended to trim off and pare down this sovereign right and obligation to carry out a public policy? The right to create an agency of government does not exist for the benefit of an individual, but for the benefit of the state itself.

It is a doctrine too well known to need more than passing reference that an injunction does not lie against the executive to restrain him from executing an unconstitutional act of the legislature (*Georgia v. Stanton*, 6 Wall. 50; *Green v. Mills*, 16 C. C. A. 516, 69 Fed. 852); nor will it interfere with the exercise of a purely legislative or executive power (see cases cited in *State v. Thorson* [S. D.] 68 N. W. 202). These doctrines were not adopted without reason, and the principles underlying them are founded on the sovereignty of the people, and the necessity of organization to exercise the functions of government based upon the three great departments of political existence, that the people may always have a channel through which to express their sovereignty. Each branch of government is necessary to constitute a state as a state is now constituted. Each is necessary to government in the practical exercise of sovereignty. In fact, it may be said in these days that sovereignty with or without a written charter implies the existence of these powers. If the contention of the

plaintiffs be carried to its logical conclusion, and the real nature of this proceeding be considered, the principle sought to be injected into our law will sap, undermine, and overturn the government, and destroy all the guaranties of a republican form of government; for, if an injunction will lie to practically oust the delegation of one county from the halls of the legislature under an alleged unconstitutional law, it would be against the delegations of all the counties of the state that might be elected under an alleged unconstitutional act. It would scarcely be a question that the judiciary could not thus nullify the constitution, and rob the state of an attribute of sovereignty. Without a legislature and the exercise of its power to appropriate funds for the defraying of expenses of government, election of officers, etc., anarchy and chaos would pervade society. There would not be a republican form of government. It will be no answer to this to say this condition is not permissible, and that the creatures of the legislature will be enjoined, not the members as members. Let us not be diverted by names. Let us look, not alone at the application to this case of this doctrine; let us consider it in its length and strength, or not consider it at all. We should stop the stream at its head now, rather than wait until it has grown larger, wider, and within a deepened channel, and greater volume threatens an overflow, drowning government.

Such a doctrine is utterly at variance with the views expressed in the impeachment trial of President Johnson, held by Jackson, Jefferson, and the great founders of our government, and deducible from the principles of government and the exercise of sovereignty. In 1827 there was an election for sheriff of Georgetown, and there were two competitors, Greir and Thaxton, and Thaxton was declared elected by the managers. A motion for prohibition was made before Judge Bay, and, among other things, he said: "In our country, the people are supreme. All civil power and authority is derived from them, and, by virtue of their inherent prerogatives, they have thought proper, in order to establish justice, and to prevent all irregularity and confusion, to make known and publish to the world their great republican charter, called a constitution, by which all the powers of the state are regulated and governed. By this constitution, all the powers of the state government are distinctly defined and vested in their separate branches, namely, the legislative, the judicial, and the executive, all of which are independent of, and have no control over, each other. The legislative branch has the power of making and enacting all laws for the government of the citizens; the judicial has the power of construing those laws so made, and of declaring their bearings on the citizens; and the executive is charged with the authority and power of causing all those laws to be duly executed, and of granting commissions to all the officers of government for the exercise of their respective functions in office, for the benefit of the whole. But no

one of these different departments has any right to interfere with the others in the legal execution of their official duties. It is admitted that the judges of the superior courts of law, in the exercise of their judicial powers, have a right by the common law of the land, which is recognized by the constitution, to send out this high prerogative writ, to restrain all the inferior courts and jurisdictions or bodies of men appointed for special purposes from doing illegal or unauthorized acts. But they have no power or authority to send out a writ to either of the other great branches of the government; for, if they had such a power to invade the province of the executive, and to say he shall not exercise his official right of issuing commissions, etc., it is difficult to see any good reason why they should not send the same writ to the other great branch of the government, to restrain it from passing any law which they might conceive was an impolitic or unconstitutional act. Thus, such a doctrine would be laying the foundation for a scene of confusion and clashing of jurisdictions." *Greir v. Taylor*, 4 McCord, 206.

Is there not application now for this decision? What has equity here to work upon? It must be moved by some property right. I repeat, there is not set out in the petition such a right as equity protects. That equity does not protect political right is a doctrine so fundamental and ingrained into our system of government that authority is not needed to support it. See *Green v. Mills*, 16 C. C. A. 516, 69 Fed. 852; High, Inj. §§ 702, 1206, 1311, 1315. Indeed, the authorities go so far as to say, if an attempt were made to interfere with such right, the refusal to obey such an injunction would not constitute a contempt. High, Inj. §§ 1296, 1312, 1314. How it is possible for the petitioners to be injured in their private rights passes all understanding, unless the establishment of a new county is per se injurious. The party seeking relief must show clear legal or equitable right, and a well-grounded apprehension of immediate injury to set right, in order to justify the granting of an injunction. The injury must also be irreparable,—not to be repaired by money. If adequate reparation could be made, then he should resort to the law side of the court. Mere apprehensions and fears of the plaintiffs, unsupported by facts establishing their probability, will not constitute a sufficient ground to warrant interference by injunction. High, Inj. §§ 35, 722; 10 Am. & Eng. Enc. Law, 783 et seq. The statement of facts should be so strong as, if made by a plaintiff on the witness stand, would justify, if uncontradicted, a judgment for him. I do not think the matter set up in the petition states facts enough.

In addition to the ordinary strictness in this character of cases, the petitioners should set out that they did not vote for the creation of the new county, but against its formation, and exhausted all their efforts in vain. It is true that the issuing of the writ is within the discretion of the court, not to be ex-

exercised by a capricious judgment, based upon imaginary injury and ambiguous and indefinite allegations, speaking by conclusions and not averments, but a judicial discretion, —a discretion controlled by precedent and authority. A discretion based upon such a consideration of the allegations of the petition, which nowhere make such an attack upon the act of 1898 (or other act), calling for a decision upon its constitutionality, in my judgment, would refuse the writ. It is a matter of grave consideration to declare an act unconstitutional, and the allegations of the pleading should plainly make such an attack. I repeat that such an attack is not made by the allegations of the petition here. It but vaguely charges that the act is null and void, because the statement of fact in the act was contrary to the evidence,—an allegation that heretofore, coming on appeal from the humblest court, has uniformly been construed as not worthy of consideration. It is an allegation that does not move the court to simply consider the matter. The plaintiffs do not attack, by their petition, the constitutionality of the act. Such a statement as required nowhere appears. If, under the constitutional administration of justice in this country, the courts are given the power of supervision over corporations formerly claimed by the king in his courts, it must still be exercised (unless in exceptional cases, of trusts, charities, etc., not necessary here to be noticed) according to the course of the common law. Chancellor Kent, in *Attorney General v. Utica Ins. Co.*, 2 Johns. Ch. 387, 388. The same great authority lays it down that, if the matter "does not touch the enjoyment of property, it ought not to be brought within the direct jurisdiction of the court, which was intended to deal only in matters of civil right resting in equity, or where the remedy at law was not sufficiently adequate. Nor ought the process of injunction to be applied but with the utmost caution. It is the strong arm of the court, and, to render its operation benign and useful, it must be exercised with great discretion, and when necessity requires it." *Id.* 378, 379. The learned chancellor above says, in speaking of the great case of *Rex v. Master & Fellows of St. Catharine's Hall*, 4 Term R. 233: "Lord Kenyon, in giving the opinion of the court, said that corporate bodies, which respected the public police of the country and the administration of justice, were better regulated under the superintendence of the king's bench," etc.

I will close this opinion with a statement which was uttered by chancellor Kent in *Attorney General v. Utica Ins. Co.*, 2 Johns. Ch. 391, declaring "the process of injunction is too peremptory and powerful in its effects to be used in such a case as this, without the clearest sanction. I shall better consult the stability and utility of the powers of this court by not stretching them beyond the limits prescribed by the precedents."

(123 N. C. 337)

BAKER v. MITCHELL et al.

(Supreme Court of North Carolina. Nov. 28, 1898.)

CHARGE ON LAND — SUFFICIENCY OF EVIDENCE — REFORMATION OF DEED.

In an action to reform a deed, a finding of an agreement between the parties to a deed that the grantor was to have charge of the land for her maintenance cannot be sustained, there being only the testimony of the justice of the peace before whom she brought an action for the consideration named in the deed that on the day she entered nonsuit therein she said she was to have maintenance off the land, of the grantor that she did not understand that she was making a deed, and of the grantee that he had no objection to her having her support out of the land, and that the person to whom he sold it appeared to have no objection to her having her support.

Appeal from superior court, Alexander county; Coble, Judge.

Action by Elizabeth Baker against W. V. Mitchell and others. Judgment for plaintiff. Defendants appeal. Reversed.

The action was brought to correct a deed so as to show the proper consideration, and to charge the land with the support of the plaintiff. It was alleged, among other things: That the defendant, her grandson, had been living with the plaintiff on the land for several years. That he was her agent and general adviser in the management of her business. That he proposed to take a deed from her for the land, which she consented to execute, upon the consideration that she should receive her support from him, and that the same should be a charge on the land. That she was old and feeble, inexperienced in business matters, and that, instead of the instrument being a deed drawn according to the said agreement, it was a deed in fee for her land for the expressed consideration of \$40, and did not charge the land with her support. That defendant did not pay anything for the land at the time, and has not yet paid anything, but obtained the said deed by fraud. That about the 27th of January, 1894, the defendant and W. V. Mitchell entered into a contract with regard to the land, as follows: "A contract has this day been entered into between W. V. Mitchell and D. O. Baker that said W. V. Mitchell does agree to give the said D. O. Baker \$200 for his entire interest in the estate of Elizabeth Baker, with interest at 8 per cent, with the following exceptions, to wit, he is to have the wheat of his old field without rent," etc. This instrument was signed and sealed by Mitchell and Baker, and it was alleged that it was made without the knowledge or consent of the plaintiff. That said Baker executed a deed in fee to Mitchell, conveying said land, without charging the same with the support of the plaintiff, and Mitchell now claims the land against the plaintiff, and refuses to allow her support. That, by reason of said fraud and wrong of the defendants, the plaintiff has been

deprived of her land and support. Defendants admit that the plaintiff had a life estate in the land, and that the said deed conveyed all her interest therein for the consideration of \$40, but deny that said deed was obtained by fraud and misrepresentation. They admit that a contract to convey the land was entered into between Mitchell and said Baker about the time mentioned in the complaint, but allege that that part of the contract which charges the defendant Mitchell "with the maintenance of the plaintiff is void—First, for want of a consideration; and, second, because it is collateral, and in no way connected with the original conveyance from the plaintiff to the defendant D. O. Baker." Defendants also admit that Mitchell lives on the land, and holds a deed in fee for the same from D. O. Baker, but deny that they are under any legal obligation to maintain the plaintiff, and ask that they go without day. After denying the other allegations, the defendants allege that the plaintiff did bring a suit before a justice of the peace for the purchase money, \$40, the consideration named in the deed, and that plaintiff refused to take judgment, assigning as a reason that defendant had fully satisfied her, and that she paid the costs of the action, and the defendant avers that this was all done without his knowledge or assistance. In the amended complaint the plaintiff alleges that the deed was made by Mitchell with intent to hinder, delay, and defraud his creditors, and especially to deprive the plaintiff of her rights, and that said Mitchell did not pay anything for the land, and had full notice of the plaintiff's claim, when the deed was executed; that previous to said agreement she had instituted an action against D. O. Baker to charge the land with her support, and that Mitchell assisted her in bringing the action, and that by agreement made by Mitchell for her with defendant Baker, that the land should be charged with her support, she took a nonsuit in the action, and that defendant's part of said agreement was never carried out; that the plaintiff is about 65 years old, and illiterate, and by reason of the relationship between defendant Baker and herself the defendant Baker acquired an influence over her, so much so that she was unable to resist any request that he might make of her, etc. The defendants denied these allegations.

Issues: "(1) Was the deed executed by plaintiff to defendant Baker obtained by fraud and misrepresentation or undue influence on the part of D. O. Baker, or any one for him? Ans. No. (2) Was the deed executed for a fair consideration? Ans. Yes. (3) Was plaintiff to have her support on the land when said deed was executed? Ans. Yes. (4) Did defendant Mitchell have notice of the claim of plaintiff to have her maintenance on the land at the time of the contract with D. O. Baker, and at the time of the execution of the deed to him by said Baker? Ans. Yes. (5) Did M.

O. Mitchell have notice of the claim of plaintiff to have her maintenance on the land at the time of the deed to her? Ans. Yes. (6) As a compromise of the action of this plaintiff against D. O. Baker, did defendants Baker and Mitchell enter into a contract that plaintiff should have her support on the land? Ans. Yes. (7) What is such support reasonably worth? Ans. \$4.50 per month. (8) Did Mitchell have notice of the fraud, if any existed, at the time he took the deed from the defendant Baker? Ans. * * *. (9) Did M. O. Mitchell have notice of the fraud, if any existed, at the time she took the deed from her husband, W. V. Mitchell? Ans. * * *." Defendants objected to all of said issues except the first two.

Evidence: Plaintiff testified: That she is about 67 years old. That she lived on the land about 23 years. That she raised and educated the defendant D. O. Baker. That she had a deed for the land, which her mother gave her. She willed the land to the witness, and after her death to be divided between witness' children. [That Philo Stevenson came to witness' house at 6 o'clock at night, and called for paper. No one there but witness. He asked her how her eyesight was. He said, "Did D. O. Baker read this paper to witness?" and witness said, "No;" and he said, "He ought to have read it," and called for a light, and said he would read it over to her, and he read it. He said the witness never heard it. Witness thinks she nodded while he read. At the winding up he asked witness if she would sign it. Witness told him he would have to tell her the meaning of it.] Defendants object to the foregoing evidence embraced in brackets. Objection overruled. Defendants except. [That Stevenson said it was a paper that D. O. Baker had got to keep the children from coming on him for back rents; that, if witness' mother had fixed her such a paper as that, Dan Davidson and Jake Lowdermilk would not have come on witness for back rent. That witness had paid these parties for back rent.] Defendants' objection to this evidence was also overruled. [That he said nobody could take her house from her; to stick to her deed. She said, was he preparing her for the poor house? and he said, "No;" he did not mean that at all; that it had to be laid by till after death.] Defendants' objection to this also overruled. [That the said D. O. Baker was using her wrong; that he ought to have some one to stay with her.] Defendants' objection was overruled. Defendants excepted. That D. O. Baker came in after 10 o'clock. Witness next heard of paper at July court. D. O. Baker said he was going to town, and have his papers fixed up, and was going to come back, and clean out his house; that, if she did not sign the deed, he would make her leave. That she sent Mitchell to town to see if there was law for driving her from home, and she came and entered suit. That Mitchell and his wife

were both with her when she entered suit against D. O. Baker. That this suit was compromised. The question, "What was said by D. O. Baker and Mitchell about the compromise of the suit?" Defendants objected. Objection overruled. Defendants excepted. Answer: "They thought it would be best to take it out, and settle it, and they would leave it to three men. D. O. Baker said he would do her right if it took the shirt off his back." That D. O. Baker said, the morning they were to have compromised, if witness got anything she would have to get it according to law. That Mitchell told witness he had bought the land from D. O. Baker, and she had him to read the deed to her, and that it took everything that the witness possessed. This was the deed that witness had made to D. O. Baker, which Mitchell read to her. There was much other evidence of the same character. On cross-examination: That D. O. Baker is the witness' grandson. That she did not make Baker any deed, and that he never said anything about his having any such paper for her to sign, etc. That she did not sell D. O. Baker her part for \$40. That the first time the witness heard of the \$40 was when Mitchell read the deed to her, etc.

Mrs. Sinclair testified: That she lived about half a mile from the plaintiff. Had known her 15 years, and her general character was good. That, after leaving Mitchell's, the plaintiff lived at Blackwelder's, and went back to Mitchell's to get her things. That she was told she had nothing there, and that she should not have the wrappings of her finger. Defendants objected. Overruled. Excepted, etc.

F. C. Gwaltney, a justice of the peace, testified that he drew the contract above set out, and did not remember that D. O. Baker and Mitchell explained why they made a contract. There was something said about Mitchell having bought out D. O. Baker. They told him how to draw the contract. On cross-examination this witness stated that he recollected a suit being brought in his court for \$40 consideration, and that she refused to take judgment, and that she was to have her maintenance. This was after she had moved to Blackwelder's. The suit was brought after the contract between Mitchell and Baker was drawn. Redirect: Mitchell came to witness, and said that plaintiff wanted a summons against D. O. Baker for \$40. Witness saw plaintiff before he issued summons. Mitchell did not say that he had any interest in the suit. He said he could offset the \$40 with mortgage which D. O. Baker held against him for the purchase money of the land. Mitchell paid the fee for summons. Plaintiff said she was to have maintenance off the land, and would not exact the \$40 of D. O. Baker. She said this the day she entered a nonsuit. There was testimony that \$5 per month would be a reasonable allowance for her.

Plaintiff offered the record of spring term, 1894, in the case of Elizabeth Baker against D. O. Baker, and the same, according to the affidavit of the clerk, consisted of the summons and affidavits and order to sue as a pauper. The following deeds were offered in evidence: Deed made on 20th April, 1893, by Elizabeth Baker to D. O. Baker; deed made on 7th February, 1894, by D. O. Baker to W. V. Mitchell; deed made on 15th January, 1895, by W. V. Mitchell to M. C. Mitchell. All these deeds are set out in the record. Defendants moved for judgment of nonsuit. Motion overruled. Defendants excepted.

J. P. Stevenson testified: That he took the examination of Elizabeth Baker to the deed in the spring of 1893. That witness said to her she did not want to sign the paper unless she knew what it was, and witness read the deed to her, and she said, "What would you do about this deed?" Witness replied: "I will not advise you. Do just as you please." That she said she had told D. O. Baker she intended this land for him; that she wanted to sign the deed, but did not want the witness to tell the other heirs anything about it. She made her mark to the deed, and told witness to put the deed in the drawer, and witness did so. Witness held out no inducement to her to sign it. Witness said he made no statement to her in reference to her having a life estate in the land. The witness' recollection is that the deed recited a consideration of \$40. That she never told the witness that she had to pay back rent, and there was not a word said about any maintenance on the land. There was no understanding between the witness and D. O. Baker that witness should make any representation to get the deed. That D. O. Baker asked the witness to take the plaintiff's acknowledgment of the deed. That her husband was dead.

D. O. Baker testified: That he was the grandson of plaintiff, and had lived with her all his life. That she executed a deed to him for her life estate. He made no fraudulent representations to her. Thought he had a right to buy the land, and did so, and he agreed to buy up the heirs' parts. She told witness she intended him to have the land, and he bought in some of the heirs' parts, and the plaintiff finally said, if witness would buy the rest, she would sell the witness her interest; and she did sell it, and then the witness bought in the other shares. There was no conspiracy between the witness and Stevenson to get the deed. Witness asked Stevenson to take her acknowledgment. The trouble about the deed arose after she left the witness' house. Plaintiff wanted witness to keep it a secret. She did not want her children to find out that she had sold the land. On cross-examination the witness stated that he paid plaintiff's taxes, and attended to the business for the plaintiff. Witness never paid her any board, etc. Witness and Mitchell did not enter into an agreement to

arbitrate the matter. Witness had no objection to her having her support out of the land. That Mitchell appeared to be willing for her to have her support. That there was no mutual understanding between witness and plaintiff that witness was to support her at the time the contract was made (between witness and Mitchell). That Mitchell suggested the idea himself that plaintiff was to have her maintenance. Question: "Did you and Mitchell consider the contract as part of the consideration of the deed,—date of contract January 27, 1894?" Plaintiff objected. Sustained. Defendant excepted.

Mitchell has been perfectly willing all the time to keep the plaintiff there, and support her. There was evidence as to the good character of the parties and witnesses.

Defendant asked the following special instructions, which were refused, and defendant excepted: "(1) That, taking the evidence of both plaintiff and defendant, plaintiff is not entitled to recover. (2) That there is no legal evidence to warrant the jury in finding there was a contract that she should have her support on the land. (3) That, if the jury believe the evidence, there was a judgment at spring term, 1894, between Elizabeth Baker and D. O. Baker, seeking to charge the land with her maintenance, and that it has not been shown that there was a judgment of nonsuit, or such a judgment as would entitle her to bring this action, then plaintiff would be estopped from bringing this action. (4) That, if the jury believe the evidence as to the contract between D. O. Baker and W. V. Mitchell, that it was such a contract as would not entitle Elizabeth Baker to recover her maintenance in this action, it being made without the knowledge or consent of Elizabeth Baker, and it being shown that the contract was burned or destroyed by Mitchell and Baker, parties to the contract, before the commencement of this action, and before the execution of said deed."

The court instructed the jury as follows:

"The first issue is, was the deed executed by plaintiff to defendant Baker obtained by fraud and misrepresentations or undue influence on the part of D. O. Baker, or any one for him? The plaintiff contends that the deed she executed to D. O. Baker was obtained by fraud and misrepresentation and by undue influence on the part of said Baker and on the part of J. P. Stevenson, acting for said Baker; that she was old and blind; that Stevenson falsely represented to her that the deed was an instrument of an entirely different nature from which in fact it was. And she contends further that undue influence was brought to bear upon her to procure her execution of the deed, and that the jury should answer the first issue 'Yes.' The defendants contend that no fraud, etc., was practiced upon plaintiff, and that she fully understood the nature of the deed when she executed it. (2) That she desired to make the deed to Baker, and that no advantage was taken of

her. The jury are instructed that, if plaintiff has shown to their satisfaction that the deed to Baker was obtained by false and fraudulent representations of Baker, or Stevenson as acting for him, to the effect that the deed was of a different nature from what in fact it was, that she was blind, and that the deed was incorrectly read to her by Stevenson, acting for Baker, or has shown to the satisfaction of the jury that the deed was obtained by undue influence, then the jury will answer the first issue 'Yes.' And the jury are instructed that any influence exercised upon plaintiff by reason of which her mind was so embarrassed that she could not control her own opinion and wishes in respect to the deed was undue influence, in the meaning of the law. (3) The jury are instructed that, ordinarily, where one alleges fraud or undue influence, the burden is on the party so alleging to prove it to the satisfaction of the jury. The plaintiff, however, contends that here such a confidential relation has been shown to have existed between her and the defendant Baker as to shift the burden of proof upon the defendant. And if the jury find that plaintiff was the grandmother of defendant, and that she was old and blind; that defendant was her business agent and adviser, and lived with her; that she reposed confidence in him as her adviser; and that during the existence of such a state of facts she executed a deed to him, conveying her interest in real estate for the recited consideration of \$40; that this consideration was inadequate,—then the law would impose the burden upon the defendant to show that no unfair advantage was taken of the plaintiff, and no fraud practiced on her; and, if he failed to show this, the jury will answer the first issue 'Yes,' but, if he does show this, they will answer it 'No.' (4) If plaintiff has failed to show to the satisfaction of the jury that such a confidential relation, as above explained, existed, then the burden rests on the plaintiff to prove that the deed was obtained of her by fraud and misrepresentation or undue influence on the part of defendant Baker, or some one for him; and, if she fails to do this, the jury will answer the first issue 'No.'

"Second issue: Was the deed executed for a fair and reasonable consideration? Defendant contends that it was, and plaintiff contends it was not. And the jury are instructed that if plaintiff has shown that the deed was not executed for a fair and reasonable consideration, then they will answer the second issue 'No.'

"Third issue: Was plaintiff to have her support on the land when the deed was executed? Plaintiff contends she was to have her support, and, if she has shown the affirmative of the issue by a preponderance of evidence, the jury will answer the issue 'Yes'; but, if she has failed to show this, the jury will answer it 'No.'

"Fourth issue: Did M. C. Mitchell have notice of the claim of plaintiff to have her main-

tenance on the land at the time of said contract and at the time of the execution of said deed? Plaintiff contends that Mitchell did have notice, but defendant contends that plaintiff failed to show notice on the part of Mitchell. The jury are instructed that, if plaintiff has shown by preponderance of evidence that Mitchell had knowledge of plaintiff's claim for maintenance at the time he made the contract referred to with D. O. Baker, and at the time of the deed to him by Baker, then the jury will answer the fourth issue 'Yes'; if plaintiff has failed to show this, the jury will answer it 'No.'

"Fifth issue: Did M. O. Mitchell have notice of the claim of plaintiff to have her maintenance at the time of the execution of the deed to her? If plaintiff has shown by a greater weight of evidence that Mitchell had knowledge of this claim at the time of the deed to Mitchell, then the jury will answer the fifth issue 'Yes.'

"Sixth issue: As a compromise of the action of this plaintiff against D. O. Baker, did defendants Baker and Mitchell enter into a contract that plaintiff should have her support on this land? Plaintiff contends that she brought suit in the superior court against D. O. Baker, and that Mitchell, who is her son-in-law, attended to the bringing of the suit, and that by way of compromise defendants Baker and Mitchell entered into a contract that plaintiff should have her support on the land; and defendants contend that no such contract was made. The jury are instructed that if plaintiff has shown by a greater weight of evidence that, as a compromise of the action, the defendants entered into a contract that plaintiff should have her support on the land, the jury will answer the sixth issue 'Yes.'

"Seventh issue: What is such support reasonably worth yearly? Plaintiff contends that it is worth \$5 per month, and the jury are instructed that, if she has shown by a greater weight of evidence what her support is reasonably worth, then the jury will give such sum in their answer to the seventh issue.

"Eighth issue: If the jury answer the first issue 'No,' they need not answer the eighth and ninth issues. If they answer the first issue 'Yes,' then they will answer the eighth and ninth issues. Did defendant Mitchell have notice of the fraud, if any existed, at the time he took the deed from D. O. Baker? Plaintiff contends that the fraud did exist, and Mitchell knew of its existence, and had knowledge of all the circumstances connected with the execution of the deed by plaintiff to defendant Baker, and that the evidence shows that Mitchell knew it was fraudulent at the time he took the deed from defendant Baker. Defendant Mitchell contends he had no knowledge of any fraud, and that the jury should answer the issue 'No.' The jury are instructed that, if plaintiff has shown by preponderance of evidence

that Mitchell had such knowledge at the time, they will answer the eighth issue 'Yes.'

"Ninth issue: Did Mitchell have notice of the fraud, if any existed, at the time she took the deed from her husband, W. V. Mitchell? The burden of proving the affirmative of this issue is on the plaintiff, and the jury are instructed that, if she has shown by a greater weight of evidence that M. C. Mitchell (the wife) knew, at the time she took the deed from her husband, W. V. Mitchell, that the deed from plaintiff to defendant Baker had been obtained by fraud, then the jury will answer the ninth issue 'Yes.'"

At the request of plaintiff's counsel, the court gave the following special instructions: "If the jury believe from the evidence that defendant D. O. Baker lived with the plaintiff, who was an old, feeble, blind, and illiterate woman, and acted as her agent, worked and cultivated the farm, and was her confidential adviser, then any advantage taken of the plaintiff by him in the execution of the deed would constitute fraud; that, if the deed to D. O. Baker was executed with the understanding and as a part of the consideration that the plaintiff should have a support out of the land, the land would be chargeable with the same in the hands of defendant Baker."

Upon the findings of the jury on the issues submitted by the court the defendants' counsel offered the following judgment, to wit: "This cause coming on," etc., "and the jury having found the first and second issues in favor of the defendant,—that there was no fraud, misrepresentation, or undue influence on the part of D. O. Baker, or any one for him, and that the deed was executed for a fair and reasonable consideration,—it is adjudged by the court that defendant go without day," etc. This judgment the court refused to sign, and rendered judgment upon the issues that plaintiff recover of defendant \$131.80, being the sum of \$4.50 per month for her support, etc., and that said sum shall be a charge on the land, and, upon failure to pay the same, that execution issue to sell the land.

Defendants moved for a new trial upon the following grounds: "(1) For that the court submitted issues to the jury which were objected to by defendants, and for that the issues were too numerous, conflicting, and calculated to mislead the jury. (2) For that the court admitted evidence objected to by defendants, as appears in the case. (3) For that the court erred in not giving the special instructions asked by defendants. (4) For that the court erred in not setting aside the answer of the jury to issue No. 3, there being, as defendants contend, no evidence whatever to support such finding, offered either by plaintiff or defendants; but defendants contends that, on the contrary, the plaintiff expressly swore that at the time she made the deed to D. O. Baker there was

no reservation in the same, and no agreement that she should have her support on the land. For that the court erred in not signing the judgment offered by defendants, for the reason that the jury had found the first two issues in favor of defendant." Motion overruled. Defendants excepted and appealed.

F. A. Linney and A. C. McIntosh, for appellee.

MONTGOMERY, J. The plaintiff brought this action to have the deed in fee to the tract of land described in the complaint, which she had executed to the defendant D. O. Baker, reformed so as to annex to it a covenant for the support and maintenance of the plaintiff for her life, to be a charge upon the land; the allegation being that at the time of the execution of the deed it was intended and agreed that such charge for maintenance was to be inserted, but that it was left out by the fraud of the grantee, who prepared the deed for her signature. The evidence objected to by the defendants and received by his honor all pertained to the question of fraud in the execution of the deed, and, as an issue of fraud was submitted to the jury, and found for the defendants, it is unnecessary to consider the exceptions to his honor's rulings, and the evidence offered under that head.

The third issue was in these words: "Was plaintiff to have her support on the land when said deed was executed?" and the jury responded, "Yes." The defendants' counsel asked the court to instruct the jury that there was no evidence to warrant a finding by the jury that there was an agreement between the parties to the deed that the plaintiff was to have a charge upon the land for her maintenance. The instruction was refused. After a most careful reading of the evidence offered, we are of the opinion that it was not sufficient, in a reasonable view of it, to warrant the inference by the jury that there was any agreement as alleged by the plaintiff. His honor was in error in refusing the instruction. Error.

(123 N. C. 384)

GRAHAM et al. v. STURGILL, Sheriff.
(Supreme Court of North Carolina. Dec. 6, 1898.)

SHERIFF—FAILURE TO RETURN EXECUTION.

Where no return on an execution issued by a justice to a sheriff is made within 60 days, and no sufficient cause for the failure is shown, a judgment absolute is properly rendered against the sheriff, under Code, § 2079.

Appeal from superior court, Ashe county; Coble, Judge.

Appeal by B. Sturgill, sheriff, from a judgment rendered against him in favor of C. E. Graham & Co. for a penalty for failure to return an execution in time. Affirmed.

31 S.E.—45

R. A. Doughton, for appellant. Todd & Pell, for appellees.

FAIROLOTH, C. J. An execution issued from a justice of the peace to the sheriff, on July 7, 1897, commanding him to collect and make due return in 60 days. The return was made on September 10, 1897, more than 60 days. The plaintiff moved for the penalty of \$100 against the sheriff for failing to make due return of the execution, and obtained judgment nisi, and on the hearing the justice refused to enter judgment absolute. An appeal was taken, and in the superior court the judge, after finding as facts that no return was made in 60 days and that no sufficient cause for such failure was shown, rendered judgment absolute against the sheriff. There was no error in the judgment. *Waugh v. Brittain*, 49 N. C. 470; Code, § 2079. Another question was argued before us, but after the above conclusion it would be of no benefit to the defendant to consider it. Affirmed.

(123 N. C. 154)

HOOKER et al. v. MONTAGUE et al.
(Supreme Court of North Carolina. Dec. 6, 1898.)

WILLS—CONSTRUCTION—RULE IN SHELLEY'S CASE.

Testatrix provided that her estate should be converted into money and divided equally among her children, share and share alike; but directed that her daughters' shares be placed in the hands of her son, as trustee, and that he should hold the same during the life of each one, respectively, and pay each of them the yearly profit during the life of each, and to their individual heirs after the death of each; and appointed her son executor to execute the will as he might deem best. *Held*, that the devise did not vest in each daughter the absolute title to her portion, and gave her no power of testamentary disposition thereof.

Faircloth, C. J., and Furches, J., dissenting.

Appeal from superior court, Wake county; Timberlake, Judge.

Action by Sallie A. Hooker and others against B. F. Montague, executor, and another. From the judgment rendered, defendant B. F. Montague appeals. Reversed.

Argo & Snow, for appellant. W. N. Jones for appellees.

DOUGLAS, J. We are of the opinion that the devise in question does not come under the rule in Shelley's Case, so as to vest in Zollie Montague the absolute title to her portion of the fund arising from her mother's will. The will of Zollie Montague is not now under consideration, as it is admitted that it legally disposes of all property of which Zollie had a right to dispose. The contest arises solely under the will of the mother Mrs. A. E. Montague, whom we shall hereafter call the "testatrix." The third item of her will is as follows: "That all my property, real, personal, and mixed, be converted into money and divided equally among my children, share and share alike, with this

restriction, however: that the share or shares falling to my daughters under this will be placed in the hands of my son B. F. Montague, as trustee for each of them, and that he shall hold the same for and during the natural life of each one, respectively, and pay each of them the yearly interest or profit arising from said fund during the life of each, and to their individual heirs at law after the death of each of my said daughters, respectively." Item 4: "I appoint my son, B. F. Montague, my sole executor, to execute this will as he may deem best." It will thus be seen that B. F. Montague was both executor and trustee, but when the duties of one ceased, and of the other began, it is difficult to determine. In any event, he had the absolute custody of the property, and was charged with responsible duties in the management thereof. He was required to sell the property, real and personal; convert it into money; apportion the fund between the legatees, paying to each son his share, and retaining the shares of the daughters; invest the shares of the daughters so as to produce an income; pay to each the profit arising from her share during her entire life, and then after her death to pay to her "individual heirs" something, but whether the principal, or only the interest, does not clearly appear. All this he was to do "as he may deem best." No part of the principal could go into the hands of Zollie, whose share we are now particularly considering, but must be retained and managed by her brother. For the purposes of this trust, when he ceased to be executor he became eo instanti trustee, and, in our opinion, held the legal title, along with the actual possession and the right of possession. It is said that "the testatrix does not even give the custody of the estate to B. F. Montague, but provides that it be placed in his hands as trustee. What is the difference? Surely no one else had the "custody." Again, it is said that "the relations of B. F. Montague with regard to this fund were in the nature of a guardian or manager of the estate." This means nothing, to our minds, beyond an executory trust. If he was a mere manager, he must have been an agent for some principal; but for whom? He was not Zollie's agent, for he was neither her appointee, nor subject to her direction; neither was he her guardian, for she was apparently of lawful age. A trust loses none of its essential attributes by being denominated a "quasi guardianship of a special fund." It is a well-established principle that executory trusts do not come within the operation of the rule in *Shelley's Case*; and it is difficult to distinguish this case from that of *Saunders v. Edwards*, 55 N. C. 134. There the will provided that: "As to my property, my will and desire is that after my death it may all be equally divided among my children, share and share alike, but in the distribution it is my will and desire that the

portions falling to my daughters, Jane Boykin, Amanda Edwards, and Eugenia Blackwood, should be secured and settled upon them, the said daughters, and their children, respectively; and, the more effectively to carry into execution this, my will and desire in regard to the division that may fall to my daughters aforesaid, I give and bequeath such lots and divisions as may fall to them from the equal division of my property as aforesaid unto my beloved friend, Ashley Saunders, to hold in trust for the sole use and benefit of them, my said daughters, and their heirs, forever; to him and his heirs in trust as aforesaid." The court held that this was manifestly an executory trust, and did not come within the rule in *Shelley's Case*, and that the daughters took only a life estate, with remainder over to their children. In the leading case of *Ham v. Ham*, 21 N. C. 598, 600, relied upon by the court, the general rule is expressly qualified by holding that "the words 'heirs of the body' are held to be words of limitation, unless there be some clause or restriction added whereby it plainly appears that the words 'heirs of the body' are intended as words of purchase." This qualified deference to the intention of the testator is shown in numberless cases throughout the books, only a few of which need be cited. *Allen v. Pass*, 20 N. C. 77; *Moore v. Leach*, 50 N. C. 88; *Thompson v. Mitchell*, 57 N. C. 441; *Faribault v. Taylor*, 58 N. C. 219; *Pless v. Coble*, Id. 231; *Newkirk v. Hawes*, Id. 265; *Ward v. Jones*, 40 N. C. 400; *Jenkins v. Jenkins*, 96 N. C. 254, 2 S. E. 522; *Crawford v. Wearn*, 115 N. C. 540, 20 S. E. 724; *Francks v. Whitaker*, 116 N. C. 518, 21 S. E. 175. In *Pless v. Coble*, supra, it was held that: "Where a testator in a residuary clause gave the surplus of his property to a son and daughter, in these words: 'And my desire is that such surplus be equally divided and paid over to my son, A., and my daughter, M. My will and desire is that my daughter M.'s equal part in this last devise, to her bodily heirs, equally to be divided between them,'—the daughter took an estate for life, with remainder to her children." A long list of cases from other jurisdictions to the same effect may be found in the exhaustive brief of Judge Greene in *Moon v. Stone's Ex'rs*, 19 Grat. 130, 199. The rule in *Shelley's Case* is purely a technical rule, and, being contrary to the general spirit of the law, inasmuch as it tends to defeat the intention of the testator, should be strictly construed. In the case at bar, we think that the trust, being executory, does not come within the rule, and that Zollie Montague took only a life estate in the interest or profits of the fund; the principal going in remainder to the heirs of Zollie, who are also the heirs of her mother. Whether they take directly from Zollie, or through the will, is immaterial to this discussion. The intention of the testatrix is plain to us, and, we think, is legally ef-

fectuated. However noble may be the object of Zollie's bounty, it was not the object of the bounty of the testatrix. She was seeking to provide for her own children, and not for the children of others. She wished those to inherit her property who inherited her blood, and she fondly hoped that the results of her thrift and economy might be enjoyed by those she had cradled in lap and heart. As it was her property, we do not feel at liberty to thwart her will, guided by a mother's love, and within the letter and spirit of the law. We think the judgment should be reversed. Reversed.

FURCHES, J. (dissenting). This action depends upon the construction of the will of Mrs. A. E. Montague, mother of plaintiffs and defendant B. F. Montague. The third item of the will is as follows: "That all my property, real, personal, and mixed, be converted into money and divided equally between my children, share and share alike, with this restriction, however: that the share or shares falling to my daughters under this will be placed in the hands of my son, B. F. Montague, as trustee for each of them, and that he shall hold the same for and during the natural life of each one, respectively, and pay each of them the yearly interest or profit arising from said fund during the life of each, and to their individual heirs at law after the death of each of my said daughters, respectively." "Item 4. I appoint my son, B. F. Montague, my sole executor, to execute this will as he may deem best." So it depends upon the proper construction of these two "items," as it is not contended that there are any other parts of the will that can affect the construction of them. Zollie Montague was one of the daughters of the testatrix, referred to in the third item of her will. Zollie Montague died in August, 1895, never having married, and without leaving issue of her body. Before she died she made and executed a last will and testament, by which she willed a remainder of her estate to the Baptist Orphanage at Thomasville. The plaintiffs are the brothers and sisters of the testatrix Zollie Montague, and they contend that under the will of the mother, A. E. Montague, the said Zollie only took a life estate, and had no interest to dispose of by her said will, and that the plaintiffs are entitled to same under the will of the mother, A. E. Montague, or as her next of kin and distributees. It will be observed that the estate is given to the daughter Zollie, and not to B. F. Montague as trustee. It was to be "divided equally between my children, share and share alike, * * * however, that the share or shares falling to my daughters under this will be placed in the hands of my son, B. F. Montague, as trustee, for each of them." The testatrix does not even give the custody of the estate to B. F. Montague, but provides that it "be placed" in his hands as trustee. So, if this had been real estate, the statute of uses and

trusts could not have operated to carry the legal estate to the cestui que trust, for the reason that there was no legal estate in the trustee. It is true that the statute of uses and trusts has nothing to do with the matter under consideration, but it is used in the discussion to show that B. F. Montague had no legal estate in this fund. This distinguishes this case from *Payne v. Sayle*, 22 N. C. 455, cited and relied upon for the plaintiffs. In that case the estate was given to the trustees, who held the legal estate, and their cestui que trust had the equitable estate. And the remainder after the determination of the life estate was a legal, and not an equitable, estate, and the rule in *Shelley's Case* could not operate. The relations of B. F. Montague with regard to this fund were in the nature of a guardian or manager of the estate. Seeing that this estate was given to Zollie, and that she was the legal owner of the same, the rule in *Shelley's Case* applies, as is held in *Ham v. Ham*, 21 N. C. 598, which seems to be the leading case on this subject; and Judge Battle, in republishing this volume of the Reports, says that this has been considered the settled law of the state ever since that decision. *Ham v. Ham* has been followed in *Sanderlin v. Deford*, 47 N. C. 74, *Worrell v. Vinson*, 50 N. C. 91, and in other cases. In *Worrell v. Vinson* there was a trustee named, and that case is similar in almost every respect to the case now under consideration. And the court there held that the circumstance of a trustee being named made no difference; that, if it were held that the party named as trustee had taken the legal estate, it was but the naked legal estate, and the legatee at once took the legal and equitable estate, and because the absolute owner, under the doctrine of *Ham v. Ham* and *Worrell v. Vinson*, supra. Under the light of these authorities, I think we should affirm the judgment of the court below.

FAIRCLOTH, C. J. I concur in the dissenting opinion.

(123 N. C. 290)

JAMES v. WESTERN NORTH CAROLINA R. CO.

(Supreme Court of North Carolina. Dec. 6, 1898.)

SUPREME COURT — POWER TO PROTECT JUDGMENT OF COURT BELOW — JURISDICTION TO ENTER JUDGMENT ON MERITS — CORRECTION OF INADVERTENT ERROR.

1. The supreme court has no power to protect a judgment entered in accordance with its mandate, by the superior court, from unwarranted interference by other courts, whereby the enforcement thereof is unlawfully obstructed.

2. Where, on appeal, judgment was entered against defendant for costs, and that the opinion be certified to the court below, to the end that such court might proceed to judgment, the supreme court had no power to enter judgment on the merits, *nunc pro tunc*, at a subsequent term, though such court may correct its judgment, where erroneously rendered

by mistake or by inadvertence, so as to make it in fact the judgment intended.

Action by Clemye James, administratrix of the estate of W. A. James, deceased, against the Western North Carolina Railroad Company. Plaintiff recovered judgment, in accordance with the mandate of this court, to which the cause had been appealed, and thereupon joined S. T. Pearson, another creditor of said company, in a proceeding for the sequestration of certain equitable assets of defendant, and for the appointment of a receiver. The plaintiffs in the last-mentioned suit were enjoined from proceeding therein by an order granted by the federal circuit court at the instance of the Central Trust Company of New York; whereupon the plaintiff in the original action moved this court for a rule requiring said trust company to show cause, and for judgment here, in said action, nunc pro tunc. Rule discharged.

A. C. Avery, L. S. Overman, and B. F. Long, for plaintiff. Charles Price, for defendant.

FUROHES, J. This action was commenced in the superior court of Rowan county to recover damages for defendant's negligently killing the plaintiff's intestate. Upon the trial in the court below it was found that the plaintiff's intestate was killed by the negligence of the defendant, and the jury assessed the damages at \$15,000. But the court, being of opinion that the plaintiff was not entitled to judgment against the defendant, refused to sign a judgment in her favor, and gave judgment against the plaintiff for costs. From this judgment the plaintiff appealed to this court, where the judgment of the court below was reversed, and the case certified to that court for judgment. *James v. Railroad Co.*, 121 N. C. 524, 28 S. E. 537. Upon the opinion of this court being certified to the superior court of Rowan, the plaintiff, at February term, 1898, recovered judgment against the Western North Carolina Railroad for \$15,000. Thereupon S. T. Pearson and Clemye James, administratrix of W. A. James (Clemye James being the plaintiff in the action for damages mentioned above), commenced their action against the Western North Carolina Railroad Company, and in their complaint they style themselves creditors of said railroad company, and that they bring this action, not only for themselves, but for the benefit of all other creditors of said railroad company who may make themselves parties plaintiff and contribute to the expense of its prosecution. This complaint alleges that S. T. Pearson is the owner of one original share of stock in said road, and that Clemye James, as administratrix of W. A. James, is a creditor, who "recovered judgment in the superior court of Rowan county against the defendant, the Western North Carolina Railroad Company, which bears date the 21st day of February, 1898, for the sum of \$15,000, and costs of action, brought for

the negligent killing of her intestate, William A. James, and plaintiffs are advised, informed, and believe that said judgment constitutes a lien upon the franchise and property of said company superior to the lien of either of said mortgages, even though the said mortgages should be declared valid liens." The above quotation is paragraph 17 of the complaint, and the reference made therein to mortgages refers to mortgages previously mentioned in the complaint. The said plaintiff alleged that she could not enforce the James judgment by execution; that the defendant had assets that might be enforced in equity; and asked for an order of sequestration, and for a receiver. Upon the filing of this complaint, the Central Trust Company of New York brought a proceeding in the circuit court of the United States, in which it alleged that the said railroad, road-bed, franchise, and rolling stock had been sold under an order of the circuit court of the United States, at which sale the Southern Railway Company (a Virginia corporation) had become the purchaser; that said Southern Railway Company borrowed large amounts of money from it, and have mortgaged or conveyed said property to it in trust to secure the payment of said money, and interest, so borrowed; and ask for an injunction against the plaintiffs, their agents and attorneys, restraining them from the further prosecution of their suit; which motion (upon notice) was granted by the said circuit court of the United States, enjoining and restraining the plaintiffs S. T. Pearson and Clemye James, their agents and attorneys, from further proceeding with or prosecuting their said suit. The matter now before this court was brought to our attention by an affidavit filed by the attorneys of Clemye James on the 16th of November, 1898, in which the facts herein above set forth, as to the James judgment, are substantially recited; and attached to this affidavit is a notice to the attorneys of the Central Trust Company to appear on the 19th (which was changed by the court to the 25th) of November, and (1) to show cause why an order shall not be made that execution issue to enforce the judgment of this court therein, and why the marshal of this court shall not be intrusted with the duty of levying said execution and enforcing the order of this court; (2) to show cause why the said Western North Carolina Railroad Company, and its agents and attorneys, shall not be required to desist from obstructing the enforcement of the mandates of this court and disregarding its authority; (3) to show cause why the said company, and its agents and attorneys, shall not be enjoined and restrained from, in any way, interfering with or obstructing the enforcement of the said judgment of this court by levying the execution issuing therefrom, or otherwise. Service of this notice was accepted by the attorneys of the Central Trust Company of New York.

During the argument the counsel for Mrs. James submitted, in addition to the motions mentioned in the notice to the trust company, a motion for judgment in this court, to be entered *nunc pro tunc*, in the case of *James v. Railroad Co.* However much this court might be disposed to protect its judgments, and any legal process issuing thereon, from unlawful interference by other courts, obstructing the same, it cannot do so in this case, even should the interference and obstruction be unlawful. The judgment which the movers alleged has been unlawfully interfered with, and its enforcement to have been obstructed, is not a judgment of this court, but the judgment of the superior court of Rowan county. This is distinctly alleged in the seventeenth paragraph of plaintiff's complaint in the action of *S. T. Pearson and Clemye James against the Western North Carolina Railroad*. It is there alleged that she "recovered judgment in the superior court of Rowan county against the defendant, the Western North Carolina Railroad Company, which bears date the 21st of February, 1898." The case of *James v. Railroad Co.* was heard on appeal at September term, 1897, of this court, when the judgment of the court below was reversed. 28 S. E. 537. Upon the opinion in that appeal being filed, judgment was entered here against the defendant company for costs, and that the opinion be certified to the court below, to the end that the court below might proceed to judgment. This was done, and that court proceeded to judgment at February term, 1898, as we have seen. This court has no power to change, alter, or modify its judgments rendered at a former term of the court. *Moore v. Hinnant*, 90 N. C. 163; *Cook v. Moore*, 100 N. C. 294, 6 S. E. 795; *Murphy v. Merritt*, 63 N. C. 502. An exception to this rule is where the judgment has been erroneously rendered by mistake or by inadvertence. In such cases, it may be altered so as to make it speak the truth,—to make it in fact the judgment of this court. *Moore v. Hinnant* and *Cook v. Moore*, *supra*.

This court is strictly an appellate court, with the exception as to claims against the state. It only acquired jurisdiction in the case of *James v. Railroad Co.* by reason of the plaintiff's appeal. The purpose of this appeal was to have the rulings of the court below reviewed upon questions of law presented by the record of the trial below; and, when this was decided and certified to the court below for judgment there, the purposes for which the appeal was taken were ended, and this court had no further jurisdiction of the case. The legal link or string that brought the case to this court was cut, and it went back home to the superior court of Rowan, and that court proceeded with the case upon its original jurisdiction, instructed by this court as to the law involved in the appeal. We cannot adopt the suggestion of counsel, made during the argument, to enter

judgment here in the *James Case* *nunc pro tunc*, for the reason that we have heretofore, at September term, 1897, entered a judgment, and we have no power to enter another judgment in the case. *Moore v. Hinnant*, *supra*.

It was contended by counsel for James that this court had a supervisory power over the superior courts, and could compel them, by mandamus and by other writs, to observe and obey the judgments and orders of this court. This is true, but no action or order of the superior court has been called to our attention of which Mrs. James can or does complain.

In the course of the argument, the complaint in the Case of *Pearson and James* was called to our attention, and discussed by counsel, as also was the complaint in the Case of the *Central Trust Company*, filed in the circuit court of the United States; and the opinion of that court, and the orders made therein, were also called to our attention, and discussed by counsel. But none of these matters are before us in such a way as to authorize us to discuss them, and we do not. We have no more right to review the opinion of the circuit court than it has to review the opinion of this court, and we do not. While we see no reason for changing our opinion in *James v. Railroad Co.*, that matter is not now before us for our consideration. The rule to show cause must be discharged, at the costs of the plaintiff in said rule. Rule discharged.

(123 N. C. 259)

CHAPPELL v. ELLIS et al.

(Supreme Court of North Carolina. Dec. 6, 1898.)

EXEMPLARY DAMAGES—WRONGFUL LEVY—MENTAL ANGUISH—APPEAL—REVIEW.

1. A recital in the record, "Defendant asked the following special instructions in writing, which were given by the court," followed by eight numbered prayers, precludes consideration of an assignment of error in failing to instruct the jury as prayed "in prayers numbered 1 to 9, inclusive, * * * except the eighth given," since it appears by the record that every instruction asked was given.

2. Mental anguish is no element of recovery of compensatory damages for a wrongful seizure and levy on chattels.

3. A wrongful seizure and levy on chattels, if attended with malice, wantonness, oppression, brutality, insult, gross negligence, or certain kinds of fraud in aggravation of the injury, will warrant the recovery of exemplary damages.

Appeal from superior court, Iredell county; McIver, Judge.

Action by Elizabeth Chappell against Milton Ellis and another. There was a judgment for plaintiff, and defendants appeal. Reversed.

B. F. Long, for appellants. Armfield & Turner, for appellee.

DOUGLAS, J. This is an action to recover damages for the unlawful seizure and detention of personal property, and also for men-

tal suffering caused thereby. The plaintiff alleges that a writ of possession was issued in favor of the defendant Ellis against her husband and herself, and also directing the sheriff to make the sum of \$197, with interest and costs, out of her said husband; that her said husband had not been living with her for two years, having abandoned her, and removed to the state of Indiana; that the defendant Thorpe, deputy sheriff, in obedience to said writ, removed her from the premises; and also, under the direction of the defendant Ellis, levied upon the following personal property, belonging to her, to wit, "about 35 bushels of corn, 5 bushels of peas, 1 yearling calf, and 2 shotes, and delivered the same to the defendant Ellis, against the will and over the protest of the plaintiff, she at the time informing Thorpe that she was the sole owner of said property; that the said Ellis took the said property to his home, and kept it for more than a week, when he returned a part of the corn and peas, the yearling, and one shote; and that the property not returned was reasonably worth \$20." She further alleges "that she is old and infirm, having reached the age of 64 years, and has to depend upon her own labor and exertion for a support; and, after the removal of the said property by Thorpe and Ellis, she had nothing upon which to live, and no home to shelter her body; that by the wrongful act of Thorpe and Ellis in taking from her the said property, contrary to the writ aforesaid, and without authority in law, and depriving her of the only means of support she then had, in her advanced age in life, she has suffered greatly in body and mind, to her damage \$500."

It is unnecessary to consider the answers or the general testimony, as the jury evidently believed the plaintiff, as they found every issue in her favor. We see no error in the charge of the court of which the defendants can complain, as it appears from the record that every instruction asked by them was given. Therefore, their third assignment of error—"For that his honor failed to instruct the jury as prayed by defendant in the prayers numbered 1 to 9, inclusive, and failed, except the 8th given"—cannot be considered by us. The record states that "the defendant asked the following special instructions in writing, which were given by the court." Then follow immediately eight numbered prayers, one or two of which it would be difficult to sustain under exception by the plaintiff.

But there is one exception by the defendants which, we think, must be sustained, and that is to the testimony of the plaintiff's witness Reavis. He was asked, "What was the condition of the plaintiff next day?" and answered, "She was crying and going on considerably; seemed to be in great deal of trouble; and was in trouble for weeks afterwards." As this testimony tended to show mental suffering, and as it is evident that the greater part of the damages awarded was based upon such suffering alone, the exception becomes

of vital importance. The doctrine of mental suffering, or "mental anguish," as we prefer to call it, as indicating a higher degree of suffering than arises from mere disappointment or annoyance, contemplates purely compensatory damages, and, as far as we are aware, has never been applied to cases like that at bar. This case would come under the rule of exemplary, punitive, or vindictive damages, as they are variously denominated. Such damages, which look not only to the loss sustained by the plaintiff, but still more to the conduct of the defendant, can be allowed only where there is shown, on the part of the defendant, malice, wantonness, oppression, brutality, insult, gross negligence, or certain cases of fraud. *Hale, Dam. §§ 85, 86; 1 Sedg. Meas. Dam. 520; 7 Am. & Eng. Enc. Law, 450, 451; Duncan v. Stalcup, 18 N. C. 440; Gilreath v. Allen, 32 N. C. 67; Hansley v. Railroad Co., 117 N. C. 565, 23 S. E. 443.* These matters of aggravation need not all concur, as any one will be sufficient if it exists in sufficient degree; but, in the absence of them all, exemplary damages cannot be allowed, no matter how great may be the mental suffering of the plaintiff. The question of exemplary damages does not appear to have been raised in the trial of the action, as no such issue or instruction was asked by either party. The theory of the plaintiff was the recovery of compensatory damages for mental anguish, under the rule laid down in *Young v. Telegraph Co., 107 N. C. 370, 11 S. E. 1044*, and analogous cases. This rule cannot be extended to the case at bar. The plaintiff is entitled to recover all her actual damages sustained from the wrongful act of the defendants, including not only the value of the property not returned, but also whatever damages may have accrued from its seizure and detention. Furthermore, she may be allowed exemplary damages, in the discretion of the jury, if such circumstances of aggravation are shown as would bring her within the rule; but her case does not come within the doctrine of "mental anguish." It is true the two doctrines are somewhat similar, inasmuch as they recognize suffering other than physical or pecuniary; but they are so widely distinguished in their application that they are universally recognized as distinct principles, wherever they are recognized at all.

It is urged on behalf of the plaintiff that this case should be governed by the principles laid down in *Cashion v. Telegraph Co. (at this term) 31 S. E. 493*. We see no resemblance. Our opinion in *Cashion's Case* was hinged on the solemn fact of death and the associations inseparable from the final severance of all earthly ties by an immortal spirit. The anguish of a mother bending over the body of her child, every lock of whose sunny hair is entwined with a heartstring, and kissing the cold lips that are closed forever, cannot come within the range of comparison with any mental suffering caused by the loss of a pig. We are not insensible to the pitiable condition of the plaintiff, thrown upon the highway with-

out shelter, and with but little to eat; but we must remember that her shelterless condition, which probably caused the greater part of her distress, was the result of a lawful eviction. Charity would have dictated a different course, but that great virtue is not enforceable in a court of law. But it is urged that the principle of the *Cashion Case*, if carried out to its fullest extent, would directly lead to the recovery of damages for all kinds of mental suffering. It may be; but we feel compelled to carry out a principle only to its necessary and logical results, and not to its furthest theoretical limit, in disregard of other essential principles. The one universal law of nature is that all action, animate as well as inanimate, is the result of conflicting forces. The orbit of the earth depends upon the exquisite adjustment of two conflicting forces,—the centripetal power of attraction, and the centrifugal force of momentum. The preponderance of either would lead to inevitable destruction. The trajectory of every shot is governed by three opposing forces,—momentum, friction, and gravitation; the speed with which it leaves the gun, the resistance of the atmosphere, and the attraction of the earth. It is so with human action. Government itself is recognized as springing from the love of personal liberty, on the one hand, and the desire for personal protection, on the other. It is said that their just equilibrium produces a government of liberty without license, and of law without tyranny, but that its disturbance would lead to anarchy or to despotism. We do not feel at liberty to adopt any one principle as the sole guide of our decisions, and to carry it out to extreme and dangerous limits, regardless of other great principles of justice and of law, so firmly established by reason and precedent. For the error of his honor in admitting evidence which tended simply to show the mental suffering of the plaintiff, disconnected with any allegation of malice or wantonness on the part of the defendants, a new trial must be granted. New trial.

(123 N. C. 432)

COMMISSIONERS OF BUNCOMBE COUNTY v. PAYNE, County Treasurer.

(Supreme Court of North Carolina. Nov. 6, 1898.)

STATUTES—ENACTMENT—CONSTITUTIONAL LAW—RAILROAD AID BONDS—VALIDATION—COUNTY SUBSCRIPTIONS—ELECTIONS—PAYMENT OF INTEREST—ESTOPPEL.

1. Const. 1868, art. 2, § 14, requiring acts authorizing counties to subscribe for railroad aid bonds to be passed in a certain manner, precludes the making of such subscriptions thereafter under a private law which was enacted prior thereto, and was not passed in accordance therewith.

2. Acts 1871-72, c. 48, making the Greenville & French Broad Railroad Company a new body politic, and giving it all the rights conferred by its act of incorporation (Acts 1854-55, as amended by Acts 1858-59), does not enable counties to subscribe bonds in aid thereof as provided by such act of incorporation, as said chapter 48 was not passed in the manner required by

Const. 1868, art. 2, § 14, for the enactment of laws authorizing a county to pledge its credit.

3. Code, § 1996, authorizing county commissioners to order an election to determine whether the county shall issue bonds "necessary to aid in the completion of any railroad," does not authorize them to order an election to determine whether bonds shall be issued to aid a railroad on which no work had been done when the election was ordered.

4. Code, § 1996, authorizing counties to issue bonds to aid a corporation to complete a railroad begun prior to the adoption of Const. 1868, does not include a corporation which was first organized under a charter of reincorporation conferred after such adoption, though its original charter was conferred prior to such adoption.

5. Payment of interest on bonds by a county does not estop it from denying their validity.

6. Priv. Laws 1876-77, c. 40, passed to validate bonds issued by Buncombe county in aid of a certain railroad, does not validate them, as it was not passed in the manner required by Const. 1868, art. 2, § 14, of all acts authorizing a county to pledge its credit.

7. Act 1893, c. 172, merely reciting that certain invalid railroad aid bonds issued by a certain county had been issued by proper authority, does not thereby validate them.

8. New railroad aid bonds issued by Buncombe county in lieu of old ones, under Act 1893, c. 172, providing that the new bonds shall be a continuation of the county's bonded indebtedness, are invalid, where the old ones were invalid for want of a proper election, and no provision was made for an election before the issuance of the new bonds.

9. A general act authorizing any county to issue bonds for railroad purposes would be invalid.

Faircloth, C. J., and Furches, J., dissenting.

Appeal from superior court, Buncombe county; Norwood, Judge.

Action by the commissioners of Buncombe county against W. R. Payne, county treasurer, to have certain bonds declared void. From a judgment for plaintiffs, defendant appeals. Affirmed.

Battle & Mordecai, for appellant. A. C. Avery, Moore & Moore, and Mark W. Brown, for appellees.

CLARK, J. The bonds whose validity is impeached by the present action contain no recital of the authority for their issue, but the order of the board of county commissioners upon which the question of their issue was submitted to popular vote, in 1875, recites as authority chapter 166, Priv. Laws 1858-59, to "amend the charter of the Greenville & French Broad Railroad Company." That act could confer no such authority after the adoption of the constitution of 1868, which by section 14, art. 2, requires such acts to be passed in the manner therein prescribed. This is held in *Board v. Call* (at this term) 31 S. E. 481, and the reason there given is that the adoption of the new constitution, with the restrictions as to issue of municipal bonds, "annulled all special powers remaining unexecuted and not granted in strict conformity with its requirements." This has been repeatedly held by the United States supreme court. *Norton v. Board*, 129 U. S. 479, 490, 9 Sup. Ct. 322; *Railroad Co. v. Falconer*, 103 U. S. 821; *Wadsworth v. Supervisors*, 102 U. S. 534, 537; *Town of Concord v. Portsmouth Sav. Bank*, 92 U. S. 625. Such was evi-

dently the legislative view also, for by chapter 48, Acts 1871-72, the general assembly created a new body politic, under the name and style of the "Greenville & French Broad Railroad Company," and gave it all the rights and immunities conferred by the incorporation act of 1864-65 and the amendatory act of 1868-69. Whether this be treated as an entirely new act, or as an attempt to revive and renew powers conferred by the prior acts, above recited, it could grant no valid power to issue these bonds, or order an election upon the subject, because of noncompliance with the requirements of the constitution (article 2, § 14), in that the bill was not "read three several times in each house of the general assembly, and passed three several readings, which readings were not on three different days, and agreed to by each house, respectively, and the yeas and nays on the second and third reading of the bill were not entered on the journal." *Board v. Call*, *supra*; *City of Charlotte v. Shepard*, 122 N. C. 602, 29 S. E. 842; *Rodman v. Town of Washington*, 122 N. C. 89, 30 S. E. 118; *Board v. Snuggs*, 121 N. C. 394, 28 S. E. 539; *Union Bank of Richmond v. Commissioners of Town of Oxford*, 119 N. C. 214, 25 S. E. 966; and *McGuire v. Williams* (at this term) 31 S. E. 627,—in all of which this constitutional provision has been carefully considered.

The defendants further contend that conceding the invalidity of the act of 1868-69, and confirmatory act of 1871-72, as authority to issue the bonds, still the commissioners had authority to order the election by virtue of chapter 171, Laws 1868-69 (which is now Code, § 1996); but the county had theretofore no interest in the railroad, and no work was done thereon in this state till after the said election, in 1875. The bonds were therefore not authorized, because not "necessary to aid in the completion of any railroad." *Board v. Snuggs*, *supra*; *Board v. Call*, *supra*. Besides the reasons given in those cases, there is this further consideration, that, even if it be conceded that a general act might authorize elections to issue bonds as to all railroads partly completed (in which counties were interested) at the adoption of the constitution, to aid in their completion, this corporation was never organized till after the charter of reincorporation of 1871, and hence could acquire no rights except those conferred in conformity with the provisions of the constitution of 1868. Not only must the bonds be authorized by a popular vote (Const. art. 7, § 7), and the authority to hold the election granted by a statute passed in the mode required by Const. art. 2, § 14, but, to exceed double the state tax (which is necessary), the special purpose must be authorized by a special act of general assembly (Const. art. 5, § 6). A general act authorizing any and all counties to issue bonds for railroad purposes would be invalid, especially when (as is the case here) it is necessary to exceed

the constitutional limitation to pay interest or principal. *State v. Commissioners of Haywood Co.*, 122 N. C. 812, at page 815, 30 S. E. 352; *Herring v. Dixon*, 122 N. C. 420, at page 424, 29 S. E. 868.

The bonds were issued in 1876, 1877, and 1878, by virtue of an unauthorized election, and are unconstitutional and void; counties being expressly prohibited from issuing bonds unless authorized in the manner prescribed by the constitution. *Lewis v. City of Shreveport*, 108 U. S. 282, at page 286, 2 Sup. Ct. 634; *Ottawa v. Carey*, 108 U. S. 110, 123, 2 Sup. Ct. 361. The payment of interest on the bonds by the county authorities is not an estoppel nor does it validate them. Such payments were as much without constitutional warrant as the original issue, and one illegal act cannot validate another. *Doon Tp. v. Cummins*, 142 U. S. 366, citing, at page 376 (12 Sup. Ct. 220), *Marsh v. Fulton Co.*, 10 Wall. 676; *Citizens' Savings & Loan Ass'n v. Topeka*, 20 Wall. 655; *Davies Co. v. Dickinson*, 117 U. S. 657, 6 Sup. Ct. 897; *Norton v. Shelby Co.*, 118 U. S. 425, 451, 6 Sup. Ct. 1121.

There is an act of the legislature, and only one, that purports to validate these bonds. *Priv. Laws 1876-77*, c. 40. But that can have no effect, because it was not passed in the mode required by Const. art. 2, § 14. Whether, if it had been enacted in the constitutional mode, it could have supplied the original lack of power to submit the question to popular vote, is a question not now before us. The later act of 1893 (chapter 172) does not purport to validate these bonds. It simply recites that the bonds had been issued by proper authority (which is a judicial, and not a legislative, question), and, under that erroneous impression, the legislature proceeded to authorize the issue of new bonds, payable "in gold coin,"—which is a deviation from the terms of the original bonds,—to be exchanged for the said bonds, or sold, and with the proceeds purchase or pay them. The act did not submit the issue of the new bonds to popular vote, as was the case in *County of Jasper v. Ballou*, 103 U. S. 745, but specially provides that the new bonds "shall be regarded and held as a continuation of the bonded indebtedness created as aforesaid"; so that, if the bonds issued in 1876, 1877, and 1878 were invalid, the new bonds are equally so. Whether or not a subsequent legislature can validate bonds issued upon the strength of an election which was held without authority, it is very certain they cannot be validated by inference from an act authorizing a sale of new bonds (issued without a popular vote) to take up the first bonds. The validating act must be a direct enactment.

The wisdom of the sovereign people has inserted in the organic law, as a protection to taxpayers, the provision to be found in section 14, art. 2, and legislation coming within its scope is void, unless the consti-

tutional requirement is observed. It is put there for that purpose. Holders of county bonds, who have taken them without ascertaining if there was constitutional authority for their issue, cannot expect the courts to disregard the constitution to save them from the consequences of their negligence. The judgment below is affirmed.

FAIRCLOTH, C. J., dissents.

FURCHES, J. (dissenting). The purpose of this action is to have declared void certain coupon bonds issued by plaintiffs in 1895, 1896, and 1897 to the amount of \$98,000. In 1855 the legislature passed an act chartering a railroad company by the name and title of the "Greenville & French Broad Railroad Company." Acts 1854-55, c. 299. This act was amended by the legislature of 1858-59, in which amended act it is provided "that it shall be competent for any county through which said road is intended to pass, to subscribe to the capital stock of said company any sum or sums that may be determined on by the court of pleas and quarter sessions of such county." Acts 1858-59, c. 166. The next act of the legislature affecting the question under consideration is Acts 1868-69, c. 171. This act expressly authorizes the commissioners of any county to submit the question of subscription to a vote, and, if a majority of the qualified voters of the county vote for the proposition, to make the subscription. This act seems to have been literally complied with by the commissioners of Buncombe in making this submission to the voters of the county. The legislature of 1871-72 passed another act, as amendatory of the act of 1855, chartering the Greenville & French Broad Railroad Company, in which new directors are appointed, and this act closes by saying that the original act, and all other acts amendatory thereof, are re-enacted. Acts 1871-72, c. 48. The legislature of 1873-74 passed another amendment to the original act of 1855, chartering this road, appointing other incorporators, and giving further time to complete its organization. Acts 1873-74, c. 88. The legislature of 1874-75 passed another act, ratifying a consolidation of the Greenville & French Broad Railroad Company with the French Broad Railroad Company, under the name of the Spartanburg & Asheville Railroad Company. Acts 1874-75, c. 27. And under this legislation and organization the commissioners of Buncombe county, in 1875, submitted a proposition to the voters of said county to subscribe \$100,000 to the capital stock of the Spartanburg & Asheville Railroad Company, and to issue coupon bonds therefor. A majority of the qualified voters of said county having voted in favor of the proposition, the subscription was made, and the bonds issued and put upon the market. These bonds ran for 20 years, and, not having been paid, the legislature of 1893 passed an act authorizing the issue of new bonds in the place of the old bonds issued in 1875, known

as the "Funding Act." Acts 1893, c. 172. It is admitted that this act was passed according to the constitutional requirements. But there was no submission to the people after the passage of this act. After the passage of the act of 1893, the commissioners of Buncombe county issued the bonds they are now seeking to have declared unconstitutional and void, and sold them to Blair & Co., of New York, at par value, for cash, with which money they paid off and discharged the original bonds issued in 1875. It is these last bonds that the plaintiffs are now trying to avoid the payment of.

This case is very much like the case of Board v. Call (decided at this term) 31 S. E. 481, but different in some respects that the court considered material in that case. In Board v. Call it appeared in the face of the bonds that they were issued under the act of 1879, which was admitted not to have been passed according to the constitutional provisions, so as to authorize their issue; and this was held by the court to be an estoppel. But there is no such question as that in this case. The submission to the voters of Buncombe county was made in pursuance of the provisions of, and in accordance with the powers granted by, an act of the general assembly of the state of North Carolina passed at its session of 1858-59, and ratified on the 16th day of February, 1859, entitled "An act to amend the charter of the Greenville & French Broad Railroad Company." This submission was in September, 1873. But before the bonds were issued, in 1875, the act of 1874 had been passed, consolidating this company with another railroad company, and called the Spartanburg & Asheville Railroad Company. The bonds are payable to bearer, and it is stated in their face that they are issued to pay the subscription to the Spartanburg & Asheville Railroad Company, this being the new name of the consolidated company, made under the act of 1874-75. It is admitted that, if the original bonds issued in 1875 were valid, these bonds are valid. This is true, and the admission does the plaintiffs no harm. And it may be that the present bonds are valid, even if the original bonds were not. But I do not propose to discuss that question now; I may do so further on.

I have discussed many of the questions presented in this case so fully in my dissenting opinion in Board v. Call (at this term) 31 S. E. 481, that I shall not enter into so full a discussion in this case as I otherwise might have done. But I refer to that opinion for arguments that might have been made here. It seems to me that, if the acts I have cited are law, there can be no doubt but what these bonds are valid. And while I recognize the doctrine contained in Union Bank of Richmond v. Commissioners of Town of Oxford, 119 N. C. 214, 25 S. E. 966; City of Charlotte v. Shepard, 122 N. C. 602, 29 S. E. 842; and Board v. Snuggs, 121 N. C. 394, 28 S. E. 539,—I propose to show that all these acts are valid law for the purposes of issuing the bonds of 1875, except the

act of 1871-72, and that that act is not necessary to the validity of these bonds; and that there is no conflict between their validity and the doctrine in *Union Bank of Richmond v. Commissioners of Town of Oxford*, *Board v. Snuggs*, and *City of Charlotte v. Shepard*, supra.

It is stated, and admitted as true, that the ayes and nays were not taken and recorded on the journals upon the passage of the act of 1858-59 and the act of 1871-72. But it is not alleged, admitted, or shown that they were not taken and entered, according to the requirements of the constitution, upon the passage of the other acts cited by me in this opinion. When an act is passed and ratified by the legislature, it is presumed that it was passed according to law (*Gatlin v. Tarboro*, 78 N. C. 119; *McGuire v. Williams* [at this term] 31 S. E. 627); and, if it is not, the burden is on the plaintiff, as in this case, to show that it was not so passed. And, it not being shown but what these acts were passed according to the constitutional requirements, they must be taken to have been so passed. It must therefore be held that the ayes and nays were called on the passage of each one of these acts, except the act of 1858-59 and the act of 1871-72. It makes no difference that the ayes and nays were not taken and recorded on the passage of the act of 1858-59, as there was no provision in the constitution at that time requiring that it should be done. This act of 1858-59 provided that counties through which the road was intended to pass might subscribe to the capital stock of the company, "if a majority of the lawfully qualified voters of such county voted for the subscription." But the second section of this act provides that, if a majority of the votes cast are for subscription, it shall be declared to have been carried. It is true that this election was to be ordered and held under the direction and supervision of the county court; and the submission to the voters in this case, as in *Board v. Call*, was by the commissioners of the county. The commissioners are the successors of the county court in all such matters. It is so held in *Belo v. Commissioners*, 76 N. C. 489, and is expressly so provided in section 1997 of the Code.

It is contended in the opinion of the court that the act of 1858-59 was repealed by the constitution of 1868. There is no provision of the constitution of 1868 repealing this or any other law of the state. So, if it is repealed, it must be by implication, on account of the repugnance of the act (the charter) to the constitution. I admit that any part of this act repugnant to the constitution of 1868 could not be enforced, on account of the repugnance. But I deny that the act was repealed by the constitution. If this were true, no corporation could have been organized under its provisions, and the *Spartanburg & Asheville Railroad Company* would be without any legal authority,—would be a nullity. If this were true, no railroad company could be chartered, unless the act chartering it

passed according to article 2 of section 14 of the constitution. This cannot be law. The passage of the act, according to article 2 of section 14 of the constitution, is only necessary where it is used as a basis for raising money by means of a corporation subscription and tax. Suppose a railroad company is chartered by legislative enactment without complying with article 2 of section 14, and a company is organized thereunder (as I have no hesitation in saying it may be); can it be contended that if the legislature passes another act, as required by article 2 of section 14 of the constitution, authorizing a subscription to said road, a submission made to the voters, and an issue of bonds under this act, it would be unconstitutional, and the bonds void? That is this case. The railroad company was organized under the act of 1858-59, but the provision of this act, authorizing counties to subscribe, was repugnant to the constitution of 1868, in that it provided that a subscription might be made and bonds issued upon a majority of those voting, and not upon a majority of the whole qualified vote of the county, but the act of 1868-69 (now section 1997, Code), which was passed or presumed to have been passed according to article 2 of section 14 of the constitution, supplied that defect in the act of 1858-59. This act was not called to the attention of the learned judge who tried the case. Had it been, he would, in my opinion, have decided it differently. The act of 1858-59 and the amendments thereto (outside of the act of 1871-72) authorized the organization of the *Spartanburg & Asheville Railroad Company*, and authorized Buncombe county to subscribe to the capital stock of said company, and the act of 1868-69 authorized a submission to the voters of said county as required by article 2 of section 14 of the constitution, and, in my opinion, the bonds are valid.

There is another ground upon which it is claimed that their legality may be maintained,—that of ratification. There is no dispute but what the question of subscription was fairly submitted to the qualified voters of Buncombe county, and that a majority voted for the subscription. The act of 1893, which is admitted to have been passed according to the requirements of article 2 of section 14 of the constitution, expressly recognizes the old bonds as a valid indebtedness of Buncombe county, in the following terms: "That said indebtedness having been created in the year 1875, under proper authority, to pay for the subscription of the said county to the stock of the *Spartanburg & Asheville Railroad Company*." This act further provides in section 3 as follows: "And when issued they shall be regarded and held as a continuation of the bonded indebtedness of said county, created for the purposes aforesaid, and they shall not be exchanged or sold for less than their par value." It is contended that this is a ratification of the acts under which the original bonds were issued. This is an interest-

ing question, but, as I am of the opinion that the bonds are valid for the reasons given by me, outside of the doctrine of ratification, I do not pursue the discussion further.

(123 N. C. 405)

**PHIFER v. TRAVELLERS' INS. CO. OF
HARTFORD, CONN.**

(Supreme Court of North Carolina. Dec. 13,
1898.)

JUDGMENT BY MISTAKE—SETTING ASIDE.

Code, § 274, authorizing the setting aside of a judgment taken against a party through his "mistake, inadvertence, surprise, or excusable neglect," does not authorize the setting aside of a judgment against a corporation, because, acting on its attorney's advice, it verified its answer by an agent, and not by an officer, as required by section 258, that being a mistake of law.

Appeal from superior court, Union county; Starbuck, Judge.

Action by W. H. Phifer, as administrator of Hattie M. Von Bonhurst, deceased, against the Travellers' Insurance Company of Hartford, Conn. There was a judgment for plaintiff by default, and, from an order refusing to set it aside, defendant appeals. Affirmed.

Jones & Tillett, for appellant. Adams & Jerome, for appellee.

DOUGLAS, J. This is an application, under section 274 of the Code, to set aside a judgment taken against the defendant, through his excusable neglect. The original action was upon a policy of insurance, and was brought by plaintiff against defendant, on March 31, 1897, to the August term, 1897, of Union superior court. About April 22, 1897, a local attorney, not the counsel now representing it here, was employed on behalf of defendant to appear for it, and make its defense in said action. At the appearance term, he entered an appearance for defendant, and an order was made by consent granting both parties time to file pleadings. Prior to the appearance term, the defendant had put its local attorney in possession of the facts upon which it based its defense, and insisted that it had a valid and meritorious defense. The complaint was filed on October 20, 1897, and the answer about December 30, 1897. The defendant inquired of its attorney as to what would be necessary, under the law and practice of this state, to make a proper verification of the answer, and inquired also as to who was the proper person to make the verification. Its attorney prepared the answer, and sent it to Richmond, Va., with instructions that it could be properly verified by a general agent of defendant who resided in Richmond; and the answer was so verified, and returned to its attorney, who filed it in court. A short time before court adjourned, the attorneys for the plaintiff, on the last day of court, made a motion before Greene, J., for judgment upon the complaint, and took the

ground that the answer had not been properly verified, for the reason that it was verified by an agent, and not by an officer of the defendant. The defendant then asked the judge to grant a continuance of the action, in order that the answer might be properly verified; but this motion was refused, and a judgment was rendered for plaintiff, for the full amount of the policy. The defendant's attorney thereupon, in open court, gave notice of an appeal, and a short time thereafter informed the defendant of the judgment. The judge held, as a matter of law, that this was not a proper case for the exercise of the discretion to set aside the judgment, and, as a matter of law, refused to grant defendant's motion, and defendant appealed.

The defendant insists that, in fact, it was not guilty of any neglect whatever, as it had promptly employed local counsel, and, having strictly followed his instructions, was not responsible for his neglect. It is admitted that the verification of the answer is invalid, as all pleadings of a corporation must be verified by an officer thereof, whenever their verification is necessary. Code, § 258; *Banks v. Manufacturing Co.*, 108 N. C. 282, 12 S. E. 741. The local attorney retained by defendant filed two affidavits setting forth substantially the above facts, and further alleging that he had so advised the defendant after investigating the questions involved; that in such investigation he had used a well-known digest of the decisions of this court, upon which he had relied, in view of the standing and antecedents of its author; that he had been misled by a false citation in said digest, and in reliance thereon had failed to examine the cited case, which, in fact, held the reverse of the citation. There are some contradictory statements of attorneys as to a verbal agreement, which were not passed on by his honor, and which it is neither necessary nor practicable for us to determine.

We are of opinion that the judgment should be affirmed. The defendant cites, in support of its contention, the cases of *Ellington v. Wicker*, 87 N. C. 14; *English v. English*, Id. 497; *Whitson v. Railroad Co.*, 95 N. C. 385; and *Gwathmey v. Savage*, 101 N. C. 108, 7 S. E. 661. These authorities would be conclusive were they applicable to the case at bar, which, we think, comes under the decision of *Skinner v. Terry*, 107 N. C. 103, 12 S. E. 118, being a mistake of law, and not of fact. The attorney did not neglect to file an answer, nor did he neglect to have it verified. He states that, after an investigation, he informed the defendant that the verification by an agent of the defendant corporation would be sufficient. This was merely his opinion upon a matter of law, and was a legal conclusion, which, however erroneous, binds the defendant, who voluntarily acted upon it. It is not the neglect of any duty, but its improper performance under

a mistake of law. In *Mauney v. Gidney*, 88 N. C. 200, 205, this court says: "As to the adult defendant, there is absolutely no ground for disturbing the judgment as to her. She took the advice of counsel, and, having acted upon it, must abide the result." It is true that the neglect and the bad advice of counsel may lead to the same result in the injury of the client, but, arising from different causes, they do not primarily come within the same rule. While it is always matter of regret that any one should suffer by following the advice of licensed attorneys, we cannot ignore the rights of adverse parties, or disturb the orderly procedure of the courts without sufficient cause. The client selects his own attorney, and in this selection he should be influenced, as in all other business matters, by the diligence and capacity of him to whom he commits the management of his affairs. The judgment is affirmed.

(123 N. C. 410)

PHIFER v. TRAVELLERS' INS. CO. OF HARTFORD, CONN.

(Supreme Court of North Carolina. Dec. 13, 1898.)

PLEADING—VERIFICATION.

A verification that the facts stated on affiant's own knowledge are true, and those stated on information and belief affiant believes to be true, includes only facts stated in the pleading as being either true of affiant's own knowledge, or else stated on information and belief, and is insufficient where the pleading contains averments not belonging to either class, under Code, § 258, requiring a verification to be that the pleading is true to the knowledge of the person making it, except as to matters stated on information and belief, and, as to those matters, that he believes it to be true.

Furches, J., dissenting.

Appeal from superior court, Union county; Greene, Judge.

Action by W. H. Phifer, as administrator of the estate of Hattie M. Von Bonhurst, deceased, against the Travellers' Insurance Company of Hartford, Conn. There was a judgment for plaintiff, and defendant appeals. Reversed.

Jones & Tillett, for appellant. Adams & Jerome, for appellee.

DOUGLAS, J. This is an appeal from the judgment rendered in the above-entitled action, which is the same original action in which the motion was made to set aside the judgment for excusable neglect, under section 274 of the Code. 31 S. E. 715. In this appeal, two errors are assigned: (1) That the complaint was not properly verified, and that, therefore, the answer required no verification; (2) that the judgment, if at all regular, should have been by default and inquiry, and not by default final. Under our view of the law, it is not necessary to consider the second exception or the facts relating thereto.

The complaint and answer both appear to

have been filed in time, so that the only questions before us arise upon their verification. The answer was verified by an agent of the defendant corporation, but it is admitted that this is not a proper verification, under section 258 of the Code. It must therefore be treated as an unverified answer, and, if the complaint had been properly verified, the plaintiff would have been entitled to judgment by default as for want of an answer. An unverified answer is equivalent to no answer at all, where verification is required. This therefore reduces this case to the single point as to whether the complaint was itself properly verified, so as to require a verified answer. The verification to the complaint is as follows: "W. H. Phifer makes oath that the facts stated in this complaint of his own knowledge are true, and those stated on information and belief he believes to be true." Section 258 of the Code requires that "the verification must be to the effect that the same is true to the knowledge of the person making it, except as to those matters stated on information and belief, and as to those matters he believes it to be true." Section 257 provides that, "when any pleading is verified, every subsequent pleading, except a demurrer, must be verified also." Where there is no verification to the complaint, none is required to the answer. The object of the statute is to give the pleader a convenient substitute for the old bill of discovery in equity, and to eliminate all issues of fact that the parties are not willing to support by the sanctity of an oath. All allegations in the complaint not specifically denied in the answer are deemed to be admitted; but, where the defendant is not under oath, he frequently looks upon his answer as being equivalent to a plea of the general issue, and feels at liberty to deny any and all of the allegations of the complaint, regardless of any knowledge or belief he may have as to their truth. The plaintiff may, at his option, verify his complaint so as to require the defendant to answer each and every allegation under oath, subject to the penalties of perjury. But, to do this, his own verification must be directly applicable to each allegation, so as to render him also subject to the same penalties if false. All facts alleged by him in good faith necessarily come under one of two classes. They are either known to him of his own personal knowledge, or they rest upon sufficient information to justify a positive belief. The law requires that his verification shall separate them into their appropriate classes, so that each may come under the direct application of his oath. In the usual complaint, the majority of the allegations are simply stated, without specifying how they are known to the pleader. It would therefore be difficult to convict of willful perjury in any case if they were simply sworn to as being true. To remedy this, the Code says he must swear that the pleading itself, in its entirety, is true to his own knowledge, except as to those matters stated on information and belief. He may believe an al-

legation to be true without knowing it, but he always knows whether or not it is true of his own knowledge. This distinction is required by the statute, and is reasonable and necessary for the protection of the opposing party.

If the verification under consideration is in effect equivalent to the statute, then it is sufficient; but, otherwise, it must be rejected, and the pleading considered as an unverified complaint, admitting an unverified answer. This verification says "that the facts stated in this complaint of his own knowledge are true, and that those stated on information and belief he believes to be true." It seems clear to us that the words "of his own knowledge" relate to and qualify the word "stated." In other words, he makes oath that the facts which he states in the complaint are true of his own knowledge are true, while those he states are true as he is informed and believes he believes to be true. This excludes those allegations which are not verified in the complaint either as resting on personal knowledge or on information and belief. This class of allegations comprises nearly the entire complaint, which therefore cannot be regarded as verified according to the letter or spirit of the law. Any immaterial variation in the mere words, which would not affect the legal effect of the verification, would be disregarded by us; but here its very intention is defeated. Even if there was only a reasonable doubt as to the meaning of this verification, this mere doubt would destroy the certainty required in a conviction for perjury, and suggest the danger of permitting such a variation from the statutory form, which itself admits of no doubt. We do not think that the form of verification now under consideration has ever been directly considered and passed upon by this court. In the case of *Alsbaugh v. Winstead*, 79 N. C. 526, the verification was similar to this, with the exception that the word "except" takes the place of the conjunctive "and," used in the case at bar, which might be a material variation; but in that case the only point apparently raised was an attempted distinction "between a statement of facts and the facts themselves." As we are compelled to hold that the complaint was not properly verified, the answer must be considered, and the judgment stricken out. Reversed.

FURCHES, J. I do not concur in this opinion.

(123 N. C. 264)

RUSSELL et al. v. BOARD OF COM'RS OF IREDELL COUNTY.

(Supreme Court of North Carolina. Dec. 13, 1898.)

CONTRACTS—EVIDENCE—PERFORMANCE—INSTRUCTION—JURY.

The evidence being conflicting, the question whether a bridge was built substantially according to contract was properly submitted to the jury, under an instruction that, if it

was so far different from the contract as not to answer the purpose for which it was intended, there could be no recovery for it.

Appeal from superior court, Iredell county; Allen, Judge.

Action by Russell & Nicholson against the board of commissioners of Iredell county. There was a judgment for plaintiffs, and defendant appeals. Affirmed.

B. F. Long and Armfield & Turner, for appellant.

FAIRCLOTH, C. J. This case concerns the building of a bridge. The defendant ordered the supervisors of Statesville township to get up plans and specifications, and let out the building of a bridge to the lowest bidder across the Salisbury branch, on the Salisbury road, which was done, and the plaintiffs were the lowest bidders, and got the contract at \$100. The chairman of the board of supervisors testified that "the bridge has been completed and not paid for. It was completed as early as could be. The bridge was and is being used by the public, and it was so used immediately after it was finished. I had plans prepared. There is no variation in the building, with one exception. The plan was to let plank project three feet. Instead of that, I asked them to have it bolted to the abutments,—to the foundation. That made it more stable and firm. It required no more labor, but additional expense of both. It was a substantial compliance with the plans and specifications. * * * Plans called for mudsills to be two feet below the water. Don't think it is quite two feet. It goes to the rock,—to a solid foundation." The plaintiffs testified that they built it according to contract. Both parties introduced other evidence and witnesses tending to sustain their contentions. The court submitted this issue, "Was the bridge built substantially according to the plans and specifications agreed to?" which the jury answered, "Yes," and that plaintiffs are entitled to the contract price. There was judgment accordingly. His honor charged the jury: "I shall leave the question with the jury as to whether the bridge was built substantially according to the contract; * * * that it was not so much a question as to whether it was a good bridge, but is it a substantial compliance with the terms agreed on, in quality and kind." He also charged that, if it is so far different from the contract as not to answer the purpose for which it was intended, the plaintiffs could not recover. The defendant filed exceptions to the evidence, to the issue, to the charge, and to the judgment, but its real contention is that the court erred in leaving the question of substantial compliance with the jury. What is a contract, and the effect of a contract, when the terms are clear, from which only one conclusion can be drawn, whether written or oral, is a question of law; but whether the contract has been performed, when the evi-

dence is conflicting, is a different question. Whether substantial compliance has occurred, under proper instructions of the court, we think is a question of fact for the jury. Looking at the findings and the charge, under the rules above stated, we see no error, and think substantial justice has been done, and it will be so certified. Affirmed.

(123 N. C. 294)

KERNER v. BOSTON COTTAGE CO. et al.
(Supreme Court of North Carolina. Dec. 13, 1898.)

PAYMENT OF TAXES.

Giving a note to a sheriff in payment of delinquent taxes for which he is about to sell the property, under an agreement to accept it and make no sale, does not constitute a payment thereof.

Appeal from superior court, Forsyth county; McIver, Judge.

Action by James T. Kerner, as administrator of the estate of R. B. Kerner, deceased, against the Boston Cottage Company and others. There was a judgment for plaintiff, and defendants appeal. Reversed.

Watson, Buxton & Watson and Shepherd & Busbee, for appellants. Jones & Patterson and Glenn & Manly, for appellee.

FURCHES, J. This action, as originally commenced, was to remove a cloud from the title of plaintiff, under the statute of 1893. But by the answer of defendant, and reply thereto by plaintiff, it seems to have been turned into an action of ejectment. It is not necessary, however, to further notice this apparent change, as it does not affect the rights of the parties so far as this appeal is concerned, and is not the point in the case. The plaintiff claims that the title is in the Boston Cottage Company, and defendant claims that he is the owner under a sale for taxes due by the Boston Cottage Company and the sheriff's deed. The sale and deed by the sheriff to the defendant (the appellant W. M. Palmer) were admitted by the plaintiff, but plaintiff alleges that the taxes under which the sale was made had been paid before the sale under which defendant claims title. This is the only question presented by this appeal.

It was admitted by the plaintiff that these taxes had not been paid in money, or any kind of lawful currency; but he alleged that A. H. Eller, as the agent of plaintiff, had seen McArter, the sheriff of Forsyth county, on the morning of the sale, and that, under an arrangement entered into between Eller and the sheriff, Eller gave the sheriff his promissory note for the taxes under which the land was sold, and the sheriff agreed not to sell. This, the plaintiff alleges, was in law a payment, and asked the court so to instruct the jury; while the defendant contended that this was not a payment, and asked the court to so instruct the jury. The court declined to give the instructions asked

by the defendant, and instructed the jury that if they should find "that, before the land was sold, on the 6th of May, 1895, for the taxes of 1894, the sheriff accepted the note of A. H. Eller and Addison for the taxes due on the property of the Boston Cottage Company, saying the property would not be sold, and you find the sheriff accepted the note, it is the duty of the jury to answer the issue, 'Yes.'" The issue was: "Had the Boston Cottage Company paid all the taxes due on the property in dispute before the sale thereof, in May, 1895?"

There was error in refusing the defendant's prayer for instruction and in the instruction given. "A tax collector has no right to receive anything in payment of taxes except legal tender money." Blackw. Tax Titles, § 160. "And the lien will not be discharged by any such payment." Id. But this may be otherwise where the tax collector is instructed by competent authority to take county scrip, or other lawful indebtedness of the county, for county taxes. Id. The same doctrine is held by Judge Cooley. Cooley, Tax'n (2d Ed.) 452. If the tax collector actually pays or accounts for the taxes under an agreement with the tax debtor to do so, this will discharge the tax and the lien; and the tax collector, paying the tax, may recover it back from the tax debtor. Id. It was stated during the argument that the property in controversy was bid in by the county of Forsyth at the sale, in May, 1895, and this bid was afterwards assigned to the defendant. But, as this question is not presented by the record and seems not to have entered into the consideration of the trial below, we do not consider it on this appeal. There is error for which a new trial is ordered. New trial.

(123 N. C. 296)

STONESTREET et al. v. FROST et al.
(Supreme Court of North Carolina. Dec. 13, 1898.)

ADMINISTRATION BOND—LIABILITY OF SURETY'S ADMINISTRATOR.

Notwithstanding the administrator of a deceased surety on an administration bond has settled the estate after giving the notice to creditors required by law, where limitations have not run against the surety's liability, he is still liable in an action on his intestate's bond, though he cannot be required to account personally.

Appeal from superior court, Davie county; McIver, Judge.

Action by N. A. Stonestreet and others against E. Frost, administrator, and others, on an administrator's bond. From a judgment for plaintiffs, J. R. Williams, Sr., one of the sureties, and others, as personal representatives of deceased sureties, appeal. No error.

Watson, Buxton & Watson, for plaintiffs. Glenn & Manly, E. L. Gaither, T. B. Bailey, and Holton & Alexander, for defendants.

MONTGOMERY, J. Although the plaintiffs allege in their complaint that the defendant Frost, administrator, made neither the annual return and accounts of his administration, under section 1399 of the Code, nor his final account, under section 1402 of the Code, yet it is apparent upon the face of the complaint that the real breach of the administration bond complained of was the demand of the plaintiffs for an account and settlement made on the administrator, first, for an account and settlement of the estate of his intestate, and for the payment to them as distributees of the amount in his hands to which they were entitled, and his failure and refusal to do so. From that time, then, the three-years statute of limitations (Code, § 155, subsec. 6) began to run in favor of defendant sureties on the administration bond. The referee to whom was referred the statement of the administration account found as a fact that there was no evidence going to show the date at which the demand and refusal were made, and that, as a matter of law (the statute of limitations having been pleaded, and the burden of proof having thereby been placed on the plaintiffs to show that the action was begun within three years after such demand and refusal, so far as the sureties were concerned), the action was barred by the statute of limitations as to the sureties. The plaintiffs filed an exception to these findings of the referee, in which exceptions they allege that there was testimony (that of N. A. Stonestreet, one of the plaintiffs) that a demand was made for the settlement in 1894, and that this action was commenced afterwards, on the 3d of August, 1894. His honor sustained the exception, and reversed the finding made by the referee that the statute of limitations was a bar to the action against the defendant sureties, and had judgment entered against the defendants Frost, administrator, J. R. Williams, Sr., one of the sureties, J. M. Cain, administrator of P. H. Cain, a deceased surety, W. R. Ellis, administrator of D. S. Tucker, another of the deceased sureties, C. L. Cook and Annie Cook, executors of Harrison Cook, another of the deceased sureties, and Mattie K. Clement, executrix of W. B. Clement, another of the deceased sureties. From the judgment the defendant Williams and the other defendants who are the personal representatives of the deceased sureties appealed. The alleged error in the judgment is that his honor held that the cause of action against the appellant defendants was not barred by the statute of limitations.

The "case" shows that the evidence was before his honor, and we must conclude, by his having sustained the plaintiffs' exceptions, that he found, upon inspection of the evidence, that the plaintiff N. A. Stonestreet had testified that in 1894 he had made demand upon the administrator for a settlement of his administration, and that the administrator refused to make the settlement, and that upon that testimony his honor found as a fact that

demand for the settlement was made in 1894. We cannot review that finding, and consequently there was no error in his holding that the action was not barred by the statute of limitations as to the defendant Williams and the other defendants, the personal representatives of deceased sureties. The defendant J. M. Cain, administrator of P. H. Cain, a deceased surety, excepted to the judgment on the further ground that his honor held that he was liable as administrator, notwithstanding the admitted fact that he had made a final settlement of his intestate's estate, and after having given the notice required by law to creditors. There was no error in his honor's ruling on that point, and the exception to the judgment cannot be sustained. The liability of the intestate surety, as we have seen, is not barred by the statute of limitations. Notwithstanding that the defendant J. M. Cain, administrator of P. H. Cain, has given notice to creditors according to law, and has made a final settlement of his intestate's estate, he is still administrator (though not personally liable for any part of the recovery in this action), and the plaintiffs have resorted to a proper remedy to ascertain the amount of their debt against the estate of one of the deceased sureties on the bond. No error.

(123 N. C. 423)

BARNHARDT et al. v. STAR MILLS.

(Supreme Court of North Carolina. Dec. 18, 1898.)

CORPORATIONS—AUTHORITY OF PRESIDENT.

The president of a corporation, even though he be the business manager, cannot, without a just consideration moving to the corporation, create an indebtedness against it by undertaking to assume for it liability for an individual debt of his own.

Appeal from superior court, Mecklenburg county; Greene, Judge.

Action by Barnhardt & Co. against the Star Mills. Judgment for plaintiffs, and defendant appeals. Reversed.

Burwell, Walker & Cansler, for appellant. H. W. Harris, for appellees.

MONTGOMERY, J. It is an admitted fact in this case that the debt which is sought to be recovered was originally a balance due by W. M. Crowell to the plaintiffs, and that it was contracted for goods sold and delivered to him by the plaintiffs. The credit was extended by the plaintiffs to Crowell on his own personal account. It is a further admitted fact that the amount due to the plaintiffs by Crowell was afterwards charged on the ledger of the plaintiffs to the Star Mills, an incorporated business company, of which Crowell was president. On the trial, T. M. Barnhardt, one of the plaintiffs, testified that when the account on the plaintiffs' books against Crowell was charged to the defendant, the Star Mills, it was done by agreement between the plaintiffs and Crowell; that

Crowell told the plaintiffs that all the goods which he had bought on his own personal account from the plaintiffs were bought in reality for the Star Mills, and that the corporation got them. The witness also testified that, if those statements had not been made to him by Crowell, he would not have made the transfer of the accounts. He further said that he did not know that Crowell was insolvent at the time the account was charged to the defendant, but he knew that he could claim his exemptions, and that the corporation could not. The testimony of Crowell, a witness for the defendant, was contradictory of Barnhardt's in all of its material particulars. There was evidence tending to show that the capital stock of defendant company consisted of 72 shares, 70 of which were subscribed by Crowell and the other 2 shares by two other persons (1 share each), and that the two other subscribers to stock simply subscribed for the purpose of organizing the corporation, and had never paid anything on their shares; and that Crowell had had the management of the business of the corporation since its formation. The plaintiffs, however, are not seeking to treat the corporation as a fraudulent contrivance to defeat creditors, as well as an abuse of the statutory law authorizing the formation of corporations, but they recognize the legality of its organization, and insist on making a recovery of their debt out of its assets. The basis of their claim rests entirely on the doctrine of novation, and the well-considered argument of their counsel here was directed along that line. The plaintiffs' contention is that upon the satisfaction and discharge of the account of Crowell to the plaintiffs, and the charging of the account to the defendant by the direction of Crowell, who was the president and manager of defendant corporation, Crowell was discharged, and the debt became, by novation, a debt against the defendant. Such a transaction between individuals undoubtedly would have the effect to discharge the original debtor, and to charge the new promisor. The consideration which would support the promise to pay under the novation would be the injury or hurt the promisee would have sustained by his having discharged his original debtor at the request of the promisor, and upon the agreement that he would assume the debt. That is familiar learning, and needs no authority for its support. But the matter presented here for decision is very different from that. The question here is, can the president, even though he be the business manager, of a corporation, without a just consideration moving to the body, create an indebtedness against it by undertaking to assume for it liability for an individual debt of his own? We are of the opinion that he cannot. The president or managing agent of a corporation, as a general rule, can only use his power to advance the interest of his principal, the corpora-

tion, and for no other purpose. *Mor. Priv. Corp.* §§ 517, 518. His honor substantially instructed the jury to the contrary, and in so doing there was error. New trial.

(123 N. C. 416)

MORRISON v. CHARLOTTE ELECTRIC RAILWAY, LIGHT & POWER CO.

(Supreme Court of North Carolina. Dec. 13, 1898.)

STREET RAILROADS—ACTIONS FOR INJURIES—CONTRIBUTORY NEGLIGENCE.

1. A person who stepped off facing the rear of a street car, which started too quickly, and injured her, is not guilty of contributory negligence, if when she started to take the last step the car was not moving.

2. Whether a person stepping off facing the rear of a street car, which had stopped to let her alight and started again before she had taken the last step, thereby negligently contributed to the injury suffered, is a question for the jury.

Appeal from superior court, Mecklenburg county; Starbuck, Judge.

Action by Elizabeth Morrison against the Charlotte Electric Railway, Light & Power Company. There was a judgment for plaintiff, and defendant appeals. Affirmed.

Burwell, Walker & Cansler and Osborne, Maxwell & Keerans, for appellant. Jones & Tillett, for appellee.

FURCHES, J. On the 12th of September, 1897, about 7 or 7:30 p. m., the plaintiff and her sister, Mrs. Grier, took passage on the defendant street railway, in the city of Charlotte. They notified the conductor that they wished to get off at Sixth street. The car stopped at Sixth street for 10 or 12 seconds, when it started again, while plaintiff was in the act of getting off, and she was thrown on the ground or pavement and injured. There was no dispute or conflict in the evidence but what the car started to move while plaintiff was in the act of getting off, and that she was thrown to the ground, and injured by the fall. There was some conflict in the evidence as to where she was, and as to what position she occupied, when the car started to move. The plaintiff testified that she and her sister occupied the same seat; that her sister was nearest the side on which they wished to alight; that when the car stopped she at once arose and stood up, but waited for her sister to get off, before she moved to the side of the car where she wished to alight; that, as soon as her sister got off, she undertook to do so, and while she was on the "running board," and before she got on the ground, the car started, throwing her upon the ground, from which fall she received serious and permanent injuries. The defendant's evidence tended to show that she did not arise from her seat and stand up when the car stopped, and did not until the car started; that she had ample time to have gotten off; that she undertook to get off with her face towards

the rear end of the car; and that her injury was caused by her own negligence, or, if her negligence was not the sole cause of her injury, that it contributed to her injury, was the proximate cause thereof, and that she cannot recover. This car was what is called an open car, in which the seats ran clear across the car, and the passengers alighted from the side. From the evidence, there was not more than a dozen passengers aboard, if that many.

The negligence of the defendant was not contested in the argument here. The finding of the jury on the first issue settled that question. But the defendant filed 11 lengthy prayers for instruction on the contributory negligence of the plaintiff, all of which it seems to us might have been reduced to two or three, if the learned counsel had had more time to prepare them. None of them were given by the court, except as they may be covered by the charge. The defendant's counsel contended that the car stopped long enough for the plaintiff to get off, and, if she got hurt by the car's starting before she got off, it was her own fault,—negligence. The defendant also contended that she got off with her face turned the wrong way, and that this was her fault,—negligence; that these contributed to her injury, and were the proximate cause of the same.

It would be difficult to see how this could be so, from any view of the evidence, when it is admitted that she was injured by the car's starting while she was in the act of getting off. Even if it be admitted that 10 or 12 seconds is sufficient time to allow a woman to get off the car, and that she did not move as quickly as she might have done, still the defendant was guilty of the grossest negligence in starting the car when she was getting off, in plain view of him. He must necessarily have seen her if he was paying attention to his duties; and if he was inattentive to these duties, and started the car without seeing her, he was guilty of gross negligence. This being so, and it being shown—admitted—that her injury was caused by starting the car, over which she had no control, it is difficult to see how the manner in which she was getting off contributed to, and was the proximate cause of, the injury, or that the length of time—10 or 12 seconds—could have contributed to, and have been the proximate cause of, the injury.

But the court charged the jury that, "if the plaintiff did not arise and start to get off before the signal to start the car was given, then, in no view, can you answer the first issue, 'Yes.'" The issues were as follows: (1) "Was the plaintiff injured by the negligence of the defendant? Ans. Yes." (2) "Did the plaintiff by her own negligence contribute to her injury? Ans. No." There was no objection as to the third issue. The court further charged the jury upon the second issue as follows: "It was the duty of

the plaintiff, in her manner of stepping off the car, to exercise the care reasonably to be expected of a person of ordinary prudence under the circumstances, and a failure to observe such care was contributory negligence." "If the plaintiff stepped off in the opposite direction to that in which the car was moving, then, if the car was not moving as she started to take the last step, she was not negligent in stepping off in this manner. If the car was moving, it was for the jury to say whether, under the circumstances, in stepping off in the opposite direction, she failed to exercise the care of a person of ordinary prudence. If it was a failure to exercise ordinary care, the jury should answer the second issue, 'Yes.'" If the question of contributory negligence was presented by the evidence (and it seems to us that it was not), the court has complied with the law in presenting it to the jury. *Hinshaw v. Railroad Co.*, 118 N. C. 1047, 24 S. E. 426, which has been since cited with approval in a number of cases. This case is very much like *Cawfield v. Railway Co.*, 111 N. C. 597, 16 S. E. 703, except that the facts in this case are more favorable to the plaintiff than were those in that case. In that case (which was an open street car), the car stopped two minutes, and the conductor claimed that he did not see her getting off; and in that case, as in this, the defendant claimed that the plaintiff (Mrs. Cawfield) had time to have gotten off, and that it was her own negligence not to have done so, and that the conductor did not see her. But the court held that it was his duty to have seen her, and held the road liable. In that case Justice Clark dissented, and Shepherd, C. J., concurred in the dissenting opinion. But this dissent was not as to the merits of the case, but as to a question of abuse of privilege by counsel. Affirmed.

(123 N. C. 497)

STEVENS et al. v. SMATHERS.

(Supreme Court of North Carolina. Dec. 20, 1898.)

CASE ON APPEAL—EXCEPTIONS—SETTLEMENT.

1. Where the exceptions to appellant's case on appeal are served within the required time, appellant cannot complain that the statement of his case on appeal was not returned to him, but must have the case on appeal settled.

2. Where appellant's case on appeal is excepted to, and he fails to have it settled, the court may either take the case as modified by the exceptions as the case on appeal, or, in case of complication, remand it for settlement.

Appeal from superior court, Haywood county; Hoke, Judge.

Action by H. B. Stevens against C. L. Smathers and another. There was a judgment for plaintiff, and defendant Smathers appeals. Remanded.

Ferguson & Ferguson, for appellant. Merriam & Merriam and George A. Shuford, for appellee.

CLARK, J. The appellant's case on appeal was duly served, and in five days thereafter the appellee's exceptions were handed to the appellant's counsel, who accepted service thereof, as appears on the papers sent up. The appellant, however, thinking this insufficient, did not apply to the judge to settle the case, as he should have done, but, instead, sent up his "case on appeal," as if it had not been excepted to, and insists it is the true case on appeal; and the appellee moves to dismiss on the ground that there is no legal case on appeal. The case of *McDaniel v. Scurlock*, 115 N. C. 295, 20 S. E. 451, is on all fours with this. It is there held that the appellant cannot complain that his statement of case on appeal was not returned to him within five days, when, in fact, the appellee's exceptions thereto were duly served on him within the five days, and that if, in such case, the appellant fails to apply to the judge to settle the case, this court may either take the appellant's "statement" as modified by the appellee's exceptions as the case on appeal (*Russell v. Davis*, 99 N. C. 215, 5 S. E. 895; *Owens v. Phelps*, 92 N. C. 231), or, in case of complication, remand the case to be settled by the judge (*Arrington v. Arrington*, 114 N. C. 115, 19 S. E. 145; *Hinton v. Greenleaf*, 115 N. C. 5, 20 S. E. 162). The latter is the condition here, and the case will be remanded that the judge may settle the "case on appeal," though it is optional with the court in such cases whether it shall not affirm the judgment, in the absence of a "case settled" on appeal (there being no errors on the face of the record proper). *Mitchell v. Tedder*, 107 N. C. 358, 12 S. E. 193; *Hinton v. Greenleaf*, supra.

Remanded.

(123 N. C. 499)

FELMET v. SOUTHERN EXP. CO.

(Supreme Court of North Carolina. Dec. 20, 1898.)

APPEAL—REVIEW—INSTRUCTIONS.

A refusal to give a requested charge cannot be reviewed, unless the evidence on which the request was based is made part of the case on appeal.

Appeal from superior court, Haywood county; Greene, Judge.

Action by M. C. Felmet against the Southern Express Company. There was a judgment for plaintiff, and defendant appeals. Affirmed.

W. T. Crawford, for appellant.

MONTGOMERY, J. The plaintiff delivered to the defendant, the Southern Express Company, at Marshall, a package of goods to be transported to a consignee in New York City. The receipt for the package contained the contract of shipment between the parties, and in the same there were conditions which limited the liability of the defendant for loss or damage to the property to its own line. The goods were found to be short in weight by the

consignee, and this action was brought to recover damages for the loss.

The defendant requested the court to instruct the jury that, if the defendant company delivered the goods to the Adams Express Company at Washington, D. C., for the purpose of having them forwarded to their destination, the defendant would not be liable for the loss after the goods were received by the Adams Express Company, unless there was a special contract to that effect, and that the burden of proof was on the plaintiff to show such contract. The court refused to give the instruction. The question sought to be presented by the defendant's appeal we cannot consider, for the reason that it nowhere appears in the statement of the case that there was any evidence tending to show that the goods were delivered by the defendant to the Adams Express Company, a connecting express line; nor is such delivery admitted as a fact in the case. No part of the evidence is sent up with the case, and the only admitted facts were the delivery of the goods at Marshall to the defendant company, the receipt to the plaintiff for the same, and the shortage in the weight of the goods, discovered by the assignee in New York. It is always to be desired that appeals should be heard on their merits, but this cannot be done at the expense of sacrificing important and necessary rules of practice. Instructions of law given by the court to the jury must be founded on some phase of the evidence, or on the admitted facts, when there is to be an application of the law to facts admitted or found by the jury; and, unless there appear in the statement of the case on appeal the admitted facts, or the evidence upon which instructions were asked, we cannot tell whether the instructions are merely theoretical propositions of law or not.

From what we have said, the second and third exceptions of the defendant need not be considered, for, if it should be conceded that the defendant's views of the law, as set out in the instructions to which those exceptions were made, be the correct views, they can avail the defendant nothing. The rulings of his honor would only be a dissertation on the law, and, even if erroneous, could have no bearing on the case as it is constituted on the appeal. The appellant must show to this court that there has been error in the court below, or the judgment of that court must be affirmed; and, if error is shown, but the error is harmless, the judgment will not be disturbed. Affirmed.

(123 N. C. 511)

TUCKER v. SATTERTHWAITE et al.

(Supreme Court of North Carolina. Dec. 6, 1898.)

BOUNDARIES—ESTABLISHMENT—REVERSED SURVEYS—INTENTION.

1. A grant described a posterior line as from a certain point, which is agreed on by both par-

ties; "thence W. 290 poles, to J.'s line." There were no natural objects called for in the grant in relation to said line. The line claimed by defendant as the true one strikes the J. line 470 poles from the agreed point, which he claims is the proper place of intersection if the line from the beginning point be reversed. A line due west would strike the J. line at a distance of 299 poles. *Held*, that the line due west is the proper one.

2. The location of a posterior line in a grant cannot be controlled by a reversed survey.

3. Where some of the boundaries as described in a grant are designated as running with an earlier grant, the boundaries of the earlier grant cannot be located or controlled by the boundaries of the second grant.

4. The possible intentions of a party in running a line of a grant will not control courses and distances as recited in the grant.

Douglas and Clark, JJ., dissenting.

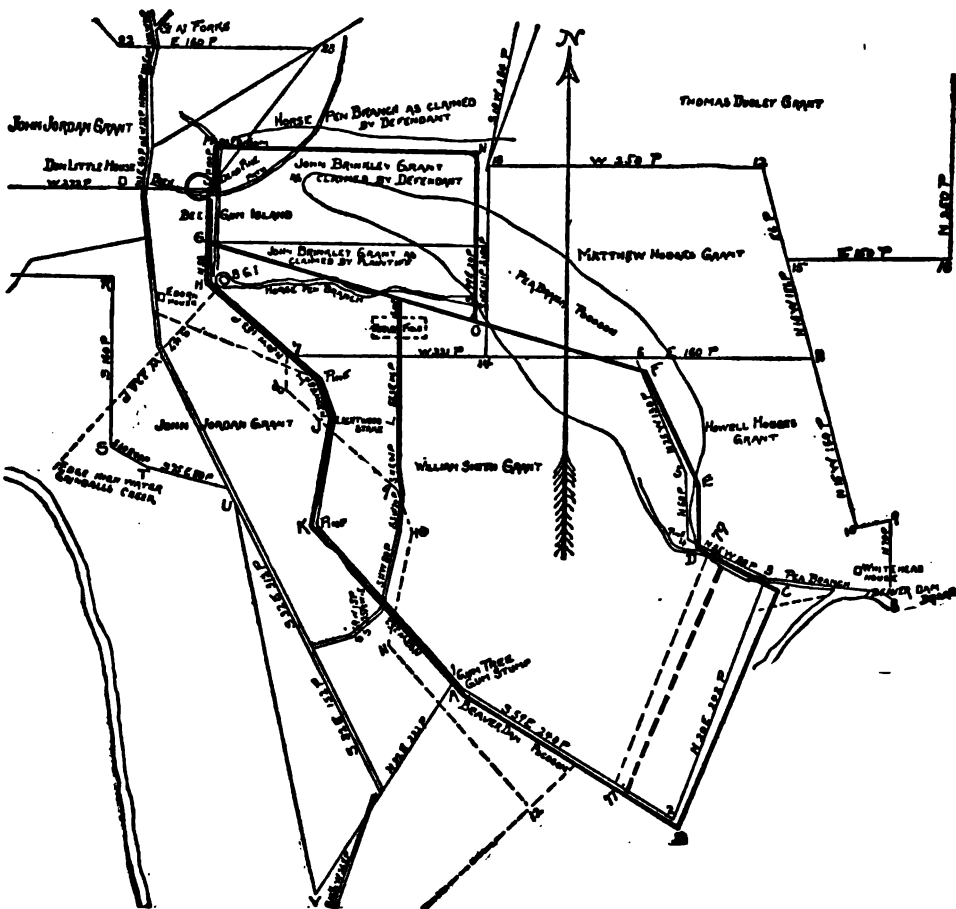
Appeal from superior court, Pitt county; Timberlake, Judge.

Trespass by Florence P. Tucker, individually and as executrix of R. S. Tucker, deceased, against J. H. Satterthwaite and others. From a judgment for plaintiff, defendants appeal. Affirmed.

The following is a map of the land in controversy:

T. J. Jarvis and Bond & Fleming, for appellants. W. B. Rodman and Jones & Boykin, for appellee.

FURCHES, J. On the 6th day of November, 1784, the state granted to William Smith a certain tract of land in Pitt county, beginning at a gum in Beaver Dam pocoson and John Jordan's corner; thence S., 59 deg. E., 240 poles; thence N., 20 deg. E., 242 poles; thence N., 66 deg. W., 80 poles; thence N. 60 poles; thence N., 25 deg. W., 120 poles, to a pine; thence W. 290 poles, to John Jordan's line; thence S., with Jordan's line, 40 poles; thence S., 35 deg. E., 130 poles; thence S., 20 E., 40 poles; thence S., 10 deg. E., 100 poles; thence to the beginning. On the 21st day of October, 1782, the state granted to John Brinkley a tract of land bounded as follows: "Beginning at a pine, John Jordan's corner, in the Bee Gum Island; thence N. 40 poles, to a pine; thence E., 240 poles, into Matthew Hodges' line; thence, with his line, S. 122 poles, to a pine into William Smith's line; thence, with his line, west 240 poles, to a pine, his corner in Jordan's line; thence, with Jordan's line, to the beginning." Bee Gum



island is not located, and cuts no figure in the case. And on the same day, the 21st of October, 1782, the state granted to John Jordan a tract of land, the second call of which strikes the William Smith grant at its beginning corner; thence calling for an agreed line with William Smith, N., 42 deg. W., 202 poles; thence N., 10 deg. E., 100 poles; thence N., 20 deg. W., 40 poles; thence N., 50 deg. W., 130 poles; thence N. 86 poles,—which carries the Jordan line further north than the intersection of the northern boundary of the Smith grant, as claimed by either party. There appears to be some inconsistency in the calls and dates of these grants. The John Brinkley grant is dated October 21, 1782, calling for the line of the William Smith grant, dated November 6, 1784. But this is susceptible to explanation, from the fact that the Smith survey was made on the 1st day of August, 1781, and the Brinkley survey was made on the 9th day of October, 1781. The plaintiff is admitted to be the owner of the lands included in the Brinkley grant, and the defendant is admitted to be the owner of the lands included in the Smith grant. This being so, the sole question depends upon the location of the northern boundary line of the Smith grant. The Brinkley grant, calling for this line of the Smith grant, and thence with it west to Smith's corner, on the Jordan line, the boundary line of the Smith grant is necessarily the southern boundary of the Brinkley grant. This was recognized on the argument as the sole question in the case, the defendant's counsel stating this to be so, and abandoning all other exceptions he had in the record of the case on appeal.

To locate the northern boundary of the Smith grant, it is necessary to start at the beginning corner, which is admitted by both parties to be at A on the map, then to B, then to C, then to D, then to E, and then to F. These points are all agreed to by both parties, including A and F. The call from F is west 290 poles, to John Jordan's line, which the plaintiff says is at 44 on the map. The defendant admits that a due west line run from F 290 poles would strike the Jordan line at 44, as claimed by the plaintiff, and that, if this is the correct line,—that is, the northern boundary of the William Smith grant,—then the plaintiff is entitled to recover. But the defendant claims that this is not the northern boundary line of the Smith grant, and contends that it runs from F to G. And the plaintiff admits that, if this line from F to G is the true boundary line,—that is, the northern boundary line of the Smith grant,—she is not entitled to recover. The defendant claims to arrive at the conclusion that G is the proper termini of the line from F west 290 poles to the Jordan line, by reversing the calls and distances, from the beginning corner at A, or, rather, by surveying the John Jordan line, north from A, according to course and distance; and the defendant claims that this will show G to be the proper

termini of the west end of the line from F. This contention of the defendant violates all rules of construction, as we are taught to understand them. The first general rule, to which we know of no exception, is that, from a known or an agreed point, course and distance must govern, unless there is some natural object called for in the deed or grant that is more certain than the course and distance called for. F is the last admitted corner in the Smith grant, and the call from this station is "west 290 poles, to Jordan's line." There is no natural object, to change the course, called for in the grant, as the only natural object called for in the grant is Jordan's line, and this is reached by running the course called for. The distance called for, to intersect the Jordan line at 44 (this being the course of the call), is only 9 poles more than the distance called for in the grant; while the distance from F to G, the point of intersection claimed by the defendant, is 470 poles,—180 poles more than the distance called for in the grant. And, when this line of 470 poles reaches G, it strikes the same natural object that it strikes at 44 in running the course called for in the grant. We admit that if the call in the Smith grant had been west 290 poles, to Jordan's line, and that line could not have been reached except at G, the line in that event should go from F to G. But that is not the case. The natural object called for is reached at 44 by running the course called for in the grant, at a distance of only 9 poles more than called for in the grant. But, as has been said, the defendant claims to arrive at the conclusion that G is the point of intersection by reversing the line from A, the admitted beginning corner of the Smith grant, and by running the John Jordan line north from the beginning corner at A. This cannot be done, for reasons appearing in the grant, nor can it be done for legal reasons established by the rules of interpretation in such cases. The physical or mathematical reason contained in the grant is that neither course nor distance is given in the last call of the Smith grant,—“thence to the beginning.” This makes it physically or mathematically impossible to reverse this line. And as there are no known or admitted corners in the Smith grant, between the intersection of the line running west to the Jordan line, whether at G or at 44, it cannot be reversed. It cannot be reversed for the purpose of fixing the intersection of the line west from F for legal reasons. The Smith grant was run from A to B, from B to C, from C to D, from D to E, from E to F, and therefore the line from F and those following are what is termed a “posterior line,” and cannot be located by a reversed survey. To locate a line, the original order of survey must be observed and followed, and a posterior line cannot be controlled by a reversed survey. This rule is too firmly established by numerous decisions of this court to be disputed now. *Duncan v. Hall*, 117 N. C. 443, 23 S.

E. 362; *Norwood v. Crawford*, 114 N. C. 513, 19 S. E. 349; *Graybeal v. Powers*, 76 N. C. 66; *Harry v. Graham*, 18 N. C. 76. It is the Smith grant that we are locating, and it is the northern boundary line which is in dispute. This line is not bounded by the Jordan grant, and cannot be located by a survey of that grant. This could not be done if the Smith grant had called for the Jordan line, south from the point of intersection, which it does not do; and the call in the Jordan grant for the line of the Smith grant can be no more than a declaration of Jordan that his line runs with Smith's. The Jordan grant calling to run with Smith's grant would be controlled by the Smith grant, and not the Smith grant by the Jordan grant. So, it is plain that the Smith grant cannot be located by the Jordan grant.

It is contended (though not by counsel of defendant) that Smith intended to run his line from F somewhere north until he reached a point east of G, and then west to G. This may be so, but, if he did, we do not know it, and there is nothing in the grant to show that he did. Whatever we may suppose his intentions were, these are but conjectures now. It is certain he did not do it, and we cannot do it for him. *Graybeal v. Powers*, supra. By every rule of construction known to us, the dividing line between the plaintiff and the defendant must run from F west to the Jordan line, which is admitted to be at 44. The judgment below must be affirmed.

DOUGLAS, J. I cannot concur in the opinion of the court. This is an action in the nature of trespass, brought to try the title to certain lands, which depends upon the proper location of two grants,—one to William Smith, and the other to John Brinkley. The real question in dispute seems to be whether the line constituting the northern boundary of the Smith grant and the southern boundary of the Brinkley grant runs from F, an admitted corner, to G, or to 44, as shown on the plat filed in the case. The usual issues were submitted, all of which were found for the plaintiff. The court charged the jury, as a matter of law, that the line between the Smith and Brinkley grants must be run from F to 44, as contended by the plaintiff. To this instruction the defendant excepted, and it is the only exception necessary for us to consider in our view of the case.

The grants herein referred to are as follows: (1) A grant from the state to William Smith, dated November 6, 1784, in which the description is as follows, the beginning corner being at A: "Beginning at a gum in Beaver Dam pocoson and John Jordan's corner; then down the pocoson, the dividing line between said Smith and John Brinkley, south, 59 degrees east, 240 poles, in said pocoson; then north, 20 degrees east, 232 poles, to a gum in the Pee branch and dividing between said Smith and William Little; then, running a dividing between Smith and How-

ell Hodges, north, 65 degrees west, 80 poles, to a gum in said branch; then north 60 poles, to a pine; then north, 25 degrees west, 120 poles to a pine; then west 290 poles, into John Jordan's line; then, along his line, south 40 poles, to a pine; then south, 50 degrees east, 130 poles, to a pine; then south, 20 degrees east, 40 poles, to a pine; then south, 10 degrees east, 100 poles, to a pine, and to the beginning." (2) A grant from the state to John Brinkley, dated October 21, 1782, containing the following description, the beginning corner being at H or L: "Beginning at a pine, John Jordan's corner, in the Bee Gum island; then north 40 poles, to a pine; then east 240 poles, to a pine, into Matthew Hodges' line; then, with his line, south 132 poles, to a pine into William Smith's line; then, with his line, west 240 poles, to a pine, his corner in Jordan's line; then, with Jordan's line, to the beginning." (3) A grant from the state to John Jordan, dated October 21, 1782, containing the following description, the beginning corner being at V: "Beginning at a pine, Jordan's corner; then, running the dividing line, John Brinkley and said Jordan, north, 32 degrees east, 232 poles, to a gum in the Beaver Dam swamp; then, running agreed line between William Smith and said Jordan, north, 42 degrees west, 200 poles, to a pine; then agreed line, the second time north, 10 degrees east, 100 poles, to a pine; thence agreed line north, 20 degrees west, 40 poles, to a pine; then agreed line again north, 50 degrees west, 130 poles, to a pine; then agreed line again north 86 poles, to a pine in a branch on the side of Bee Gum island; then west 272 poles, to a pine on a branch, and crossing one pocoson; then, down the branch, south 80 poles, to a water oak, and in James Barrow's line; then, with his line, east 186 poles, to his corner; then, with his other line, south 160 poles, to Jordan's own line; then, with his line, south, 60 degrees east, 40 poles; thence, with his other line, south, 75 degrees east, 80 poles; then, along his other line, to the beginning." The surveys on which these grants were issued were made as follows: The John Jordan survey, on July 31, 1781; the William Smith survey, on August 1, 1781; and the John Brinkley survey, on October 9, 1781. While the Brinkley grant was issued before the Smith grant, it is based on a later survey, and, calling for the Smith line, must be treated as the junior grant. Therefore the Smith grant must be located first, and its northern boundary being called for by the Brinkley grant, will become the southern boundary of the latter survey. There is thus no conflict; but, even if there were, the Brinkley grant would be compelled to give way under the act of 1777, which provided that a senior grant issued on a junior entry should be void.

It is worthy of note that the Jordan and Smith surveys were made on consecutive days, and were practically simultaneous. The lines between them were evidently run but

once, and were in their origin dividing lines, constituting really one continuous boundary, made of several short lines, with slightly varying courses. This line seems never to have been disputed, and there is positive testimony that it has been repeatedly run without change of location, once while the Jordan land belonged to the deviser of the plaintiff. Their boundaries in reverse order completely coincide wherever they touch. This line may be regarded as settled, and becomes an important factor in the determination of the issue now before us. Both the Smith and Brinkley grants, under which the defendants and the plaintiff respectively claim, begin and end by their very terms in the Jordan line. Therefore this Jordan line must be located before the other surveys can even get a starting point. But the Brinkley grant calls for John Jordan's corner as its beginning point, and, when it reaches the line now in question, it calls for Smith's line, and thence, with Smith's line, to a pine, Smith's corner in Jordan's line. How can we better locate Smith's corner in Jordan's line than by fixing it where Smith and Jordan located it in its genesis? If we begin the Brinkley survey at L, as contended by the defendants, we can run every course and distance without material variation and interfere with no one. If, however, we begin at H, as contended by the plaintiff, and run thence to Y, and south to 14, we cannot possibly form a parallelogram, as called for in the grant. Running east 240 poles, south 132 poles, and west 240 poles, must bring this point directly south of the beginning. And yet 44 is evidently not directly south of H. It is admitted that, if Brinkley's line is run from F to 44, it must stop at Jordan's line, which is considered as a natural boundary. But, if Jordan's line from H to I is a natural boundary as to Brinkley, why is it not a natural boundary as to Smith, being an agreed line between Smith and Jordan, for such is evidently the meaning of the grants? *Jawett v. Hussey*, 70 Me. 433. If we begin the Brinkley grant at H, as claimed by the plaintiff, we not only cut off a corner of that grant itself, but we utterly destroy the agreed and well-settled line between Smith and Jordan, which is the beginning point and foundation line from which both the plaintiff and the defendants begin their surveys and derive their title. It will be obliterated from G to 44, and south of that it will proceed in the most eccentric fashion, cutting in first on Jordan, then on Smith, and back again on Jordan, and finally ending in somebody's land at least 100 poles southeast of the beginning corner. Surely, an honored age of 100 years should protect it from such desecration.

There is positive testimony tending to show that there were marked trees at L, M, N, and G, the corners of the Brinkley grant, as claimed by the defendants, and that there were no marked corners except the common corner, G, if it were located as claimed by the plaintiff.

Among others, James Taylor, a surveyor, testified that he "found an old marked pine at Bee Gum island, corner of John Jordan grant, and beginning corner of John Brinkley grant, as claimed by the defendants, at L. Pine set upon its stump showed very old marks pointing south, west, and north. At M, found a gum marked as a corner. At N, found an old marked pine. At G, found a stake with three old marked trees as pointers, two pines and a gum. These marked trees were found in running the calls of the John Brinkley grant as claimed by the defendants. Found no marked trees in running the same grant as claimed by the plaintiff. Both sides agreed that A was the beginning corner of the Smith grant, and also corner of John Jordan grant. At K, found an old marked pine. At H, found an old marked pine, marked as a corner, and pointing the direction of the John Jordan grant lines, and this old marked pine is 40 poles south of the point G." This evidence clearly tended to prove the contention of the defendants. The old marks on the pine at L were especially significant. Country surveyors, in the homely phrase of the woods, say "Howdy" and "Goodbye" whenever they meet a tree directly in the line; that is, they chop it on the side where the line first strikes, and again where the line leaves it. The relative position of these chops distinguishes a line tree from a corner tree. If the chops are on sides directly opposite to each other, the line passes on without variation; but, if the marks are not opposite to each other, it is necessarily a corner tree, the distance around the tree between the marks roughly indicating the angle of the survey. The same tree may be the corner of two tracts in the line of the third, and would thus be marked on three sides. Where, as in the present instance, the survey of a parallelogram begins in the middle of one side, the last line would come up behind the first on the same course, and would therefore be marked as a straight line. This would be so were the Brinkley grant to begin at L. It is true that beginning at A, and running the courses and distances of the Smith grant, we come to the admitted corner, F. Thence the call is, with Smith's line, west 240 poles, to a pine, Smith's corner in Jordan's line. Ordinarily, this line would be run according to the course and distance; that is, directly west to Jordan's line at 44. But we have seen that this would completely disarrange all the remaining calls of this grant, seriously disturb the boundaries of the Jordan grant, and practically obliterate an old and well settled line, which is the beginning point of both surveys now under consideration. It is evident that such could not have been the intention of the grantor. The original plat printed in the record does not give us much assistance, as it omits two admitted lines of the Smith grant, one for 40 poles, and the other for 200 poles. It seems probable that another line has been omitted from the Smith grant, running perhaps from F to Y, which would reconcile the

calls of all the grants. But, be that as it may, I am satisfied that G was intended to be the northwest corner of the Smith grant; and, as F is the next admitted corner, the line in dispute would run from F to G, as contended by the defendants, and not from F to 44, as contended by the plaintiff.

The next question is, can we give effect to what appears to us the evident intent of the grantor, and keep within the established rules of construction as laid down by the courts? I think we can. In the construction of all deeds and grants, there is one essential object to be kept in view, and that is to ascertain the true intent of the grantor, and to give full effect to that intention when not contrary to law. All rules of construction adopted by the courts are simply means to a given end, being those methods of reasoning which experience has taught are best calculated to lead to that intention. Hence all authorities unite in saying that no rule can be invoked, no matter how correct in its general application, that tends to defeat the intention of the grantor. This doctrine is of such universal acceptance as to require but few citations, more to illustrate its extent than to prove its existence. It is well expressed by Chief Justice Shaw in *Salisbury v. Andrews*, 19 Pick. 250, 252, as follows: "In construing the words of such a grant, where the words are doubtful or ambiguous, several rules are applicable, all, however, designed to aid in ascertaining what was the intent of the parties, such intent when ascertained being the governing principle of construction. And first, as the language of the deed is the language of the grantor, the rule is that all doubtful words shall be construed most strongly against the grantor, and most favorably and beneficially for the grantee. Again, every provision, clause, and word in the same instrument shall be taken into consideration in ascertaining the meaning of the parties, whether words of grant, of covenant or description, or words of qualification, restraint, exception, or explanation. Again, every word shall be presumed to have been used for some purpose, and shall be deemed to have some force and effect, if it can have. And further, although parol evidence is not admissible to prove that the parties intended something different from that which the written language expresses, or which may be the legal inference and conclusion to be drawn from it, yet it is always competent to give in evidence existing circumstances, such as the actual condition and situation of the land, buildings, passages, water courses, and other local objects, in order to give a definite meaning to language used in the deed, and to show the sense in which particular words were probably used by the parties, especially in matters of description." *Salisbury v. Andrews*, supra, a case cited by nearly all text writers with uniform approval. In *Smith v. Parkhurst*, 3 Atk. 135, Lord Chief Justice Wills says: "Another maxim is that such a construction should be made of the words of a deed as is most

agreeable to the intention of the grantor. The words are not the principal thing in a deed, but the intent and design of the grantor. We have no power, indeed, to alter the words or to insert words which are not in the deed, but we may and ought to construe the words in a manner the most agreeable to the meaning of the grantor, and may reject any words that are merely insensible. Those maxims, my lords, are founded upon the greatest authority. Coke, Plowden, and Lord Chief Justice Hale, and the law commends the astutia—the cunning—of judges in construing words in such a manner as shall best answer the intent. The art of construing words in such a manner as shall destroy the intent may show the ingenuity of, but is very ill becoming, a judge." In *Campbell v. McArthur*, 9 N. C. 33, this court held that "a mistake in the course and distance of a deed should not be permitted to disappoint the intent of the parties, if that intent appears, and if the means of correcting the mistake are furnished either by a more certain description in the same deed, or by reference to another deed containing a more certain description." *Ritter v. Barrett*, 20 N. C. 133; *Credle v. Hays*, 88 N. C. 321. *Devl. Deeds*, § 835, says: "But it is doubtful how far arbitrary rules can be of service where the only object is to determine the intention of the parties. In fact, the truth was well expressed by Mr. Justice Sanderson (*Walsh v. Hill*, 35 Cal. 481, 487), who said that 'in the construction of written instruments, we have never derived much aid from the technical rules of the books. The only rule of much value is to place ourselves as near as possible in the seats which were occupied by the parties at the time the written instrument was executed; then, taking it by its four corners, read it.' This is the main object of all construction. When the intention of the parties can be ascertained, nothing remains but to effectuate that intention." Also, *Id.* §§ 836, 839, 1013; *Sedgw. & W. Tr. Title Land*, § 856; *Tied. Real Prop.* § 827; *Washb. Real Prop.* p. 403, par. 21; *Id.* p. 408, par. 24. While the deed itself is the evidence of the intent of the parties, there are frequently latent ambiguities, which must be explained by parol testimony or other evidence allunde, such as deeds or plats referred to therein. It is well settled by this court in repeated adjudications that a mistake in course and distance will not be permitted to defeat the intent of the parties if such intent otherwise appears from the deed, and that any course and distance may be disregarded when it conflicts with a natural or artificial monument, a marked line of the same tract, or a well-known line of another called for in the deed. A number of authorities are cited in *Bowen v. Gaylord*, 122 N. C. 816, 29 S. E. 340, which it is unnecessary here to repeat. Brief reference to a few will show to what extent this rule has been carried.

In the leading case of *Person v. Roundtree*, 2 N. C. 378, note, repeatedly cited and approved, the course of the first line wa

"north" from a creek, so as to put the entire tract on the north side. The marked line ran south from the creek, so as to put the whole tract on the south side of the creek. It was held that the marked line controlled. In *Anonymous v. Beatty*, 2 N. C. 376, this court says: "The beginning of the last line is not disputed; the only question is where it terminates. * * * Should we run from the beginning of the last line but one, directly to the hickory at the point of the island, we leave the marked line, proved to be marked as a boundary, and leave out a part of the land intended for the patentee. The court therefore is of opinion that the marked line should be pursued till it strikes the island, and that from thence to the hickory along the edge of the island shall be deemed another boundary, and the last line be drawn from thence to the beginning." This opinion corresponds with the suggestion that an entire line running from F to Y may have been omitted from the grant now in question. In *Cherry v. Slade's Adm'r*, 7 N. C. 82, these matters are elaborately treated by the first chief justice of this court. In *Hough v. Dumas*, 20 N. C. 328, this court affirmed the judgment, approving the charge of Chief Justice Pearson, then on the superior court, in which he said: "That, if the jury were satisfied that the corner of the Gad tract at A was the corner called for in the Love grant, then they must go to A; and it made no difference whether from I they went to T, and then around to A, or whether from I they went to U, W, Q, A, or to V, X, Q, A, for in either way, after getting to A, then the next call, which it was admitted would go to N, an established corner, and so around, would take in the land in dispute." So, in the case at bar, if the jury believe G to be the true corner of the Smith grant, it makes no difference whether they go from F direct to G, or from F to Y, and thence to G, as either way "would take in the land in dispute." In the case of *Credle v. Hayes*, 88 N. C. 321, 324, this court held that every line in the deed should be changed, saying: "If the calls of courses in the deed should be held to be the true boundary of the land conveyed, the intent of the parties would be entirely disappointed; for the deed, according to the calls, covers no part of the land evidently intended to be conveyed." In *Long v. Long*, 73 N. C. 370, an additional line was inserted by the court, citing *Cherry v. Slade's Adm'r*, supra, and *Shultz v. Young*, 25 N. C. 385. In *Clarke v. Wagner*, 76 N. C. 463, it was held that a call in a grant reading as follows: "Beginning on a stake, the upper end of the island, thence south, 35 degrees east, 53 poles, to a stake, the lower end of the island," which ordinarily would be a straight line, should be run from the upper end of Island No. 1 to the upper end of Island No. 2, thence around Island No. 2, back to the upper end of Island No. 1, and thence, along the second call, to the third corner. Thus, to

effectuate the intent of the grantor, a call which under the ordinary rules of construction would be a straight line is cut up into three different lines, two straight, and the other meandering, varying in the aggregate nearly 180 degrees from the original course.

It is contended on behalf of the plaintiff that, to locate a line, the original order of survey must be observed and followed, and that a posterior line cannot be controlled by a reversed survey,—citing us to *Duncan v. Hall*, 117 N. C. 443, 23 S. E. 362; *Norwood v. Crawford*, 114 N. C. 513, 19 S. E. 349; *Graybeal v. Powers*, 76 N. C. 66; and *Harry v. Graham*, 18 N. C. 76. This is undoubtedly the general rule, but every one of these cases recognizes the principle that the rule does not apply where the posterior line is more certain than the prior line, and would more clearly indicate the intent of the grantor. See above cases, 18 N. C. 79, line 7; 114 N. C. 518, line 1 of opinion, 19 S. E. 349, and 114 N. C. 520, line 2, 19 S. E. 350; 117 N. C. 446, line 8, 23 S. E. 362. *Graybeal v. Powers* does not seem to touch this point. I think the true rule is laid down in *Harry v. Graham*, supra, as cited by Chief Justice Pearson in *Safret v. Hartman*, 52 N. C. 199, in which it was held that the survey could be reversed, to wit: "It was decided in that case [*Harry v. Graham*, 18 N. C. 76] that a posterior line could not be reversed, in order, by its intersection with a prior line, to show the corner, unless such posterior line was certain, because to do so would be to extend the distance of the prior by the course of the posterior line. The chance of mistake resting on one or the other being equal, it was deemed proper to follow the order in which the survey was made. But the court say: 'So if, even upon such calls as this deed contains, a line of marked trees was found, by tracing the line back from the post oak, corresponding with the survey of the 300-acre patent, that might carry the other line to the point of intersection, because it would prove an actual survey, and be the evidence of permanent natural objects, to show where the black oak once actually stood, which, wherever it stood, would be the terminus, and control the distance mentioned in the deed.'" See, also, *Dobson v. Finley*, 53 N. C. 495, and *Cowles v. Reavis*, 109 N. C. 417, 13 S. E. 680.

In the case at bar, if the Smith boundary were reversed, it would follow along the well-settled and marked line of Smith and Jordan to the corner G, which the testimony tends to show has been actually surveyed at least four times, once by the deviser of the plaintiff. The beginning corner is presumed to have been selected by the parties on account of its greater certainty, but any other corner that can be definitely ascertained is of equal dignity, especially as far as its connecting lines are concerned. 4 Am. & Eng. Enc. Law (2d Ed.) p. 763, and note. It is a leading and well-settled rule in the cou-

struction of all instruments, laid down by Gaston, J., in *Shultz v. Young*, supra, "that effect should be given to every part thereof, and in expounding the descriptions in a deed or grant of the subject-matter thereof, they ought all to be reconciled if possible, and as far as possible. If they cannot stand together, and one indicate the thing granted with superior certainty, the other may be disregarded as a mistaken reference." Washb. Real Prop. (5th Ed.) p. 422, par. 37, and cases cited. In *Ferguson v. Bloom*, 144 Pa. St. 549, 565, 23 Atl. 52, the court holds that "as between two proposed methods of location, where the work on the ground will permit, that should be preferred which fills the largest number of the calls of the return of survey." In view of these established principles as applied to the facts in this case, I think the court below erred in instructing the jury that the line in dispute must run from F to 44, as a matter of law. The location of this line should have been left to the jury as a mixed question of law and fact, under proper instructions from the court. As said by Pearson, C. J., in *Clarke v. Wagner*, supra: "This is the governing fact in the case, and ought to have been distinctly left to the jury, with instructions to consider all of the evidence and the surroundings of the case, including the marked line trees and corners, and the plat annexed to the grant, the tradition of old persons, the land and the nature of the river, * * * and other like matters." This is substantially the instruction approved in *Reed v. Proprietors*, 8 How. 274, 288. For error in the instructions of the court as above set forth, I think there should be a new trial.

CLARK, J., concurs in the dissenting opinion.

(123 N. C. 577)

McMILLAN et al. v. McMILLAN et al.

(Supreme Court of North Carolina. Dec. 20, 1898.)

JURY TRIAL—PARTITION—APPEALABLE ORDER.

1. On a motion, made on affidavits, to set aside a report of commissioners in partition proceedings, petitioner is not entitled as of right to a jury trial.

2. Under Code, § 252, authorizing an appeal to the superior court from any decision of the clerk on an issue of law or legal inference, a clerk's order vacating a report of commissioners in partition proceedings is appealable.

3. An appeal from a clerk's order setting aside a report of commissioners in partition proceedings because of inequality of the partition, there being no other question involved, is neither fragmentary nor premature.

4. A judge in chambers has jurisdiction of appeals from commissioners appointed in special proceedings to partition land.

Appeal from superior court, Pender county; Robinson, Judge.

Action by W. D. McMillan and others against H. J. McMillan and others for partition. An order of the clerk setting aside the commission-

ers' report was reversed by the superior court, and defendants appeal. Affirmed.

J. D. Bellamy and J. T. Bland, for appellants.
E. K. Bryan and Junius Davis, for appellees.

MONTGOMERY, J. The commissioners who were appointed in the special proceeding to make partition of the lands described in the petition made their report in due form of law. That report, upon its face, is regular in all respects, and apparently bears no mark either of irregularity or injustice. Exceptions were filed to it by the defendants Atkinson, based upon inequality of partition, and nothing more. Affidavits on that matter were introduced before the clerk by both the plaintiffs and the defendants. On the hearing of the affidavits, that officer set aside the report of the commissioners, and ordered a redivision of the lands. From that order the plaintiffs appealed to the judge of the district. The matter was heard by his honor upon consideration of the evidence (affidavits) and argument of counsel, and he set aside the order of the clerk, confirmed the report of the commissioners, and ordered the enrollment and registration of his decree. There was an appeal from the order of the judge by the defendants Atkinson, and the assignments of error were: "(1) The decision of the court that the affidavits did not raise an issue of fact for the jury; (2) that the order of the clerk did not affect a substantial right, and was not appealable; (3) that the report of the commissioners should stand as made."

The question whether or not a report of commissioners appointed to make partition of lands, where the exceptions are in the nature of allegations of inequality of partition, simply, without a further charge of omission of some matter of importance in the action of the commissioners, or of fraud or collusion on their part, is valid, is not before us, and hence that matter need not be considered. This case is to be treated as if matters had been raised in the affidavits and exceptions which would warrant the clerk and the judge in considering the evidence.

The first contention of the defendants (that is, that the matters stated in the affidavits raised issues of fact for the jury, and that the judge had no power to find the answer to these issues) cannot be sustained. It is true that, where an issue of fact is made in the superior court before the clerk, that issue must be transferred to the superior court, at term time, for trial, and there must be tried by a jury, unless that right is waived. But in *Lovinger v. Pearce*, 70 N. C. 167, the court pointed out that there were questions of fact, as distinguished from issues of fact. The court there said: "And so, in a case like the present one, where a motion is made to vacate an order made in any court, the court must of necessity hear the fact upon which the motion is founded; and the parties are not entitled, as a matter of right, to make an issue of fact and demand a jury trial." But does the motion made before the clerk in this case,

to set aside the report of the commissioners, stand on the same footing as a motion made in a cause to vacate an order of the court already made? It seems to have been so decided in the case of *Simmons v. Foscue*, 81 N. C. 64. That was a case in which the commissioners appointed to divide the lands had made their report, and the defendant filed exceptions thereto. The affidavits were considered by the judge, and a decree made by him upon their consideration. In that case this court said: "But of the force and effect of the evidence in inducing the exercise of that reasonable discretion reposed by law in the judge when called on to confirm the action of the commissioners, he alone must determine; and, if no error in law is committed, we cannot reverse his decision."

The second contention of the defendants is that the order of the clerk setting aside the report of the commissioners did not affect any substantial right of the plaintiffs, and therefore was a matter of discretion with the clerk, and is not appealable. It is true that in *Lovnier v. Pearce*, supra, it was held that the matter of the refusal of the probate judge to set aside the report of the commissioner was one of discretion; but the court said, "The discretion is not willful or arbitrary, but legal." The exercise of the discretion of the clerk in the case before us was not purely a matter of law, yet it was one of legal inference, and, under the Code, was appealable. Code, § 252.

But the defendants further contend, under their second exception, that, even if the order of the clerk was appealable, yet the appeal was premature and fragmentary. Fragmentary appeals will not be allowed, as has been often decided by this court; but it seems to us that in no proper sense can this appeal be called fragmentary. When it was taken there was but a single question involved, and that was whether or not the lands had been properly divided by the commissioners among the tenants in common. If any other question was ever involved, it was out of the way, either by the admissions in the pleadings, or by the terms of the decree, from which there had been no appeal. The only thing involved in the case is before us on the appeal. The second exception in neither of its aspects can be sustained.

The third exception cannot be sustained, for the reasons already given in this opinion. The judge properly had the matter before him, there is no error in law apparent upon his ruling, and the evidence upon which he found his facts we will not review. There is no error.

(123 N. C. 390)

TAYLOR et al. v. McMILLAN.

(Supreme Court of North Carolina. Dec. 13, 1898.)

PAROL TRUSTS—ENFORCEMENT—EVIDENCE.

In an action to enforce a parol trust it appeared that the land was sold under execu-

tion, and bought in by the judgment creditor, who, at the debtor's request, on payment of the debt, deeded it to the latter's son, who agreed to deed it back to his father, when he should so request. The testimony disclosed that the conveyance was made to defeat creditors, but it was not alleged that the agreement was made for that purpose. *Held*, that the trust should have been enforced.

Appeal from superior court, Ashe county; Coble, Judge.

Action by Cynthia Taylor and others against James McMillan. There was a judgment of nonsuit, and plaintiffs appeal. Reversed.

W. W. Barber, for appellants. R. A. Doughton, for appellee.

FAIRCLOTH, C. J. The object of this action is to have a parol trust declared and enforced on land. It is admitted that the land described was sold by the sheriff under an execution against John McMillan, the father of plaintiffs and defendant, and was purchased by, and a deed made to, the judgment creditor, John F. Greer, conveying 114 acres. It is proved that at the time of this sale and subsequent agreement between said McMillan and the defendant (James McMillan), the former was indebted to one Ray by judgment in the sum of \$80, which was subsequently paid off and satisfied by John McMillan, who then demanded a deed from the defendant. It was also proved that after the sheriff's sale John McMillan requested the defendant to take the deed from Greer, saying "that Wash Ray had judgment against the land, and that, if he took it back in his name, said Ray would have the land sold again, and that he could not pay Ray at that time, but he would pay him, and then he must have the deed to his land back, and James McMillan (defendant) said he would take it, and he should have it back." John McMillan remained on the land till his death. Ray, Greer, and other witnesses gave evidence tending to show the above facts. When the plaintiffs rested their case, the defendant moved for judgment as of nonsuit on the ground that the plaintiffs' testimony "disclosed that the land in question was conveyed to James McMillan for fraudulent purposes at the instance of John McMillan, to wit, to hinder, delay, or defraud one Ray in collecting a debt against John McMillan." This motion was allowed, and judgment of nonsuit was entered, and the plaintiffs appealed.

That judgment is erroneous. A court of equity will not interfere with a contract if it be illegal, and against state policy, where the parties are in pari delicto. *Grimes v. Hoyt*, 55 N. C. 271. Where A. paid the purchase money for land, and had title made to B. on a parol trust for A., it was held that such trust was not embraced in the statute of frauds. But where it appeared that the contract was made to defraud creditors, the court will not interfere with the legal title. *Turner v. Eford*, 58 N. C. 106. Where both parties to an action have united to defraud

others, the public, or the due administration of justice, or in a transaction contra bonos mores, the courts will not enforce it against either party. *York v. Merritt*, 77 N. C. 213. The defendant relies upon these and similar decisions, but, unfortunately for him, these decisions do not fit the facts in the present case. There is no allegation in the pleadings that the agreement between the defendant and his father was made to defraud any one, and the plaintiffs do not allege any mistake in the deed or deeds, and ask to have the deeds corrected. They insist that the deeds speak as intended by the parties, and they seek to impress a parol trust on the legal estate by the aid of the court of equity, and to have the trust executed according to its terms and provisions. The sheriff's sale put the land out of the creditors' reach and beyond the debtor's control. It had been applied to his creditors, and the agreement was made between the defendant and his father after the sale, and there is no suggestion of any fraudulent purpose on the ancestor's part, but it does appear that he was moved by the commendable purpose of rehabilitating himself and family at the old homestead. He paid Ray's debt, and the defendant has paid nothing for the land, and his position looks more in bad faith towards the old man than the evidence discloses against the old man. If the evidence be true, the defendant's conduct is inexcusable, and it appeals in vain to the conscience of this court. The plaintiffs rely on *Link v. Link*, 90 N. C. 235, which is precisely in point, and so conclusive that we think a reference to it and the cases cited therein, and to the subsequent case of *Hughes v. Pritchard*, 122 N. C. 59, 29 S. E. 93, is sufficient. In *Link's Case*, *supra*, the parol agreement was made before, and in anticipation of, the sheriff's sale, and the agreement was enforced by this court. Error.

(123 N. C. 753)

STATE v. BARRETT.

(Supreme Court of North Carolina. Dec. 13, 1898.)

LARCENY—FELONIOUS INTENT—INSTRUCTIONS.

On a trial for larceny of an ax the jury were instructed that, if they believed that prosecutor missed an ax, and that the ax shown to be in possession of accused was that of prosecutor, they should find him guilty. *Held* erroneous, as it did not submit the question of felonious intent.

Appeal from superior court, Union county; Greene, Judge.

Milton Barrett was convicted of larceny of an ax, and he appeals. Reversed.

Armfield & Williams, for appellant. The Attorney General, for the State.

FURCHES, J. This is an indictment for the larceny of an ax. The defendant had been in the employ of the prosecutor, who was a sawmill owner, and some time after the de-

fendant left the prosecutor's employment he missed an ax. He testified that he did not know the ax was stolen, and, if it was stolen; he did not know that the defendant had stolen it. But there was evidence tending to show that some time after defendant left the prosecutor he went to work for one Shannon, and carried with him an ax; and there was evidence tending to show that the ax he carried with him to Shannon's was the ax that belonged to the prosecutor, and the one that he said he had lost. The defendant alleged, in explanation of his possession, that he traded for the ax, and got it from a strange negro from South Carolina. Upon this evidence the court charged the jury as follows: "If you believe from the evidence that the prosecutor missed an ax, and if you should believe that the ax described by the witness Shannon, as in the possession of the defendant, was that ax of prosecutor, and believe all this beyond a reasonable doubt, you will bring in a verdict of guilty, otherwise you will acquit the defendant." This was the whole charge, and the jury "brought in" a verdict of guilty. Defendant excepted, and appealed.

The charge is fatally defective, for the reason that it does not submit the question of felonious intent to the jury, which is one of the necessary ingredients of larceny. *State v. Coy*, 119 N. C. 901, 26 S. E. 120, and cases there cited. For this error the defendant is entitled to a new trial. We have before called attention to the careless manner in which juries are often charged, "if you believe" such a fact or facts, when the charge should be, "if you find from the evidence" such to be the fact or facts. This manner of charging the jury is probably the result of carelessness of expression. But it should not be indulged in, as there is a substantial difference in the two manners of charging the jury. A juror may very well believe a thing is so, when he would not be willing to find that it was a fact established by the evidence. For the error pointed out in the charge there must be a new trial.

(123 N. C. 749)

STATE v. AUSTIN.

(Supreme Court of North Carolina. Dec. 13, 1898.)

ASSAULT AND BATTERY—DEFENDING PROPERTY—EXCESSIVE FORCE.

1. Under Code, § 1754, providing that "any and all crops raised on land," whether by a tenant or cropper, in the absence of a contrary agreement, "shall be deemed and held to be vested in possession of the landlord and his assigns at all times," until the rent for said land, and all advancements made and expenses incurred in making and saving said crop, shall be paid, a landlord who used personal force necessary to defend such crops from being unlawfully removed before the rent and advancements were paid is not guilty of assault.

2. Threatening to beat with a stick, which accused had, certain persons who unlawfully entered on land, and attempted to remove crops, which accused, as the landlord, was entitled to hold, is not more force than the protection of his rights necessitates.

Appeal from superior court, Union county; Green, Judge.

J. E. Austin was convicted of crime, and he appeals. Error.

Osborne, Maxwell & Keerans, for appellant. The Attorney General, for the State.

CLARK, J. In *Harrison v. Ricks*, 71 N. C. 7, it is said: "A cropper has no estate in the land; that remains in the landlord. Consequently, although he has in some sense the possession of the crop, it is only the possession of a servant, and is in law that of the landlord. The landlord must divide off to the cropper his share. In short, he is a laborer receiving pay in a share of the crop. *McNeeley v. Hart*, 32 N. C. 63; *Brazier v. Ansley*, 33 N. C. 12." As against a cropper, the landlord always had the right to have possession of the crop. *State v. Burwell*, 63 N. C. 361. But it has now become immaterial whether the producer of the crop is a cropper or a tenant, under Code, § 1754, which provides that "any and all crops raised on land," whether by a tenant or cropper (in the absence of an agreement to the contrary), "shall be deemed and held to be vested in possession of the landlord or his assigns at all times until the rent for said land shall be paid to the lessor or his assigns, and until said party or his assigns shall be paid for all advancements made and expenses incurred in making and saving said crop." There is no evidence here that such payments had been made. The defendant was the landlord, and in taking charge of the basket of cotton, to carry it to his house, he was in the exercise of his legal right. Even if Henry Keziah had been the cropper or tenant himself when he seized the basket of cotton, and attempted by force to take it from the defendant, the latter used no more force than was necessary to protect his possession when he shook his stick at him, with a threat to strike, and was not guilty. *State v. Yancey*, 74 N. C. 244. Here, the condition of the defendant was still stronger, for the cropper or tenant was dead, and Henry Keziah was not his administrator. In entering upon the premises of the defendant, an old man of 82, with a multitude, after being forbidden to do so, and picking out and carrying off the crop, Henry Keziah and his companions were guilty of forcible entry as to the land, and of forcible trespass in removing the cotton after being picked out. He was a wrongdoer ab initio, and the defendant was only using sufficient force to protect the possession guaranteed him by the law. It is true that, if the cotton had already been carried off, the landlord could recover it by claim and delivery; but this is only an additional remedy (which in many cases would be futile), and does not take away the landlord's right to retain possession till he is paid for his share and his advancements. If the landlord unjustly detains the crop, the cropper or tenant has his remedy to obtain a division up-

on claim and delivery, after five days' notice. Code, § 1755. He had no right to go on the premises after being forbidden, and pick out and carry off the crop. Error.

(105 Ga. 327)

CENTRAL OF GEORGIA RY. CO. v. CHANCY.

(Supreme Court of Georgia. Nov. 26, 1898.)

APPEAL—REVIEW—SUFFICIENCY OF EVIDENCE.

The verdict in this case was not without some evidence to support it, and, the only ground in the petition for certiorari being that the verdict was contrary to the evidence, this court will not interfere with the discretion of the court below in overruling the petition for certiorari.

(Syllabus by the Court.)

Error from superior court, Early county; Clarence Wilson, Judge pro hac.

Action by J. C. Chancy against the Central of Georgia Railway Company. Judgment for plaintiff. Defendant brings error. Affirmed.

The following is the official report:

Chancy sued the railway company in a justice's court for \$50 damages for the killing of a cow. On appeal to a jury in the justice's court there was a verdict for the plaintiff for the amount sued for, and the railway company took the case to the superior court by certiorari, alleging that the verdict was contrary to law and the evidence. The certiorari was overruled, and the railway company excepted.

From the answer of the magistrate it appears that the railway company admitted the killing, and introduced evidence as follows: The engineer testified: He did not see the cow until after she was killed. There were thick bushes at that point. He discovered that something was under his engine, and presumed that she came from behind them, or rather from the left. Was on the lookout, and, if the cow had been visible, would have seen her. She was killed between the blow post and what is known as the "poor farm public crossing," nearly half way between. Was running 25 miles an hour at the time. Sounded whistle at blow post. There was nothing he could have done to prevent the killing. The fireman testified that he was shoveling coal at the time of the killing, and was not in a position to see anything. Another witness testified that there were thick bushes to the left of the road between blow post and crossing. There was evidence for the plaintiff that the whistle was not blown at the blow post, nor until the train stopped to take the cow from under the engine. Also that the place where the cow was struck was on an embankment about two feet high, between the blow post and the crossing, that there was an open place on each side of the engine, and the cow could have been seen standing on the track at that place, on either side, 20 or 30 feet away; that there were a few little bushes, but the cow could have been seen lying down in them.

W. T. Jones and R. H. Powell & Son, for plaintiff in error. R. H. Sheffield, for defendant in error.

PER CURIAM. Judgment affirmed.

LUMPKIN, P. J., and LITTLE, J., absent on account of sickness. The other justices concurring, except SIMMONS, C. J., dissenting, as follows: The evidence of the servants of the company rebutted the legal presumption of negligence. The legal presumption being rebutted, there was no evidence tending to show negligence of the company, and the court should have sustained the certiorari.

(106 Ga. 106)

DISPENSARY COM'RS OF TERRELL COUNTY v. THORNTON, Tax Collector.

(Supreme Court of Georgia. Nov. 26, 1898.)

INTOXICATING LIQUORS—DISPENSARY COMMISSIONERS—LIQUOR TAX.

The dispensary commissioners appointed under the local dispensary act for Terrell county, approved December 10, 1897 (Acts 1897, p. 562), are governmental officials, and not liquor dealers, within the meaning of the tax act of 1896.

(Syllabus by the Court.)

Error from superior court, Terrell county; H. O. Sheffield, Judge.

Action by H. O. Thornton, tax collector, against the dispensary commissioners of Terrell county. Judgment for plaintiff, and defendant brings error. Reversed.

James G. Parks, Hoke Smith, and H. O. Peeples, for plaintiff in error. John R. Irwin, for defendant in error.

LEWIS, J. It follows from the decision in the case of Plumb v. Christie (Ga.) 30 S. E. 759, that the dispensary commissioners of Terrell county, under the dispensary act for that county, approved December 10, 1897 (Acts 1897, p. 562), are mere governmental agents or officials, not only empowered, but required, by the legislature of the state to establish, under certain rules and conditions, dispensaries for the sale of liquors in that county, that this body is not a private corporation, and that these dispensaries are in no sense private institutions, but they are public institutions of the government created by the state legislature in pursuance of its police power in the interest of public morality. It is true, the commissioners in the act are designated a body corporate, but as such they have no financial interest in the business of these dispensaries, are not even paid a salary by virtue of their office, and represent no individual stockholders who are entitled to any income from the profits derived from the business. The power of establishing these dispensaries is conferred upon the commissioners of roads and revenue of Terrell county and their successors,

and, in effect, they are simply made, under the act, by virtue of their office, dispensary commissioners of Terrell county. Even the managers employed by this body, who are actively engaged in the sale of these liquors, do not depend for their pay upon the income derived from such sale, but the act provides that their compensation shall be fixed without any regard whatever to the profits of the enterprise. The net profits realized pass into public treasuries, one half going to the county, and the other to the municipality, in which these dispensaries are located. These dispensaries, then, being established by the government, and for the governmental purpose of protecting the morals of the people, they are really governmental institutions, and the only question for consideration is whether or not the tax act approved December 24, 1896 (Acts 1896, p. 21 et seq.), imposing a tax upon all dealers in spirituous or malt liquors, etc. (see division 15, p. 24, of that act), applies to this business. If it does, manifestly this would be tantamount to the government taxing itself, or imposing a tax upon the public. Cooley, in his work on Taxation (page 172), says: "Some things are always presumptively exempted from the operation of general tax laws, because it is reasonable to suppose they were not within the intent of the legislature in adopting them. Such is the case with property belonging to the state and its municipalities, and which is held by them for governmental purposes. All such property is taxable, if the state shall see fit to tax it; but to levy a tax upon it would render necessary new taxes to meet the demand of this tax, and thus the public would be taxing itself in order to raise money to pay over to itself, and no one would be benefited but the officers employed, whose compensation would go to increase the useless levy. It cannot be supposed that the legislature would ever purposely lay such a burden upon public property, and it is therefore a reasonable conclusion that, however general may be the enumeration of property for taxation, the property held by the state and by all its municipalities for governmental purposes was intended to be excluded, and the law will be administered as excluding it in fact." It is true, the tax in question is one not upon public property, but upon a business or occupation; but the same principle will apply where such business is being conducted by the government or its subordinate branches, and where the payment of the tax must necessarily come out of the public funds. The dispensary act itself not imposing such a burden upon these commissioners, we do not think the power of levying the tax can be derived from the general tax act of the state. An examination of the dispensary act itself will show that the commission could not properly be classed with liquor dealers under the tax act. No sales under this local act can ever be allowed for private gain. The liquor dealers licensed to sell under the

laws of the state are not required to make the oath or give the bond required by the act of 1897. They are not restricted as to who shall manage their business, as are the dispensary commissioners. They are not restricted by the state laws as to the quantity that may be sold, or what hours they may sell, nor by the provision that what they sell may not be drunk on the premises, nor as to breaking packages, making reports, or disposition of the proceeds, etc. All the proceeds of the dispensaries must be turned over to the county and town authorities, and the requirement to establish dispensaries is mandatory. We do not mean to say that the legislature cannot impose a tax upon such a business conducted in the public interest. That question is not now before us. What we do decide is that there is no existing law in this state which, by fair and reasonable construction, imposes any tax upon the business of dealing in liquors through the medium of this public dispensary. We therefore think that the court erred in overruling the illegality, and the judgment is accordingly reversed. Judgment reversed. All the justices concurring, except LUMPKIN, P. J., and LITTLE, J., absent on account of sickness.

(106 Ga. 91)

DANIEL v. HANNAH.

(Supreme Court of Georgia. Nov. 26, 1898.)

APPEAL — REVIEW — OBJECTIONS TO EVIDENCE — DECLARATIONS — SALE — DELIVERY.

1. A ground in a motion for a new trial, complaining of alleged error in admitting testimony, cannot be considered by this court when it does not appear what objection was made by the movant to the introduction of the evidence.

2. In the trial of a case involving title to personal property, where both litigants claim under the same person, one as a vendee under a contract of sale, and the other as a widow claiming a year's support, the mere declarations of such person, made in his own interest, after he had parted with possession under his contract, and not in the presence of the vendee, are not admissible in evidence against the latter.

3. Where a debtor verbally agrees to sell to his creditor a definitely specified number of bales of cotton of the value of over \$50, to be credited on an account due by the former to the latter at the market value of the cotton at a certain time and place, there is a complete acceptance and delivery of the property sold, within the meaning of section 2693(7) of the Civil Code, when the debtor moves the cotton to a public place designated by the creditor, and agreed upon by the parties in their contract of sale.

4. The verdict in this case was not contrary to evidence, and there was no abuse of discretion in overruling the motion for a new trial.

(Syllabus by the Court.)

Error from superior court, Talbot county; W. B. Butt, Judge.

In the matter of the appraisal of the estate of R. M. Daniel, G. W. Hannah filed objections to setting apart certain property to Frances M. Daniel, his widow. Judgment in favor of the caveator, and the widow brings error. Affirmed.

Persons & Son, for plaintiff in error. J. H. McGehee and J. A. Cotten, for defendant in error.

LEWIS, J. To the return of appraisers appointed to set apart a year's support to the widow of R. M. Daniel objections were filed by Hannah that certain cotton embraced in the return of the appraisers did not belong to R. M. Daniel at the time of his death, and that it was then, and is still, the property of caveator, and not a part of the estate of R. M. Daniel. The case was, by consent, appealed from the court of ordinary to the superior court, and the trial in the latter court resulted in a verdict in favor of the caveator. The applicant for a year's support moved for a new trial, which was refused, and she excepted.

1. The first ground in the amended motion for a new trial is that the court erred in permitting the caveator to testify, over objection of applicant's counsel, that he bought the cotton in dispute from the husband of the applicant; the value of the cotton being over \$50. It does not appear from the motion upon what ground this objection was based at the time the testimony was admitted. It is true, the reason for the objection is suggested in the motion by the words, "the value of the cotton being over \$50," but it nowhere appears that such objection was actually made when the testimony was objected to before the court below. Without intimating that there was anything in this ground, even if the question had been properly made, we simply decide, under repeated rulings of this court, that we cannot consider it as presented by the record.

2. Another ground of alleged error in the motion is that the court erred in ruling out the testimony of certain witnesses, who were not interested in the suit, as to what R. M. Daniel, the deceased husband, said to witnesses, in the absence of Hannah, the caveator, concerning the cotton in dispute, and yet permitting the caveator to testify about his transaction with deceased in buying the cotton in dispute. There was manifestly no error in excluding this testimony, as it was merely hearsay, being the declarations of a deceased party to the contract, not even made under oath, nor in the presence of the other contracting party.

3, 4. It was further objected that the court erred in charging the jury that, if they believed from the evidence that R. M. Daniel sold the cotton at Reeves' ginnery to Hannah, and in pursuance of that sale moved the cotton to a place designated by Hannah, to be credited on R. M. Daniel's account at the price it would bring on November 10, 1896, that was a sale, and title to the cotton was in Hannah. And again, because the court erred in refusing to charge, at the request of counsel for applicant, that, as no earnest money was paid, and no receipt for the cotton was given, by Hannah to Daniel at the time

of the alleged sale, Hannah should have had actual possession of the cotton to have made it a legal sale of the cotton. There was testimony by one witness to the effect that he was present, and heard a conversation between Daniel and Hannah, at Hannah's store, in Thomaston, on October 10, 1896; that Daniel told Hannah that he had hauled seven bales of cotton to Mr. Reeves'; that it belonged to Dr. Hannah, and, if Hannah wished it, he would haul the cotton to Thomaston for him; that the cotton was paid to Hannah to go on Daniel's store account, and the agreement was that Hannah should allow Daniel the highest market price in Thomaston for the cotton on November 10, 1896; that is, Daniel's account with Hannah should be credited with the value of the seven bales of cotton at its highest market value at that time. There was considerable testimony introduced in behalf of the applicant for a year's support conflicting with the evidence in behalf of the caveator, and tending to establish the fact that no such contract was made as claimed by him, and no credit was upon the books of the caveator at the time of Daniel's death. The books of Hannah were introduced, showing a credit on Daniel's account of the seven bales of cotton on the day Hannah said he purchased it. Hannah testified that the credit was there on that date. Two witnesses testified that they examined Hannah's books after Daniel's death, and found no such credit on Daniel's account. The price fixed in the contract of purchase was the highest market price in Thomaston on November 10, 1896. Before that date, however, Daniel had died, and the appraisal for the year's support of the widow had been returned. Reeves, the owner of the ginny, swore that he ginned the cotton in dispute for Daniel, and Daniel left it at his ginny; that he kept it for Daniel; and Hannah said nothing to witness about the cotton prior to Daniel's death. This witness further swore, "Soon after the cotton was ginned, Daniel hauled it, and placed it on the road in front of my house." The charge of the court complained of is evidently based upon the theory of the caveator's case that the facts he relied on for a recovery constituted an actual delivery and acceptance of the goods sold. Counsel for plaintiff in error contended that there was no such delivery and acceptance as is contemplated in section 2693, par. 7, Civ. Code, there being no testimony that caveator actually received the goods in his possession, or that they had been delivered by the vendor to any one for him. The paragraph above cited provides that any contract for the sale of goods, etc., to the amount of \$50 or more, except the buyer shall accept part of the goods sold, and actually receive the same, or give something in earnest to bind the bargain or in part payment, is void. It is true that what would constitute good delivery in ordinary contract of sale would not necessarily be sufficient in that class of

contracts falling within the above statute of frauds. But it is difficult to conceive how a delivery can be more complete than it is when dominion and control over the property is relinquished by the vendor, and its absolute custody and the unconditional power of disposing of same are transferred to the vendee. While Reeves testified he held the cotton for Daniel, yet it does not appear from his testimony, or elsewhere in the record, that there was any understanding between him and Daniel, after it was moved from the ginny to the roadside, that Reeves should continue to keep the custody of the cotton for Daniel's benefit. On the other hand, according to Hannah's testimony, it was moved from the ginny by virtue of the special contract between him and Daniel, designating a particular place for delivery. This place, it seems, was not even on the premises of a third party, but on a public highway, which ran by or through the land of Reeves. This was a public place, and hence as accessible to one party as the other. By transferring it there, the vendor relinquished all dominion and control over the property, and the vendee, and he alone, thereby acquired the right to dispose of it as he saw proper. We think the delivery was as effectual and complete as if, under the contract, it had been placed by the vendor upon the platform of a railroad company, or even upon the premises of the vendee himself. There was also manifestly an acceptance of the cotton by the vendee. The particular thing sold was designated and agreed upon, and nothing whatever remained to be done by either party after its delivery at the place agreed upon to confirm the sale. No right remained in the vendee to reject the goods bought, either on account of quantity or quality. The fact that the price of the cotton was to be ascertained subsequently by the condition of the market at a particular place does not affect the validity or completeness of the sale. *Loud v. Pritchett* (Ga.) 30 S. E. 870. It would seem from the decisions in the cases of *Tansley v. Turner*, 2 Bing. N. C. 151, and *Cooper v. Bill*, 3 Hurl. & C. 722, that if the goods, at the time of the bargain, are on the land of a third person (such person not having the custody of them as bailee), or are in some public place to which buyer and seller have equal right of access, the possession, as well as the title, may be transferred by the mere agreement of the parties to that effect. 1 Beach, Mod. Cont. pp. 668, 669. A fortiori would such title and possession follow where the goods are transported by the vendor to a public place, where they were to be delivered in pursuance of the contract of sale.

The authorities cited by plaintiff in error from decisions of this court we do not think at all in point. The case of *Lloyd v. Wright*, 25 Ga. 215, simply decides that where the buyer continues to have the right to object either to the quantum or the quality of the goods, there has been no acceptance and re-

ceipt within the meaning of the statute. In *Denmead v. Glass*, 30 Ga. 637, it was decided that a delivery of goods to a railroad company under the statute of frauds is not a delivery to the purchaser, the company not being the agent of the buyer "to receive and accept the same." There is no question of agency in the case at bar, and, as before seen, there was, under the contract, no right reserved in the vendee to reject the goods for any reason. In *Bowers v. Anderson*, 49 Ga. 143, it appeared that it was agreed that the seller should haul the cotton to a certain place for the buyer; that, if it was burned, it should be the loss of the buyer; that the agent need not pay the money, but hold it for the buyer to check on as he might want it; and that no act was done by either party as to the payment or delivery; and the seller afterwards refused to deliver the cotton, and the agent returned the money to his principal. It was very properly held in that case that there was no actual receipt by the buyer, or payment, as required by the seventh section of the statute of frauds. In *Gunn v. Knoop*, 73 Ga. 510, there was an attempt to sell cotton which was stored in a warehouse by the vendor. There was nothing done in pursuance of the contract except to weigh the cotton, and agree upon the price, the purchaser indorsing on the bill containing the amount of cotton and its price, "O. K.," and signing his name. The cotton was to remain in the warehouse until next morning. It was burned that night. It was held that the contract of sale was not complete, as the actual possession remained in the seller. To the same effect is the ruling in *Sparrow v. Pate*, 67 Ga. 352. From the opinion of the court it will be seen that the decision in that case was based upon the fact that the price was not paid, and there was no evidence of delivery, the same remaining in the warehouse where it was when the contract was made.

A marked distinction between the facts in the cases cited and those in the case we are now discussing is apparent from the fact that, under this contract, neither the vendor nor his bailee retained possession of the property, but, under the testimony, the same was actually taken by him from the custody of his bailee, and delivered to the vendee at a place where no one had a right to its possession or control except the vendee himself. There was a conflict in the testimony as to when the credit for the cotton was placed by the vendee on his books, but we think this entirely immaterial, for, under his contract, he could not, with any degree of certainty or accuracy, have given the credit until he ascertained the condition of the market on November 10th, which was after other witnesses had inspected his books. This credit actually appeared upon his books at the time of the trial.

Construing the charge of the judge and his refusal to charge in the light of the real issue in this case, we think there was no error com-

mitted in the rulings complained of. The real contest and the material issue of fact for the jury to pass upon was whether or not the contract claimed by the caveator had been made and executed. Upon this, though there might, in the opinion of this court, have been a preponderance of evidence in favor of the applicant, yet the jury saw fit to accept as the truth the testimony introduced in behalf of the caveator, and, this testimony being sufficient to support the verdict, we will not interfere with the discretion of the trial judge in overruling the motion for a new trial. Judgment affirmed. All the justices concurring, except LUMPKIN, P. J., and LITTLE, J., absent on account of sickness.

(105 Ga. 55)

DORSEY v. MILLER.**MILLER v. DORSEY.**

(Supreme Court of Georgia. July 22, 1898.)
JUSTICE COURT—JURISDICTION—CERTIORARI—DECISION.

1. A justice's court has no jurisdiction of an action of tort unless the alleged wrong consisted of injuring or damaging personal property belonging to the plaintiff. Such a court, therefore, cannot lawfully entertain or try a suit against a defendant for fraudulently removing property subject to a lien held by the plaintiff, or for conspiring with another so to do.

2. There was no error in setting aside the verdict complained of in the petition for certiorari, as the same was unsupported by evidence, and the magistrate's court was without jurisdiction; but the superior court erred in not rendering a final judgment in favor of the plaintiff in certiorari.

(Syllabus by the Court.)

Error from superior court, White county; J. J. Kimsey, Judge.

Action by W. F. Dorsey against J. M. Miller. From a judgment of the superior court setting aside a verdict in a justice court, plaintiff brings error and defendant assigns cross error. Affirmed on main bill of exceptions, and reversed on cross bill.

J. W. H. Underwood and J. L. Oakes, for plaintiff in error. M. G. Boyd, O. J. Lilly, and G. S. Kytie, for defendant in error.

LITTLE, J. The only question of law which arises in this case is whether a justice's court has jurisdiction in an action to recover damages against one who, by collusive and fraudulent conduct, damaged the plaintiff in a sum less than \$100 by destroying the lien which plaintiff held as landlord on the crops of his tenant, etc.

1. By paragraph 2, § 7, art. 6, Const., justices of the peace are given jurisdiction in all civil actions arising ex contractu, and in cases of injuries or damages to personal property, when the principal sum does not exceed \$100. Even a casual reading of this section of the constitution is sufficient to determine that a justice's court has no jurisdiction in cases of this character, nor in any other case where damages sounding in tort are sought to

be recovered, save only where the injury or damage is to personal property. We are aware that in the case of *James v. Smith*, 82 Ga. 345, Jackson, J., delivering the opinion of the court, used language which would seem to intimate that justices of the peace, under the paragraph of the constitution above quoted, had jurisdiction to entertain actions in trover instituted to recover property less in value than \$100. An examination of that case, however, will show that no such ruling was made. The action there was for an account for the sum of \$52.50, being the value of a bale of cotton, which it was alleged James had converted and sold. On the trial in the justice's court, the defendant moved to dismiss the case on the ground that the facts made it an action of trover, and that the justice's court had no jurisdiction in cases of trover. The justice refused to dismiss. A certiorari was sued out to the superior court, which sustained the certiorari, ruling that the justice's court had no jurisdiction in actions of trover, but refused to pass final judgment in the case, and sent it back, with direction that it had no jurisdiction in cases of trover, but to cause the action to be amended, if possible, in such a manner as to proceed for money had and received. To the refusal of the court to pass final judgment in the action James excepted on the ground that the court erred in sending the case back, and in not making a final disposition of it; and the question made in that record was, should the superior court have finally disposed of the case? It was held by this court that the action was for money had and received; that the facts were all in, and that there was nothing to show that they would be varied; that the law of the case was plain; that no further trial in the justice's court was needed; and that the court erred in not making a final disposition of the case. It is true that the honored and learned justice delivering the opinion of the court went further, and said: "Suppose the case had been trover, did not the justice's court have jurisdiction?" and cited an authority for the proposition that the action of trover is an action for damages to personal property; but the case was decided on the point that the suit there was brought to recover the value of one bale of cotton, and on the further principle that the plaintiff had the right to waive the tort, and sue for the value of the property converted. So that that case cannot be held as authority that justices of the peace have jurisdiction to entertain suits sounding in tort other than for damages to personal property. If the words of the constitution above quoted needed any explanation, the cases of *Williams v. Sulter*, 78 Ga. 355, and *White Star Line Steamboat Co. v. Gordon Co.*, 81 Ga. 47, 7 S. E. 231, are sufficient to show that, in the opinion of this court, the jurisdiction of justices of the peace in cases other than those which arise *ex contractu* are limited to actions which are brought to recover damages for injuries to personal property. We do not deem it necessary to do more than call

attention to the plain language of the constitution. The action in the present case was brought to recover damages which the plaintiff alleges he sustained in consequence of the wrongful and fraudulent and collusive conduct of the defendant in taking possession of the crop of his tenant upon which the plaintiff had a lien. Such an action cannot lawfully be tried in a justice's court.

2. The court did right in setting aside the verdict which had been rendered for the plaintiff in the justice's court, but, as that court was without jurisdiction to hear and determine the case, the superior court erred in not rendering a final judgment in favor of the plaintiff in certiorari, who was the defendant in the justice's court, and who by cross bill assigned error on the refusal of the court to so render a final judgment in the case; and the judgment on the main bill of exceptions must be affirmed; on cross bill, reversed.

(105 Ga. 614)

WYNNE v. MAYOR, ETC., OF CITY OF EASTMAN.

(Supreme Court of Georgia. Oct. 13, 1898.)

ORDINANCE—OCCUPATION TAX—DOUBLE TAXATION.

An ordinance imposing a tax upon "merchandise, meaning dealers in varied stock of goods," and also imposing taxes upon persons engaged in the sale of various articles which would be embraced under the term "merchandise," will not, unless the terms of the ordinance imperatively require it, be construed to authorize the collection of more than one tax upon dealers in general merchandise.

(Syllabus by the Court.)

Error from superior court, Dodge county; C. C. Smith, Judge.

M. Wynne was convicted of violating an ordinance of the city of Eastman, and brings error. Reversed.

J. E. Wooten, for plaintiff in error. J. Bishop, Jr., for defendant in error.

COBB, J. The mayor and council of the city of Eastman passed a tax ordinance for the year 1898, of which the following is a copy: "Be it ordained by the mayor and council of the city of Eastman, and it is hereby ordained by the authority of the same, that the following license taxes shall be levied and collected in the city of Eastman for the year 1898: Boots and shoes, retail, including repairs, manufacturing, and other merchandise, \$10.00; bicycle agents, \$5.00; brick, lime, etc., dealer in, \$5.00; bicycle livery and repairs, \$5.00; carriage and wagon depository, or dealers in any kind of vehicles, except bicycles, \$5.00; cigarettes, dealers in, \$5.00; drugs, retail and wholesale, including paints, etc., \$10.00; dealers in secondhand clothing, \$5.00; dealers in musical instruments, \$5.00; dealers in hogs or cattle for shipment, \$20.00; fish and game, dealers in, including any kind of uncured fish or game, \$10.00; fruit and vegetables, stand alone, \$2.50; furniture, alone, \$10.00; feed and livery stable, and any person

or persons offering for sale any live stock, \$20.00; groceries, retail, \$10.00; gunsmith, alone, \$2.00; harness, retail, and repairs, \$2.50; hardware, retail, alone, \$10.00; jeweler, retail, and repairs, \$5.00; merchandise, meaning dealers in varied stock of goods, \$15.00; millinery, alone, or in connection with other business, \$2.50. When payable: Each license shall be in the name of the person, firm, or agents to whom same shall be issued; and each tax levied by this ordinance shall be registered tax, due and payable on the first day of March, 1898, except as hereinbefore provided, and licenses issued thereunder shall expire on the first of March, 1899. Classification: In all cases the person applying for licenses shall make oath, when so required to do, that the business followed by the applicant falls within the class to which the ordinance fixing the specialty applies. All persons entitled to have licenses issued to them under the ordinance, who do not pay for them in five days from date they are due, shall be deemed guilty of doing a business without license, and shall be summoned before the mayor's court, and upon conviction shall be punished by fine not exceeding \$25.00, or imprisonment or work on the streets not exceeding twenty days. Adopted Jan'y. 31, 1898." The plaintiff in error paid the tax required under the item of the ordinance imposing a tax upon dealers in "merchandise, meaning dealers in varied stock of goods." In the stock carried by him were contained wagons, carriages, and other vehicles, which were stored in a building adjacent to that containing his general stock. He was arraigned before the mayor's court of Eastman, charged with doing business without a license, in that he was engaged in the sale of carriages, wagons, and other vehicles, without paying the tax prescribed in the ordinance above quoted. Upon conviction in that court he applied for a writ of certiorari, which coming on for a hearing and being overruled, a writ of error to this court was sued out by him.

The municipal authorities of this city possibly have power, under its charter, to impose a tax upon each class of business; and this, too, notwithstanding the effect of the classification might be to impose two or more taxes upon a person who carries but one general stock of goods. Acts 1894, p. 167; Keely v. City of Atlanta, 69 Ga. 583. The question now under consideration, however, is not whether this power exists, but whether the ordinance above quoted is intended by the municipal authorities to be an exercise of such power. Does the ordinance require that each owner of a general stock of goods shall pay a separate tax for the privilege of selling each class of goods embraced in the stock which is named in the ordinance, or is the true interpretation that any one carrying a general stock of merchandise shall pay only the tax required of dealers carrying a "varied stock of goods," and that persons dealing in specific articles, which generally form a component part of "a varied stock," shall be required to pay a sepa-

rate tax for the privilege of selling each of such articles, when they are not connected in any way with a general stock of merchandise? The latter seems to us to be the correct interpretation of the ordinance. Nearly all of the articles made the subject of tax are of a nature usually found in a general stock of merchandise, and it would seem that it was the intention of the municipal authorities that if a party desired to deal in all those articles which are usually sold by general dealers, he should have the privilege of doing so by paying the tax upon merchandise, which is declared in the ordinance to be "a varied stock of goods." The amount of the tax required for this general license to deal in merchandise being larger than that required for a license to deal in any specific article is a circumstance indicating that such was the intention of the council. This view is also sustained when we consider the item of the ordinance imposing a tax upon the business of a person engaged in the sale of millinery; that business being declared taxable whether carried on alone or in connection with other business, rather indicating that the other articles usually found in a stock of merchandise not so dealt with are not to be taxed, if embraced in such stock. Carriages, wagons, and other vehicles are embraced within the ordinary meaning of the term "merchandise," as well as within the meaning of the term as it is defined in this ordinance (that is, "a varied stock of goods"); and the plaintiff in error, after paying the license imposed upon the sale of general merchandise, was entitled to sell carriages, wagons, and other vehicles without paying an additional tax. The collection of more than one specific tax upon a dealer in merchandise, while, as has been seen, under certain circumstances, allowable, still, as it is really a species of double taxation, will not be held to have been contemplated by the taxing power, unless the terms of the law levying the tax are such as to imperatively demand a construction which would bring about this result. Even if the mayor's court of Eastman had authority to impose a fine upon the plaintiff in error, it was wrongfully imposed in the present case, because he has not been guilty of any violation of the ordinance of the city. Judgment reversed. All the justices concurring.

(106 Ga. 608)

WILLIAMS v. STATE.

(Supreme Court of Georgia. Oct. 12, 1898.)
ABUSIVE LANGUAGE—PROVOCATION—QUESTION FOR JURY.

Wrongfully entering and taking possession of the place of business of another in his absence, remaining in possession until his return, and refusing to leave when requested to do so by him, may or may not amount to such provocation as will justify the owner in using to the wrongdoer, upon his refusal to leave, opprobrious words and abusive language tending to cause a breach of the peace. On the trial of an indictment against the owner for using language of the character above referred to, it

should be left to the jury to determine whether or not, in their judgment, the circumstances were such as to justify the accused.

(Syllabus by the Court.)

Error from superior court, Coffee county; J. L. Sweat, Judge.

Isham Williams was convicted of using abusive language, and brings error. Reversed.

Quincey & McDonald, for plaintiff in error. John W. Bennett, Sol. Gen., for the State.

COBB, J. The accused was indicted under that section of the Penal Code which declares that "any person who shall, without provocation, use to, or of, another, and in his presence, opprobrious words or abusive language, tending to cause a breach of the peace," shall be guilty of a misdemeanor. Pen. Code, § 396. It appeared from the evidence that the prosecutor was summoned by the marshal of the town to aid in the arrest of the accused, who was charged with a violation of a city ordinance; that the prosecutor went to the place of business of the accused,—a livery stable,—and, as he claimed, by direction of the sheriff, who had a warrant charging the accused with an offense against the state, took charge of the stable in the absence of the accused; that the accused, coming in shortly thereafter, found the prosecutor in possession of the stable, with a hatchet in his hand. Accused asked the prosecutor what he was doing there, and told him to leave, which prosecutor refused to do, whereupon the accused used the opprobrious language which is alleged in the indictment. It appeared that after the words were used the prosecutor closed up the stable of the accused and nailed boards across the door. From the statement of the prisoner it appeared that when he ordered prosecutor to leave the stable his refusal to do so was accompanied with the use of profane language. The judge charged the jury, in effect, that under the evidence there was no provocation given by the prosecutor to justify the use of the words charged in the indictment. We think this was error. In the case of Meaders v. State, 96 Ga. 299, 22 S. E. 527, the court instructed the jury that under a given state of facts the accused was not justified in using certain opprobrious words. In commenting upon this charge, Chief Justice Simmons says: "The court thus assumed to pass upon the defense of the accused without submitting it to the jury, and thereby decided that the conduct of the prosecutor was not a sufficient provocation. We think this was error. It was for the jury to say whether there was a provocation, and, if so, whether it was sufficient to justify the accused in the language attributed to him." See, also, Dyer v. State, 99 Ga. 20, 25 S. E. 609. The case should be tried again, and a jury allowed, under proper instructions, to pass upon the question as to whether, under all the

facts and circumstances, the accused was justifiable in using to the prosecutor the language charged in the indictment. Judgment reversed. All the justices concurring.

(105 Ga. 830)

BENJAMIN v. STATE.

(Supreme Court of Georgia. Oct. 12, 1898.)

LARCENY—EVIDENCE—VALUE OF PROPERTY.

1. On the trial of an indictment for simple larceny, the value of the property alleged to have been stolen must be shown; and a conviction for this offense cannot legally stand in the absence of such evidence.

2. In the present case the record does not show the value of the property alleged to have been stolen, and the verdict of guilty must be set aside.

(Syllabus by the Court.)

Error from criminal court of Atlanta; J. D. Berry, Judge.

Nathan Benjamin was convicted of larceny, and brings error. Reversed.

Geo. P. Roberts, for plaintiff in error. Jas. F. O'Neill, for the State.

PER CURIAM. Judgment reversed.

(105 Ga. 655)

KERR v. STATE.

(Supreme Court of Georgia. Oct. 13, 1898.)

LARCENY—EVIDENCE.

1. The question whether or not, upon the assumption that the state's theory as to the facts was duly established by evidence, the offense committed was simple larceny, or some other offense, is dealt with in the case of Hecox v. State, 31 S. E. 592, and a similar question is discussed in the case of Finkelstein v. State, Id. 589, both decided this day.

2. It was, in a criminal trial, erroneous to allow the state to prove by parol the contents of a written telegram, prejudicial to the accused, without first requiring the proper foundation for the introduction of the secondary evidence to be laid.

(Syllabus by the Court.)

Error from criminal court of Atlanta; J. D. Berry, Judge.

R. Kerr was convicted of simple larceny, and brings error. Reversed.

Geo. P. Roberts and I. L. Bishop, for plaintiff in error. James F. O'Neill, for the State.

LUMPKIN, P. J. 1. An accusation duly filed in the criminal court of the city of Atlanta jointly charged B. L. Hecox and R. Kerr with the offense of simple larceny. They were tried severally, and each, being found guilty, filed a motion for a new trial. Both motions were overruled, and separate writs of error were brought to this court. The evidence in the record of Kerr's trial tends to show that Hecox was the actual perpetrator of the offense committed; and it is evident that Kerr was convicted upon the theory that he aided and abetted Hecox in doing the criminal act, and that, as the same was a misdemeanor, both were guilty as

principals. The main legal question involved is whether or not, upon the assumption that the state's theory as to the facts was duly established, the accused was guilty of simple larceny or of some other offense. The law applicable to this question is announced in Hecox's Case, 31 S. E. 592, and is fully discussed by Mr. Justice Lewis in that case, and also in the case of Finkelstein v. State, Id. 589, both of which were this day decided. It thus appears that the offense in question was simple larceny.

2. As a new trial is granted in Kerr's case, we refrain from expressing any opinion upon the sufficiency of the evidence to establish his alleged participation in the larceny committed by Hecox. We think Kerr is entitled to a new trial because the judge erred in admitting evidence. Over objection by the accused, Mauker, a witness for the state, was permitted to testify to the contents of a telegram intended for Hecox, and which, according to Mauker's testimony, contained statements practically accusing Hecox of the very offense for which Kerr was on trial as an alleged confederate of Hecox, and threatening a prosecution unless restitution was made. Mauker further testified that he read this telegram to Kerr, and, after so doing, demanded of him the identical sum of money which the indictment in this case charges Hecox and Kerr with having stolen, and that thereupon Kerr handed to the witness the amount of money in question. It will therefore be readily perceived that the contents of this telegram had a direct bearing upon the case, because the reading thereof to Kerr apparently influenced him to surrender the money claimed to have been stolen; and it follows that the accused had a right to demand that proof of the actual contents of the telegram should be made by competent and legal evidence. Unquestionably, the conversation between Mauker and Kerr was admissible against the latter; and there is no doubt that, in giving an account of what transpired, it was competent for Mauker to testify that in the course of the conversation he read a telegram to Kerr, and in this connection to state the terms he employed in representing to Kerr how the telegram was worded. The reading of the telegram was a part of the *res gestæ* of the conversation, and all that was said or done by Mauker on that occasion was relevant, as throwing light upon what Kerr did and said in reply. To this extent Mauker's testimony was relevant, and was properly allowed to go to the jury. It was, however, another and an entirely different thing to allow him to state, independently of the conversation, what the contents of the telegram actually were. Permitting him to do this was surely allowing parol evidence of the contents of a writing. His testimony could easily have been confined to allowing him to state what actually passed between himself and Kerr, without going further, and testifying affirmatively to the language em-

braced in the telegram. His statement of what he read to Kerr may or may not have been a correct version of the real contents of the telegram. When, therefore, he was allowed to testify under oath at the trial what these contents were, he was, in effect, permitted to corroborate and strengthen the other portion of his testimony in an illegal manner, viz. by proving by his mere verbal statement what a written paper contained, when the paper itself was the best evidence as to this matter. In the motion for a new trial it is distinctly alleged that the court erred in allowing Mauker to state the contents of the telegram, for the reason that "the best evidence of the contents of the telegram was the telegram itself." We have pointed out that portion of Mauker's testimony which we think was admissible, as well as that which was not. In allowing the witness to state independently, and not as a part of the conversation between himself and Kerr, the contents of the telegram, we are quite clear the presiding judge went contrary to that rule of evidence, universally recognized, which declares that the contents of a writing cannot be proved by parol without first showing a sufficient legal reason for its nonproduction. Judgment reversed. All the justices concurring.

(105 Ga. 631)

GASKIN v. STATE.

(Supreme Court of Georgia, Oct. 13, 1898.)

ASSAULT WITH INTENT TO RAPE—EVIDENCE.

1. Before there can be a conviction for the offense of assault with intent to commit a rape, it must appear that the accused, with the intention of having carnal knowledge of the female forcibly and against her will, did some overt act amounting to an assault upon her. It was therefore error to charge the jury that: "If you find that this defendant formed the intent and design in his heart to have carnal knowledge of [the female alleged to have been assaulted] forcibly and against her will, and, in the accomplishment of that evil design and intent, slipped into her room and secreted himself there, awaiting an opportune moment to carry his evil design into execution, and, being detected, fled and made his escape, the court charges you that that would make such a case as that the necessary element of assault would be in it, and you would be authorized to find this defendant guilty of the offense as charged in the indictment,—that of an assault with intent to rape."

2. The verdict was contrary to law and the evidence, and the refusal of a new trial was error.

(Syllabus by the Court.)

Error from superior court, Coffee county; J. L. Sweat, Judge.

Jeff Gaskin was convicted of crime, and brings error. Reversed.

Quincey & McDonald, for plaintiff in error. John W. Bennett, Sol. Gen., for the State.

FISH, J. Jeff Gaskin, a negro boy about 16 or 17 years of age, about dark entered through a window the room of a white girl about 14 years old, and concealed himself under her

bed. She came into the room to retire about two hours afterwards, and, hearing a noise under the bed, went for her mother. Upon examination, they discovered him. He immediately fled through the window and escaped. The room contained no articles of value. The girl's father and mother were in an adjoining room, into which the girl's room opened. The mother's bed was three or four feet from that of her daughter's. The girl occupied her room alone. The boy had been working for the girl's father two or three months, and had been around the house a good deal. Upon substantially this evidence, Gaskin was convicted of assault with intent to commit a rape upon the girl. His motion for new trial assigned as error the charge of the court as set forth in the first headnote, and alleged that the verdict was contrary to law and the evidence. Upon the overruling of the motion, he excepted.

1. Before the jury would have been authorized to have found the accused guilty of the offense of assault with intent to rape, it must have appeared, not only that he intended to have carnal knowledge of the girl alleged to have been assaulted, forcibly and against her will, but that he did some overt act towards the accomplishment of his purpose, which amounted in law to an assault upon her. That both the criminal intent, and concomitant assault towards its execution, are essential elements of the offense, is manifest from its very name, "assault with intent to commit a rape." An assault is an attempt to commit a violent injury upon the person of another. It was held in *Brown v. State*, 95 Ga. 481, 20 S. E. 495, that "mere preparation to commit a violent injury upon the person of another, unaccompanied by a physical effort to do so, will not justify a conviction for an assault." There must be some demonstration of violence, some overt act which amounts to an attempt, in order to constitute an assault. 2 Am. & Eng. Enc. Law, 956. There can be no assault until the execution of violence has begun. *State v. Davis*, 23 N. C. 125. In the case at bar the trial judge, in effect, told the jury that if the accused, with intent to commit a rape upon the girl, secretly entered her room and concealed himself there, awaiting an opportunity to execute his criminal design, and, upon detection, fled, the necessary element of assault would be made out, and they would be authorized to convict the accused of the offense charged. We think that the hypothesis stated by the court, if true in fact, would have amounted only to preparation for an attempt to commit the offense. After the preparation there was no overt act done by the accused to effectuate the criminal design which would amount to an assault upon the girl. We must therefore hold that the charge was erroneous.

2. The evidence not only failed to show that an assault was made, but it was too uncertain and unsatisfactory to warrant a finding that the accused had any intention of committing a rape upon the girl. There should be no rea-

sonable doubt as to the specific criminal intent of the accused from the facts and circumstances proven. The verdict was contrary to law and the evidence, and the court erred in not granting a new trial. Judgment reversed. All the justices concurring.

(105 Ga. 612)

EUBANK v. STATE.

(Supreme Court of Georgia. Oct. 13, 1898.)

CRIMINAL TRESPASS—EVIDENCE.

In a trial on an indictment which charges the defendant with having committed an act of trespass on the lands of J. M. and E. F. M., it is error to charge the jury that they would be authorized to convict the defendant on proof that the trespass was committed by him on the land of J. M. or E. F. M.

(Syllabus by the Court.)

Error from superior court, Pike county; M. W. Beck, Judge.

A. E. Eubank was convicted of criminal trespass, and brings error. Reversed.

J. J. Rogers, for plaintiff in error. S. N. Woodward and O. H. B. Bloodworth, Sol. Gen., for the State.

LITTLE, J. The plaintiff in error was indicted in the superior court of Pike county for the offense of trespass, under section 717 of the Penal Code. The indictment charged the particular act of trespass to be that the defendant did "willfully and maliciously sever from the land of Josh Martin and from the land of E. F. Martin the produce growing on said land, and the property of said Josh Martin and the property of said E. F. Martin; said produce being cotton which was then and there growing on said land." The case was transferred, and tried in the county court of Pike county, and resulted in a verdict of guilty. The defendant filed a petition for certiorari, in which he avers that the verdict rendered by the jury, and the judgment imposed, are contrary to law and the evidence. The petition further alleges that the court erred in admitting as evidence on the trial of the case, over his objection, a plat and boundary lines made by the county surveyor, under apparently regular proceedings, processions the land of E. F. Martin, because to the return of the processions a protest had been filed, and proceedings arising under the protest were then pending in the superior court. The petition further alleged that the court erred in giving to the jury the following charge: "If you should believe from the testimony that said cotton was growing upon the land of E. F. Martin or Josh Martin, and it was severed therefrom by the said A. E. Eubank, then you would be authorized to find him guilty." Several other grounds of error were set out in the petition, but we do not find it necessary to specifically consider them, as our ruling determines the case in favor of the plaintiff in error, and the determination of the other

questions involved is not necessary for the purpose of another trial. On the hearing, the certiorari was overruled, and the plaintiff in error excepted.

The charge of the court complained of was error. The bill of indictment charged one act of trespass, and that act as having been committed on the land of Josh Martin and E. F. Martin. The evidence distinctly showed that Josh Martin did not own the land upon which the trespass was alleged to have been committed, but that E. F. Martin did. The former testified that he had no interest in it, nor the crops grown on the land in the year the trespass was alleged to have been committed. In a civil action for trespass Mr. Greenleaf says that a variance in the description of the locus in quo is available to the defendant under the plea of not guilty, as the allegation of place in an action of trespass *quare clausum fregit* is essentially descriptive of the particular trespass complained of. 2 Greenl. Ev. p. 611. Criminal laws are to be strictly construed, and, in charging an offense which involves the liberty of a citizen, all the averments which go to make up the charge must be proven as made; otherwise the accused would not be put on notice of what he was called on to answer, and would have no opportunity to prepare his defense. In general, a variance in the proof of ownership will vitiate the indictment. 1 Bish. Cr. Proc. par. 582. See, also, authorities cited in *Id.* p. 309.

The exception taken to the admission of the plat and return of the processioners cannot be considered, because no specific objection appears to have been made to its admission. It may be stated, however, in passing, that such papers are not held even *prima facie* correct where a protest has been filed to the return and is pending, and the return does not become conclusive until made the judgment of the court. *Howland v. Brown*, 92 Ga. 513, 17 S. E. 806. Because of the error in the charge as above set out, the judgment of the court below in overruling the certiorari is reversed.

(105 Ga. 722)

BROWN et al. v. ISON.

(Supreme Court of Georgia. Nov. 16, 1898.)

APPEAL—HARMLESS ERROR—SUFFICIENCY OF EVIDENCE.

1. Where the charge of the court complained of in the motion for a new trial could not possibly have affected the finding of the jury, except as to one item in their verdict, and where the amount of this item was written off by plaintiff's counsel, the charge, even if erroneous, was thus made harmless to defendant; and hence there was no error in refusing a new trial on this ground.

2. There being a conflict in the testimony, and that in favor of the successful party being sufficient to sustain the verdict as it now stands, this court will not interfere with the discretion of the trial judge in overruling the motion on the general grounds.

(Syllabus by the Court.)

Error from city court of Griffin; E. W. Beck, Judge.

Action by F. M. Ison against Brown & Wilkins. Judgment for plaintiff. Defendants bring error. Affirmed.

J. M. Kimbrough, Jr., and R. T. Daniel, for plaintiffs in error. Hammond & Cleveland, for defendant in error.

LEWIS, J. On January 31, 1898, Ison sued out a distress warrant against Brown & Wilkins, alleging in his affidavit that the defendants owed him \$130 for rent, of which amount \$4, the balance for the month of January, was due, and that the remainder would become due as follows: \$18 on the 1st day of each of the months of March, April, May, June, July, August, and September,—and further alleging that the defendants were moving their goods from the rented premises. Defendants filed a counter affidavit to the effect that they rented a storehouse from plaintiff for \$14, by the month, that the contract terminated at the end of each month, and that at the end of January, when they left, they paid all that was due up to that time, and therefore owed plaintiff nothing. Plaintiff claimed that defendants owed him rent for the storehouse at the rate of \$14 per month, and for an office upstairs at the rate of \$4 per month, aggregating the sum of \$130. The defendants admitted that as partners they rented the storehouse at \$14 per month, but denied the partnership as to the office, claiming that this was rented by Wilkins alone for his dental office. The only other issue of fact presented by the testimony was whether or not the term of rental under the contract had expired when defendants left, or whether it continued through the following September. On this point the evidence was directly in conflict. The jury found for the plaintiff the full amount he claimed. Defendants moved for a new trial on the ground that the verdict was contrary to law and evidence, and on account of alleged error in the following charge: "If the plaintiff believed from the acts and conduct of the defendants that they were partners, and he considered them partners from such acts and conduct, then the plaintiff would be entitled to recover from both the defendants, as partners, whatever you find that they are due the plaintiff for the rent of the store-room and office." When the motion was heard the court directed that the plaintiff write off from the verdict \$32, claimed to be due as rent at the rate of \$4 per month for the office; and, this being done, the motion for a new trial was overruled, and defendants excepted.

It will be seen from this statement that the charge of the court complained of could not possibly have affected the finding of the jury, except as to the rent of the office. There was no question between the parties as to the existence of the partnership, so far as the

store was concerned. The amount for the office rent included in the verdict having been written off therefrom by direction of the court, the charge complained of, even if erroneous, was thus cured of all harm to the defendants. It could not possibly have affected the finding of the jury in reference to the rent of the storehouse. The plaintiff's testimony made out his case; at least, for the amount claimed to be due for the rent of the store. The verdict now stands for only this amount. The jury saw fit to believe plaintiff in preference to the witnesses sworn in behalf of the defendants. The trial judge being satisfied with their finding, under the repeated rulings of this court we will not interfere with his discretion in overruling the motion for a new trial. Judgment affirmed. All the justices concurring, except LUMPKIN, P. J., absent on account of sickness.

(105 Ga. 727)

RIGGINS v. ADAIR et al.

(Supreme Court of Georgia. Nov. 17, 1896.)

WILLS—TRUSTS—NATURE—EXECUTION—MARRIED WOMEN.

Where in 1857 one conveys land to another as trustee, with power to have and to hold the property and its increase for the sole and separate use of the grantor's daughter "during natural life, free from all and every liability of her husband, only as contracted on account of the maintenance, support, and comfort of the said" daughter and her children, and at her death "then" the property is to be equally divided among her children, or, in the event she, "who has only a life estate in said property, shall die without a lawful child or children living, the [trustee named] is to have and to hold said property and its increase, to be divided equally among the heirs at law of the [grantor]," *held*, that the trust is executory, at least during the lifetime of the daughter, and did not become executed by virtue of the married woman's act of 1866, and that the property is liable for debts created by the trustee for the benefit of the trust estate.

(Syllabus by the Court.)

Error from superior court, Pike county; M. W. Beck, Judge.

An execution in favor of Adair & McCarty Bros. was levied on property to which a claim was interposed by Mary S. Riggins. There was a judgment for plaintiffs in execution, and claimant brings error. Affirmed.

J. S. Pope and A. B. Pope, for plaintiff in error. E. F. Dupree, for defendants in error.

SIMMONS, C. J. In the present case it is necessary to determine whether there was at the time the judgment of the plaintiffs below was obtained an existing executory trust. If so, the property of the trust estate was bound by the judgment against it on the suit by persons who had furnished fertilizers for the use of the trust estate. Section 3202 of the Civil Code recognizes the liability of a trust estate "for articles or property or money furnished for the use of said estate," and the judgment above mentioned was obtained

in accordance with that and the following section, the declaration containing allegations showing that the debt sued upon was binding upon the estate. If the trust was executory, the trust estate and the cestus que trustent were, therefore, bound by the judgment. *Clark v. Flannery*, 99 Ga. 239, 25 S. E. 312. Counsel for plaintiff in error contends that: "There were no children of Mary Susan Neal [the daughter of the grantor] in life at the time of the execution of said trust deed, and children born subsequently to that time took no interest thereunder. Hence the trust created by said deed was created for the sole use and benefit of Mary Susan Neal,"—and cites the cases of *Lofton v. Murchison*, 80 Ga. 391, 7 S. E. 322, and *Baird v. Brooklin*, 86 Ga. 709, 12 S. E. 981. He then argues that the trust was executed by the married woman's act of 1866. This we think is not true. The rules of construction resorted to in cases where a deed does not show whether a grantor intended to convey a life estate with remainder, or to create an estate in common, or where a conveyance is to a person or persons and their children, without stating whether unborn children are included, are not to be invoked where the intention of the grantor may be determined from words and expressions in the deed itself. In the deed now under consideration the property was conveyed to the trustee for the sole use and benefit of the daughter "during natural life," and at her death "then" to be divided equally among her children. If this daughter, "who has only a life estate in said property," died "without a lawful child or children living," the trustee was to hold the property and its increase, to be divided equally among the heirs at law of the grantor. The cases cited by counsel, and also the cases there referred to (among others, the case of *Wiley v. Smith*, 3 Ga. 551), were based upon the rule in *Wild's Case*, 6 Coke, 16b. That rule applies where the conveyance is to a person and his children or issue, he having at the time no issue. In each one of the cases above mentioned the devise or conveyance was so made, showing no intention that the children should take as remainder-men, the gift being immediate. Here, however, the estate of the daughter is expressly limited to a life estate; and at her death the property is to be divided among her children, or among the heirs at law of the grantor. The property is given for the sole and separate use of the daughter during her natural life, and until after her death the children can take no interest under the deed. The estate is to the daughter, "free from all and every liability of her husband, only as contracted on account of the maintenance, support, and comfort of the [daughter] and her children." But this gives the children no interest at all. Whatever interest they may get under the deed is postponed until after the death of their mother. The cases cited have, therefore, no application to the present. From

the language of the instrument itself, it seems to us clear that the daughter was to receive only a life estate, with remainder over to her children, if any survived her; while if, at the time of her death, and the consequent termination of the life estate, she left no surviving children, then the property was to be divided equally among the heirs of the grantor. The trust was therefore not executed by the act of 1868, for "something remain[ed] to be done by the trustee, either to secure the property, to ascertain the objects of the trust, or to distribute according to a specified mode," and the trust was still executory. Civ. Code, § 3156.

The facts of this case differ materially from those of the case of *Carswell v. Lovett*, 80 Ga. 36, 4 S. E. 866. In the latter case the trustee held the property for the use of the beneficiary, to protect it against the debts of her husband. The husband had died, and at the death of the beneficiary the property was to be divided among her children and their representatives, the remainders being thus vested. In the present case the property was to be divided equally among the children of the life tenant, if any survived her; if not, the trustee was to hold it and its increase to be divided equally among the heirs of the grantor,—the remainder-men being uncertain, and the remainders contingent. The facts of this case are more nearly like those in *Cushman v. Coleman*, 92 Ga. 772, 19 S. E. 46, where it was held that where the "fee is carved up into an estate for life in favor of one beneficiary, and a remainder in behalf of other beneficiaries, who are uncertain and unascertained, * * * the title as to the remainder should be considered as abiding in him [the trustee] so long, at least, as the identical persons who are to take and enjoy it are not ascertainable. Up to that time the trust is executory, and the remainder is an equitable, not a legal, estate. * * * That a trust in remainder will become executed on the happening of a certain event, such as the death of a tenant for life, does not involve, as a presupposition, that the trustee has no title to the remainder, but the contrary; for the passing of the legal title out of the trustee into the beneficiaries is what executes and terminates the trust." In the present case it is impossible, before the death of the life tenant, to ascertain who will be the remainder-men. They may be the children of Mrs. Riggins, surviving her, or they may be the heirs at law of the grantor; and in either event it would seem, under the deed, that the trustee is "to have and to hold" the property to be equally divided. So long as the life tenant survives, the trustee has still to hold and secure the property and its increase, to ascertain the objects of the trust, and to distribute it according to the mode provided in the deed. While these things are to be done, the trust is not executed. *Cabot v. Armstrong*, 100 Ga. 438, 28 S. E. 123.

The trust being executory, and the judgment valid and binding upon the trust estate, the trial judge rightly held, upon the trial of the claim case before him without the intervention of a jury, that the property was subject to the execution issued upon that judgment. Judgment affirmed. All the justices concurring, except LUMPKIN, P. J., absent on account of sickness.

(106 Ga. 37.)

COLUMBUS R. CO. v. SIZEMORE

(Supreme Court of Georgia. Nov. 12, 1896.)

INSTRUCTIONS—RESTRICTION TO ISSUES—APPEAL—REVIEW—CARRIERS—EJECTION FROM STATION.

1. The special plea of justification filed in defense to the action having been stricken, it was proper for the trial judge, in his charge to the jury, to restrict them to a consideration of the remaining issues made by the pleadings. (a) No exception having been taken to the striking of this plea, the merits of the defense therein set up cannot properly be passed upon by this court.

2. Viewed in the light of the pleadings as they stood after striking of the defendant's special plea, no error of law was committed in any of the rulings complained of; the evidence warranted the verdict; and no reason appears why the judgment of the court overruling the motion for a new trial should be set aside.

(Syllabus by the Court.)

Error from superior court, Muscogee county; *W. B. Butt, Judge.*

Action by Eta Sizemore against the Columbus Railroad Company. Judgment for plaintiff. Defendant brings error. Affirmed.

L. F. Garrard, Frank Garrard, and Brannan, Hatcher & Martin, for plaintiff in error. C. J. Thornton, A. B. Thornton, and Miller & Miller, for defendant in error.

SIMMONS, C. J. The plaintiff brought an action for damages against the defendant railroad company on account of an alleged wrongful ejection from a waiting room provided by the company for the accommodation of persons intending to take passage upon its cars. In its answer, the defendant denied all the material allegations of the plaintiff's petition. By special plea of justification, the defendant sought to make the further defense that the plaintiff was a woman of loose character, and accordingly it was not only the right, but the duty, of its officials to eject her from its waiting room, which it had provided for the convenience and use of its lady passengers, and which was not intended to be kept for and occupied by persons who were dissolute or of doubtful character. At the instance of the plaintiff, the court struck this plea, and the case proceeded to trial upon the sole remaining issue made by the pleadings, viz. whether or not the plaintiff was in fact ejected, as alleged in her petition. Upon this issue, the jury found in her favor, and, the defendant's motion for a new trial having been overruled, the case is brought here for review.

1. Complaint is made that the court charged.

in effect, that, notwithstanding the plaintiff may have been a lewd woman, still, if her conduct on the occasion in question was not such as was unbecoming a lady, her ejection from the defendant's waiting room was wrongful. It appears that the court allowed the defendant to introduce evidence tending to show that the plaintiff was a common prostitute, whose general character was bad; but this evidence was admitted only for the purpose of affecting her credibility as a witness in her own behalf. Doubtless, therefore, the court intended, by the charge above referred to, not only to limit the purpose for which the jury were authorized to consider the evidence relating to her character, but to instruct them that, under the pleadings as they then stood, the mere fact that the plaintiff was a woman of ill repute and of immoral habits would constitute no defense to the action.

It is to be observed, in this connection, that the defendant's special plea of justification had been stricken; and, this being so, it was eminently proper for the trial judge to confine the jury to a consideration of the issues presented by the pleadings as they then stood. This is true, whether the striking of the plea was or was not erroneous. No exception to this ruling was taken, and the action of the judge in refusing to allow the defendant to make the special defense sought to be urged is not properly before this court for review. We therefore wish to be distinctly understood as not intimating that this defense was not in law a good one. Had the striking of the special plea been excepted to, the question respecting it would be a very different one, and would present the case in another light.

What is said above disposes of several exceptions which allege error in the refusal of the court to give in charge to the jury certain written requests, by which the defendant endeavored to get before the jury the defense set up in its special plea, which had been stricken.

2. Other requests to charge presented by the defendant, but which the court refused to give, assumed as true the version of what occurred as detailed by the company's president, Mr. Flournoy, who was introduced in its behalf as a witness. Clearly, therefore, they were properly rejected as not adjusted to the testimony, which was decidedly conflicting. The least objectionable of these requests was as follows: "I charge you that an eviction may be made by force or intimidation. Plaintiff insists that she was evicted by being ordered out of the transfer house by intimidation. Now, I charge you that if you believe from the evidence that, after the conversation of Flournoy, he left upon the car for his home, and that plaintiff remained at the time in the transfer house, and knew that Flournoy had gone when she left, then this was not such intimidation at time of her leaving as would constitute an eviction in law, and you should find for the defendant." In the first place, this request is objectionable, because unauthorized by the evidence. While it was shown that the com-

pany's president did in fact leave for his home after the conversation referred to, leaving the plaintiff in the waiting room, it did not affirmatively appear that she knew of his departure, or, if so, of his intention to leave for his home, with or without the expectation of presently returning. On the contrary, the plaintiff testified that he had threatened to eject her if she did not leave voluntarily; that she feared personal violence, and immediately departed, leaving him still at the station. While she may have been mistaken as to his presence when she left, it certainly could not be arbitrarily assumed that she knew he had previously gone, destined for his home (wherever that may have been), and had no intention to presently return and carry out the threat which she understood him to have made. Moreover, the charge requested is subject to the criticism that it undertakes to declare, as matter of law, that, if the plaintiff knew of Flournoy's departure for his home before she left, the jury were bound to assume that she left voluntarily and of her own volition, uninfluenced by any fear of being forcibly ejected if she remained. Besides, "intimidation at the time of her leaving" was not, under the facts presented by the evidence, the proper test to be applied; for, if intimidated at all by what Flournoy said to her, this occurred some little time previously to her actual departure, and if, in leaving, she was really influenced thereby, it was not essential that the intimidation employed should be coincident with her departure.

A portion of the charge as given, relating to the law concerning ejection by force, as distinguished from ejection by intimidation, is excepted to. No special assignment of error is, however, stated or relied on. The extract complained of which is thus made is certainly unobjectionable as an abstract statement of well-known legal principles, which is a sufficient reply to the assignment of error made thereon. Indeed, not only is this true, but the charge excepted to appears to have been peculiarly well adapted to the pleadings in so far as the same were sustained by evidence. The jury evidently accepted the plaintiff's version of what occurred at the station between herself and the company's president; and we cannot say that, taking as true the evidence introduced in her behalf, the finding in her favor was unwarranted. It follows that, no error of law having been committed to which exception is taken, the judgment overruling the defendant's motion for a new trial should not be set aside. Judgment affirmed. All the justices concurring, except LUMPKIN, P. J., and LITTLE, J., absent on account of sickness.

(105 Ga. 732)

O'BRIEN v. HARRIS et al.

(Supreme Court of Georgia. Nov. 17, 1896.)

EQUITY—INJUNCTION—COMMISSION OF CRIME.

Equity has no jurisdiction, upon the petition of individuals, to interfere in matters

merely criminal, or to enjoin any one from the commission of a crime, when it does not appear that the acts complained of affected any property rights of the petitioner.

(Syllabus by the Court.)

Error from superior court, Warren county; Seaborn Reese, Judge.

Suit by J. I. Harris and others against Joe O'Brien. Judgment for plaintiffs, and defendant brings error. Reversed.

Benj. H. Hill, for plaintiff in error. E. P. Davis and James Whitehead, for defendants in error.

LEWIS, J. This was a suit by individuals to enjoin the violation of a penal statute. The petition itself does not disclose any particular injury to the property of the complainants resulting from such violation. The only allegation on this point is that some of the petitioners own real estate near the town in which the sale of liquors is being had, and that such sale injures and damages their property, interferes with their business, and is hurtful to the best interests of the church of which they are trustees. There is no allegation whatever how their property is injured, or that the act complained of affects their rights any more than it does all other persons who come within the sphere of its operation. On the hearing, there was an absolute want of any proof tending to show any private injury, or any damage whatever to the property rights of the plaintiffs. Manifestly, then, the object of this petition was not to redress a private grievance, but to enjoin the perpetration of an alleged public wrong. We cannot conceive upon what theory equity could interfere in such a matter, except upon the idea of restraining the commission of acts which amount to a nuisance; but, if the facts alleged in the petition constitute a nuisance, it is of a public, and not of a private, nature, for it is not limited in its injurious effect to one or a few individuals. In such a case no right of action lies to any individual; but, if any exist, it should be instituted in the name of the state, upon information filed by the solicitor general of the circuit. Civ. Code, §§ 3858, 4761. The doctrine is too well established to require any lengthy discussion that equity never interferes at the instance of the individual citizen or person in matters merely criminal, or merely immoral, which do not affect any right to property. It is true, a court of equity, under some circumstances, will, at the instance of an individual, restrain an act which amounts to a violation of a criminal law; but the act itself must be of some peculiar injury to the property rights of the party complaining, and the court interferes, not on account of the public wrong, but on account of the private injury. When, therefore, a case is presented by individuals for the sole purpose of restraining or preventing crime, equity is absolutely without any jurisdiction whatever over the

subject-matter of the complaint. See this subject fully discussed in the following works, and citations therein contained: Kerr, *Inj.* *5; 1 *High, Inj.* § 20; 10 *Am. & Eng. Enc. Law*, p. 914. See, also, *Paulk v. Mayor, etc.* (Ga.) 30 S. E. 417.

Where the court has no jurisdiction over the subject-matter of a suit, parties cannot confer jurisdiction by agreement. Although this question was not argued by counsel for either side before this court, and we presume it was waived for the purpose of obtaining a final adjudication as to the right of the plaintiff in error to sell liquors, yet we cannot, even upon such consent and waiver, sustain the judgment of the court granting an injunction, when no jurisdiction has been conferred upon it by law. The judgment in such a case is void, and no consent or waiver of the parties litigant can make it a legal judgment of a court of law or equity. Judgment reversed. All the justices concurring, except LUMPKIN, P. J., absent on account of sickness.

(105 Ga. 302)

PEARSON v. BROWN.

(Supreme Court of Georgia. Nov. 18, 1898.)

APPEAL—ASSIGNMENT OF ERROR—ACTION ON NOTE—ESTOPPEL.

1. An assignment of error upon the admission of evidence cannot be considered unless the evidence alleged to have been illegally admitted be set forth literally, or its substance clearly stated, either in the motion for a new trial or in the bill of exceptions brought to this court.

2. That the maker of a promissory note, after its maturity, addresses to the payee one or more letters in which he asks for indulgence, and promises to pay the note if its collection is not pressed, will not operate to estop him from subsequently setting up the defense of partial failure of consideration, notwithstanding the facts upon which this defense is based were well known to him at the time he wrote the payee to the effect stated.

(Syllabus by the Court.)

Error from superior court, Putnam county; John C. Hart, Judge.

Action by Ike W. Brown against J. M. Pearson. Judgment for plaintiff. Defendant brings error. Reversed.

Jenkins & Lewis, for plaintiff in error. W. T. Davidson, for defendant in error.

SIMMONS, C. J. 1. Complaint is made in the motion for a new trial that "certain letters, six in number, were illegally admitted to the jury, over objection of counsel"; that there had been no sufficient proof of their execution, the same having been "offered as letters from the defendant to the plaintiff." None of these letters are set forth in the motion, nor the contents thereof stated, the movant simply making the above-quoted reference thereto, and adding that "they have been briefed, and will appear in the brief of the evidence filed with this motion, and marked and identified as letters 1 to 7." This is not

a sufficient assignment of error. *Telegraph Co. v. Michelson*, 94 Ga. 436, 21 S. E. 169. We will therefore pass to a consideration of such points as are properly presented for adjudication.

2. It appears that the defendant bought of the plaintiff a mare, giving in payment therefor a promissory note secured by a mortgage. Some considerable time after the maturity of this note, a number of letters, purporting to have been written by the defendant, and addressed to the plaintiff, were received by the latter by due course of mail. In these letters the writer requested indulgence, promising payment of a balance due on the note as soon as possible if its collection was not pressed. None of these repeated promises being fulfilled, the plaintiff finally sought to foreclose the mortgage given him. In defense to the action, the defendant alleged that, shortly after the mare was delivered to him, it was discovered to be unsound and diseased; and consequently, the animal having been sold on a warranty that it was sound and well, the consideration upon which his promissory note was given had partially failed.

In submitting to the jury the issue thus presented, the trial judge instructed them that "if they should find that defendant, Pearson, after the maturity of the note, and with the knowledge of the defects in the mare, wrote letters to the plaintiff, Brown, asking for more time in which to pay the balance due, and also promising to pay the balance at some future time, he would then be estopped from now setting up and pleading a failure of consideration, and they should find for the plaintiff." It is insisted here that this charge was erroneous, "because the law of estoppel is not applicable to the facts of this case, for the letters, even if they admit owing the debt, would be nothing more than an admission, and would simply be a circumstance for the jury to consider, like any other evidence before them." We think the point thus made a good one. It does not appear that there was any novation of the original contract between the parties, whereby, in consideration of the time of payment being extended, Pearson obligated himself by a new promise to pay the note. On the contrary, it would seem that while, upon his urgent solicitation, Brown refrained from taking any legal steps to collect the note, he never, by any agreement to extend its payment for any definite period, surrendered his right to resort to his legal remedies at any time he saw proper to do so. Nor can it be said that, relying upon the naked promise of Pearson to pay the note as soon as possible if he was not pressed, Brown has suffered injury, or has been placed in any worse position than he otherwise would have occupied. Clearly, therefore, the doctrine of estoppel cannot be invoked in his behalf.

As pointed out in the very helpful brief filed in behalf of the plaintiff in error, none

of the cases cited and relied on by the defendant in error can be regarded as controlling upon the question here presented. In the first of these,—*Electric Co. v. Blount*, 96 Ga. 272, 23 S. E. 306,—it appeared that the defendants, with a full knowledge that the electric plant built for them was defective and unsuited to the use intended, and "while a controversy was pending between them and the contractor as to the terms of settlement, executed and delivered to the latter their promissory notes" for a balance claimed to be due under the contract. Accordingly, this court held that, under the circumstances recited, the giving of the defendants' promissory notes amounted to a waiver of all defects known to them at that time. The case of *Harder v. Carter*, 97 Ga. 273, 23 S. E. 82, follows this ruling, as does also that of *Lunsford v. Malsby*, 101 Ga. 39, 28 S. E. 496. In *American Car Co. v. Atlanta St. Ry. Co.*, 100 Ga. 254, 28 S. E. 40, there was a distinct novation of the original contract, in that the defendants, with knowledge of the alleged defects in property purchased of the plaintiff, procured an extension of the time of payment of the purchase price as fixed by the note originally given, and voluntarily executed another note in renewal of the first, thereby waiving the defense sought to be set up of failure of consideration.

In the case at bar it clearly appears that the defendant, at the time he executed his promissory note, did not know that the mare purchased by him was diseased; so it cannot be said that, by thus closing the trade with the plaintiff, this defect in the animal was voluntarily waived. There was, subsequently to the time the note became due, and after the defective condition of the mare was discovered by the defendant, no new promise on his part, based upon a valuable consideration, which could operate as a novation of the original contract. No implied waiver can be inferred from a naked promise to pay, which is not legally binding upon the person making the same; that is to say, such waiver, if any, would share the fate of the promise, and would fall therewith, if the promise itself was incapable of enforcement. Suppose, for instance, the defendant had written the plaintiff, calling attention to the diseased condition of the mare, and stating expressly that he would waive the defect and pay the note regardless of this fact, if not immediately pressed for payment. Even in that event, if there was no consideration for this voluntary offer, the defendant would not be legally bound thereby. See, in this connection, 23 Am. & Eng. Enc. Law, 581, and cases cited in note 2. Certainly, an implied waiver has no greater force or validity than an express one. To sum the matter up in a nutshell: In order that a waiver may be implied as necessarily incident to an act done by a party, it must affirmatively appear that the act itself is not one which he is at liberty to repudiate at pleasure. We are therefore

forced to the conclusion that, however hurtful to the defendant the letters purporting to have been written by him may be, regarded as an admission of the righteousness of the plaintiff's claim, they do not amount to an estoppel, and, accordingly, the charge of the court of which complaint is made was totally unwarranted. Its practical effect was to deprive the defendant of all benefit of the defense relied on, in the event the jury should believe these letters were written by the defendant himself or at his instance, and therefore operated greatly to his prejudice. Judgment reversed. All the justices concurring, except LUMPKIN, P. J., absent on account of sickness

(105 Ga. 799)

REINHART v. BLACKSHEAR.

(Supreme Court of Georgia. Nov. 18, 1898.)

APPEAL—REVIEW—ASSIGNMENT OF ERRORS—JUDGMENT—LEAVE TO SELL TRUST PROPERTY—PRESUMPTIONS.

1. An assignment of error which neither states what (if any) objection was made to evidence alleged to have been illegally admitted, nor undertakes to set forth literally or in substance the evidence referred to, cannot be considered by this court.

2. An order passed by a judge of the superior court, whether in term or at chambers, granting an application presented by a trustee for leave to sell property held by him in trust, has all the sanctity which attaches to a formal judgment rendered by a court of general jurisdiction, and, accordingly, every presumption in favor of its validity is to be indulged. (a) This being so, it will be presumed, in the absence of any proof to the contrary, that all necessary parties to the proceeding were regularly before the court, or that else such order would not have been passed.

3. Under the evidence submitted in the present case, a finding for the defendant was demanded, and therefore the trial court did not err in directing a verdict in his favor.

(Syllabus by the Court.)

Error from superior court, Laurens county; John C. Hart, Judge.

Action by Leila Reinhart against Freeman Blackshear. Judgment for defendant, and plaintiff brings error. Affirmed.

John M. Stubbs, T. B. Felder, and Alex. Akerman, for plaintiff in error. T. L. Griner and James K. Hines, for defendant in error.

FISH, J. 1. The only error assigned in the bill of exceptions now before us is that the trial judge erred in overruling the plaintiff's motion for a new trial. One of the grounds of the motion was as follows: "Because the court erred in admitting in evidence the deed from John T. Duncan, trustee, to J. J. F. Blackshear, and the petition and order of court upon which the same was based." As will readily be observed, no attempt is made by the movant to state what objection, if any, was made to the admission of the evidence when offered. Consequently, we cannot deal with this ground, for, as repeatedly ruled by this court, such an omission is fatal. Furthermore,

the movant does not undertake to set forth, either literally or in substance, the evidence referred to. This of itself would be a sufficient reason for our declining to consider the alleged error complained of. *Telegraph Co. v. Michelson*, 94 Ga. 436, 21 S. E. 169; *Pearson v. Brown* (Ga.) 81 S. E. 746. We shall therefore pass to the general grounds of the motion, all alleging that the verdict returned was contrary to law and the evidence, and opposed to the principles of justice and equity.

2. It appears that on December 29, 1864, the plaintiff's father, under whom she claims, executed a deed of trust for the benefit of his wife and children, whereby the legal title to the premises in dispute passed into John T. Duncan, as trustee. On December 5, 1865, Duncan, as trustee, conveyed the premises to Joseph J. F. Blackshear, under whom the defendant holds through a regular chain of title. The conveyance last referred to recited that it was executed by the trustee under and by virtue of a decree of the superior court of Laurens county, rendered at the October term, 1865, of that court. The application of the trustee for leave to sell, and the order of court granting the same, were also introduced in evidence in behalf of the defendant. At the time this order was passed, the plaintiff was a minor; but whether or not she was served with notice of the proceedings, and a guardian ad litem appointed to represent her upon the hearing of the trustee's application to sell, does not affirmatively appear. Certain it is, however, it was neither alleged in the pleadings filed in her behalf in the present case, nor shown by the evidence introduced on the hearing thereof, that, in point of fact, she was not served, or that she was not duly represented by a guardian ad litem, in the proceeding upon which the order of court above referred to was based.

Nevertheless, it is contended by counsel for the plaintiff in error in the brief filed in her behalf that she is not bound by this order, for the reason that she was not served, and because no guardian ad litem for her was appointed; and the assertion is made that "the record shows this was not done." We cannot better meet this contention than by quoting somewhat at length from the opinion recently filed by Lumpkin, P. J., in the case of *Wagnon v. Pease* (Ga.) 30 S. E. 805, wherein it was said, in reply to the argument of counsel that because the record of the proceedings before the chancellor, which had been introduced in evidence, did not show service upon the cestui que trust, it followed conclusively that they were not in fact served: "If this conclusion of fact necessarily resulted from the premises stated, the particular contention now under consideration would undoubtedly be a good one. But, as will have been observed from the above statement of what this record shows, the real truth of the matter is that, while it does not affirmatively appear that service was in fact duly made, there is absolutely nothing going to show the contrary. In other words,

the record is merely silent as to this point. This being so, everything is to be presumed in favor of the validity of the order of court, which [as was ruled in *Pease v. Wagnon*, 98 Ga. 361, 20 S. E. 637] is to be regarded as having all the sanctity which attaches to a formal judgment rendered by a court of general jurisdiction. It follows, of course, that, in the absence of proof showing a failure to serve the parties interested in the proceeding, the presumption would be that every one to be affected thereby was properly before the court, else the order would not have been passed."

3. The order of court upon which the defendant in the present case relied was, apparently, binding and conclusive upon the plaintiff as to the right of her trustee to sell the land in controversy. She neither alleged nor proved the contrary. Accordingly, a finding for the defendant was the only logical result which could have been reached, and the trial court properly directed the jury to return a verdict in his favor. Judgment affirmed. All the justices concurring, except LUMPKIN, P. J., absent on account of sickness.

(105 Ga. 743)

WILLIAMS v. STATE.

(Supreme Court of Georgia. Nov. 18, 1898.)

STEALING FROM RAILROAD CAR—VENUE—EVIDENCE.

A verdict of guilty upon an indictment charging the accused with the specific offense of entering and stealing from a railroad car is not, as to venue, sustained by evidence showing merely that the accused carried the stolen goods into the county where the trial took place; but in such case it should affirmatively appear that the larceny from the car actually occurred in that county. (a) The evidence in the present case was not sufficient to show that the offense charged was committed in the county where the trial was had, and the verdict of guilty was, for that reason, illegal, and should have been set aside.

(Syllabus by the Court.)

Error from superior court, Bibb county; W. H. Felton, Jr., Judge.

J. H. Williams was convicted of stealing from a railroad car, and brings error. Reversed.

M. G. Bayne, for plaintiff in error. Robt. Hodges, Sol. Gen., for the State.

COBB, J. Williams was indicted in the superior court of Bibb county for the offense of entering and stealing from a railroad car. Having been convicted, he made a motion for a new trial, on the grounds that the verdict was contrary to law and the evidence, and because the venue of the offense was not proven. The motion was overruled, and the accused excepted. The evidence adduced upon the trial was, in substance, as follows: About 11 o'clock on the night of May 9, 1898, W. F. Coombs got on a sleeping car at Jesup, and went to bed and to sleep. The train ran through Bibb county that night. Coombs did not wake up until he got to a place near

Atlanta, next morning, when he found that he had lost certain articles of value, among which were a vest and a gold watch and chain. The vest he afterwards recovered from the agent of the railroad, with whom it had been left by some person. The watch was in the vest pocket when Coombs retired to bed, but was not in the vest when he received it from the agent. The watch taken from the accused by the officers was the same watch that was lost, but the initials "J. H. W." had been put on since. Jesup is about 60 miles from Macon. The accused was arrested on the 3d day of August, in the city of Macon, and the watch taken from him at that time. Accused said when arrested that he had bought the watch last fall, in Houston, Tex. The porter of the sleeping car from which the articles were taken testified that he did not see any one get on the car after it left Jesup. He "saw some tracks in the dust on the steps and platform after we left Bullards, which looked like some one had gone in the car," but did not see where they went out. The train did not stop between Bullards and Macon. The train stopped about 7 or 8 minutes at Macon the morning Mr. Coombs was on the train. He "did not see any one get on the train or get off the train at Macon while the train stopped. * * * The train runs about four miles an hour after it gets into the city limits. * * * Bullards is not in Bibb county, but in Twiggs county, which joins Bibb." There was also evidence tending to show that the accused had had the watch repaired in July, and had had the initials "J. H. W." engraved on the watch, but it did not appear when this was done. There was evidence that "a white man" had brought the vest which was lost, and given it to the roadmaster at the Southern Depot, and said that he had found it on the railroad about two miles from Macon, in Bibb county; also, that the train stops at an iron drawbridge in Bibb county, before coming into the city. The accused worked at the Southern Railroad yard as a fireman on a local engine.

Even conceding that the evidence above recited was sufficient to show that the accused was the perpetrator of the larceny charged in the indictment, the evidence as to the venue of the offense was entirely too weak to authorize his conviction. The only evidence as to this was the testimony of the porter of the sleeping car, and the fact that the vest which was lost had been delivered to an agent of the railroad company by a white man, who said that he found it on the railroad, in Bibb county. It certainly needs no argument to demonstrate that this evidence is entirely insufficient to show where the actual entering and stealing took place.

Section 29 of the Penal Code provides that "all criminal cases shall be tried in the county where the crime was committed, except cases in the superior courts, where the judge is satisfied that an impartial jury can-

not be obtained." Section 155 defines the offense of simple larceny, and provides that "the thief may be indicted in any county in which he may carry the goods stolen." Such was the rule at common law, the reason being that the theft "is considered as committed in each and every county into which the thief may pass, having the stolen goods in possession." *Tippins v. State*, 14 Ga. 422. The legal possession still remaining in the owner, every moment's continuance of the offense amounts to a new taking and carrying away. *Clark, Cr. Proc.* p. 10. While it is true that simple larceny is an essential element of the offense of entering and stealing from a railroad car, the latter offense belongs to the same class of larcenies as larceny from the house and larceny from the person, and is a distinct offense. *Pen. Code*, § 185. In the case of simple larceny, the taking and carrying away may properly be considered as committed in every county into which the thief carries the goods. But the offenses of larceny from the house, larceny from the person, and entering and stealing from a railroad car, can only be considered as committed in the county in which the actual taking and carrying away or entering and stealing takes place. A simple taking and carrying away may, indeed, be so considered, but a taking and carrying away from the house or from the person, or the entering and stealing from the car, can never be considered as taking place but once; that is, at the place where the house, person, or car happens to be located at the time. The offense of simple larceny, which is a component part of the offense of entering and stealing from a railroad car, is committed in every county into which the thief carries the goods, and he may be there indicted and tried for this offense; but, if the state elects to try him for the compound offense, the venue must be laid and proven in the county where the actual entering and stealing took place. Without deciding whether the evidence in the present case, irrespective of the question of venue, was sufficient to authorize a conviction, we are clear that the venue was not proven, and the judgment is reversed for that reason. Judgment reversed. All the justices concurring, except SIMMONS, C. J., not presiding, and LUMPKIN, P. J., absent on account of sickness.

(105 Ga. 835)

DOKE v. DAVIS.

(Supreme Court of Georgia. Nov. 19, 1898.)

APPEAL—REVIEW.

There being some evidence to support the verdict, the trial judge being satisfied therewith, this court will not control his discretion in refusing a new trial.

(Syllabus by the Court.)

Error from superior court, Wilkinson county; John O. Hart, Judge.

Action between Dennis Doke and Rachel Davis. From the judgment, Davis brings error. Affirmed.

J. W. Lindsey, John T. Allen, and Roberts & Pottle, for plaintiff in error. W. Dessan and F. Chambers, for defendant in error.

PER CURIAM. Judgment affirmed.

LUMPKIN, P. J., absent on account of sickness.

(105 Ga. 757)

DIXON v. STATE.

(Supreme Court of Georgia. Nov. 18, 1898.)

CRIMINAL LAW—APPEAL—OBJECTIONS TO CHARGE—RIOT—INTENT—EVIDENCE.

1. Where error is assigned to the charge as a whole, such assignment will not be considered, if it appears that any part of the charge complained of was legal.

2. To sustain a verdict of guilty (when the offense charged is not one arising from culpable negligence), it is necessary that intention should exist at the time of the commission of the act; and it was therefore error in the judge, on the trial of a person accused jointly with others with the offense of riot, to charge that "when two or more persons unite, with or without a common intent, in doing an unlawful act, the acts and words of each become the acts and words of every other one engaged."

3. To sustain a conviction of one charged with the offense of riot, it is necessary that the evidence should show the joint action of at least two persons, with a common intent to do an unlawful act of violence, or other act, in a violent and tumultuous manner. This not being shown by the evidence in this case, the verdict is contrary to the law and the evidence, and a new trial should therefore have been granted.

(Syllabus by the Court.)

Error from city court of Cartersville; J. W. Harris, Judge.

John Dixon, Sr., was convicted of riot, and brings error. Reversed.

J. B. Conyers, T. W. Milner, and Ben. J. Conyers, for plaintiff in error. Sam P. Maddox, Sol. Gen., for the State.

LITTLE, J. The plaintiff in error was jointly indicted with Lucius Goodwin, Gene Hamilton, and Ike Sanders with the offense of riot by the grand jury of Bartow county. It is alleged in the bill of indictment that persons named did, in a violent and tumultuous manner, gather and assemble together, and, being so assembled, in a violent and tumultuous manner did do an unlawful act of violence, by cursing, and urging John Dixon, Jr., to shoot Cliff Johnson, and preventing a gun from being taken from John Dixon, Jr., who was threatening to shoot the said Cliff Johnson, and did otherwise act in a violent and tumultuous manner. The state placed the plaintiff in error on trial, and, on arraignment, he pleaded not guilty. The evidence, briefly stated, is as follows:

Cliff Johnson testified: "That in the month of April there was a disturbance in Klugston.

in front of the storehouse of Hill, which was the furthest store on the east side of town. A number of negroes and white people assembled on the sidewalk and street in front of the store. There was loud and boisterous talking and some cursing. Heard Lucius Goodwin say he 'would kill the God damn rascal if he done him that way.' I heard Gene Hamilton say, 'If it had been me, I would do him up.' I heard John Dixon, Sr., say, 'Anybody who would strike my son had better first step into hell.' Do not remember anything else that was said. The first time I saw John Dixon, Jr., that night, Reynolds, Nance, and myself were together near Griffin's store, just west of Hill's store, and on the same side of the street. Dixon, Jr., passed us. We went on behind him as far as Hill's store. There Reynolds and Nance stopped. Dixon was about forty feet beyond. I called him to stop, and went to where he was. In a few moments I returned, and went into Hill's store. Soon after I went in, Dixon, Jr., came to the front door with a gun and attempted to enter. He was by himself, and Davidson, a negro, who was at the front of the store, prevented him from going in, and took him down towards the store of Griffin." The witness, in company with Reynolds, then went into the back room of Hill's store, and remained until the fuss was over. While in the back room, a considerable crowd of people assembled in front of the store. It was then witness heard the loud talking and threats to which he testified. Witness further stated: "I do not know that any one of the persons at the front of the store made any attempt to enter the store, or that any of them did any act other than talking," as he stated. He recognized the men who did the talking by their voices.

Ed. Bruce testified: "Remembers the disturbance in the month of April last. Before the difficulty Hill and myself were sitting on the steps of the former's store. While there, Dixon, Jr., passed along going towards Sanders' shop. A short time after, Johnson, Reynolds, and Nance came by, following him. The two latter stopped in front of the store. Johnson called to Dixon to stop, and walked towards him. Witness then heard noise, as if licks were struck. Johnson had a stick in his hand when he passed. He returned in a few minutes, and walked into Hill's store. A little while after that John Dixon, Jr., ran by the store, and up an alley, crying. In a few minutes the accused came along, following his son, and went towards Griffin's store, calling his son. In a very short time Dixon, Jr., came to the store with a gun, and started to enter it, saying, 'Where is he?' Another negro, by the name of Davidson, was standing at the front door when Dixon, Jr., came up, and took hold of him, prevented him from entering the store, and took him down the sidewalk towards Griffin's store; and very soon a crowd assembled in front of Griffin's store. Then the crowd of negroes and white

people came up in front of Hill's store, numbering 10 or 15. Among these, I recognized Dixon, Jr., Dixon, Sr., Lucius Goodwin, Gene Hamilton, and Ike Sanders. I heard the accused say, 'Why didn't he hit me? He is mad with me. Why did he jump on my son?' I heard Hamilton say, 'If he had done me that way, I would do him up.' I heard Lucius Goodwin say, 'If he had done me that way, I would have killed the damn rascal.' Does not recollect to have heard any of the others say anything. None of them made any effort whatever to enter the storehouse of Hill. Johnson at that time was in the back room of Hill's store with Reynolds. Hill came to the front door of his store, and said to the crowd that none of them were coming in there to have any fuss, and the crowd immediately dispersed. Hamilton had a knife in his hand, whittling, when I saw him. I saw no act of any of the parties other than as stated. None of them made any effort to go into the store. While Johnson was in the store he was scared; was white and trembling."

Hill, sworn for the state, testified: "Remembers the difficulty in Kingston last April. Bruce and myself were sitting on the step of my store when Dixon, Jr., passed by, about dark, going towards Sanders' shoe shop. Soon after he passed, Johnson, Reynolds, and Nance came up following him. Nance and Reynolds stopped. Johnson called to Dixon to stop, and went on eastward. I heard a noise as if licks were struck where Johnson and Dixon were. Immediately Johnson came back, and walked into the store. About that time was called into the store to wait on a customer; and soon after, John Dixon, Jr., came to the front door with a gun, by himself, and started to go into the store. Davidson took hold of him, and prevented him from coming in, and took Dixon off towards Griffin's store. Soon afterwards a crowd assembled in front of the store, and there was some loud talking. I went out on the porch, and told them I wanted no difficulty there, and none of them could enter my store; and while there I saw Dixon, Jr., the accused, Gene Hamilton, Goodwin, and Sanders. Hamilton had a knife in his hand, whittling. None of them made any effort to come into the store, and all went off when I told them I wanted no trouble at my store. They went, as I thought, in the direction of Griffin's store. John Dixon, Sr., was in the crowd, and I said, 'Stand back, you are not coming in here.' They were mad, and there was considerable excitement."

Will Bruce, sworn, testified: "I remember the difficulty. I was at my place of business, west of Griffin's store, when I heard a noise, and came out, and walked to the front of Griffin's store, where there was a considerable crowd, white and colored. Dixon, Jr., was in the crowd, and had a gun. His mother was there, and a negro by the name of Sanders. It was my purpose to take the

gun from the boy, and Sanders said: 'If we want the gun taken away from him, we can take it. There is enough of us here to do it.' I then said, 'Take it,' and immediately Sanders took the gun away from the boy. Then Sanders, the boy, and his mother went off in the direction of Sanders' shop. I went to Hill's store, and saw a number of people in front of the store, who were then scattering. There I met the accused, and he and I walked on together towards the depot. The accused and his son were employed at the W. & A. R. R. depot."

Nance testified that Reynolds, Johnson, and himself were together, and Dixon passed, and, while witness and Reynolds stopped at Hill's store, Johnson called Dixon to stop, and went to where he was. Heard a noise, as if some one was striking, and heard Dixon crying; that Johnson returned to Hill's store, and went in. He further testified: "I went into the store, and remained near the porch. Very soon I heard the accused and his son John coming from towards Sanders' shop, and just before they got in front of Hill's store I heard Dixon, Jr., say to his father, 'He's got a gun;' and his father said to him, 'You go and get one too;' and when they got in front of the store I heard the accused say that 'anybody who hits my son had just as well jump into hell.' Then I think Dixon, Jr., went up the alley, and the old man went towards Griffin's store. About five minutes afterwards, Dixon, Jr., came to the front of Hill's store with a gun, and attempted to enter, asking, 'Where is he? I will put two loads in him.' Davidson took hold of him, and prevented him from entering the store, and took him down towards Griffin's store. Very soon a crowd assembled on the sidewalk in front of Hill's store. There were present the accused, John Dixon, Jr., Lucius Goodwin, Gene Hamilton, and Sanders. Hamilton had a knife in his hand, whittling. I heard him say, 'If he had done that to me, I would have killed the God damn son of a bitch.' There was a good deal of loud talking, and some cursing. Hill came out, and said to the crowd that none of them could enter his store; that he did not want to have any fuss there; and very soon the crowd dispersed. None of them made any effort to enter the store. All remained in front of the store, on the sidewalk and in the street. The parties mentioned were very mad, and there was considerable excitement."

This was all the evidence for the state.

The evidence on the part of the defendant did not materially differ from that of the state. Some of the witnesses for the defendant contradicted the statements made by the witnesses for the state as to what was said at the time. Sanders testified that he took the gun away from Dixon, Jr., at Griffin's store. Dixon, Jr., testified that, after he was stricken, he went home, got his gun, and returned to Hill's store alone, and was not in the crowd afterwards, in front of the

store, except in passing. The accused in his statement denied having anything to do with any disturbance.

After the jury was charged they returned a verdict of guilty, and the plaintiff in error made a motion for new trial on certain grounds, which was overruled, and he excepted. A number of assignments of error set out in the motion for new trial, in view of our ruling hereafter made, we do not find it necessary to pass upon, as the case is controlled in favor of the plaintiff in error for the reasons herein given.

1. One of the grounds of the motion for new trial alleges error on the charge given as a whole. Under repeated rulings of this court, it must appear, before this ground can be sustained, that the entire charge was error. It does not appear to be such in this case, and there was no error in overruling the motion for new trial on this ground.

2. Error is also assigned upon the following charge of the judge: "I charge that when two or more persons unite, with or without a common intent, in doing an unlawful act, the acts and words of each one become the acts and words of every one engaged in it. And if you find that there was any assembly to do an unlawful act of violence on this occasion, or to do any other act in a violent or tumultuous manner, and that this defendant was engaged in it, then it is immaterial whether the riotous act, if there was one, is done by one or another of the participants; each one is responsible." This charge, we think, is error. Without intention or criminal negligence, no act becomes a crime. It is not necessary to look beyond the circumstances connected with the perpetration of the offense to ascertain intention, because every person is presumed to intend the natural and necessary consequences of his act. Pen. Code, § 32. But intention or criminal negligence must always exist to support a conviction for an offense against the law. It is declared by our law that "if two or more persons do an unlawful act of violence, or any other act in a violent and tumultuous manner, they shall be guilty of a riot and be punished as for a misdemeanor." Pen. Code, § 354. And, when done, the riot, although it must be the act of at least two persons, is but one offense. *Jacobs v. State*, 20 Ga. 841; *Rachels v. State*, 51 Ga. 374, 375; *Stafford v. State*, 93 Ga. 207, 19 S. E. 50. Such offense is a joint one, and one person alone cannot be indicted. *Robinson v. State*, 84 Ga. 680, 11 S. E. 544. Under the provision of Code 1882, § 4514, which gives the definition and prescribes the punishment for the offense of riot, it was declared that, "if any two or more persons, either with or without a common cause of quarrel, do an unlawful act of violence, or any other act in a violent and tumultuous manner, such persons" would be guilty of a riot. It will be noticed that the codifiers eliminated from the definition of "riot," as it appears in the Code of 1895, the

words, "with or without a common cause of quarrel"; and very properly so, because, if an unlawful act of violence, when done by two persons with a common cause of quarrel, was a riot, and if done in the same manner by two persons without a common cause of quarrel was a riot, then whether they did or did not have a common cause of quarrel was immaterial, so far as the offense was concerned, and the section, after the words are stricken, means exactly the same thing as it did before they were stricken. It was for this reason, we apprehend, that the codifiers rejected the words as surplusage. In any event, the section is to be construed as it stands. But eliminating the condition as to whether the persons doing the act had or did not have a common cause of quarrel in no possible way qualified the rule of law as to the intention necessary to hold one criminally responsible.

Defining the offense of "riot," the compilers of the American and English Encyclopedia of Law, citing a number of cases and eminent authors, define "riot" to be "a tumultuous disturbance of the peace by three persons or more, assembled together of their own authority, with an intent mutually to assist one another, against any who shall oppose them, in the execution of some enterprise of a private nature, and afterwards actually executing the same in a violent and turbulent manner, to the terror of the people, whether the act inflicted were of itself lawful or unlawful." Volume 21, p. 408. At common law, and in most of the states, a riot cannot be committed without the joint action of at least three persons. In Illinois and Georgia the number of persons necessary to commit this offense has been changed by statute to two. In the definition given it will be noted that an intent must exist as an essential ingredient of the offense. Owing to the character of the offense, and the fact that it requires the joint action of more than one person, the intent is that of mutually assisting each other against any who shall oppose them in the execution of some enterprise. According to Mr. Desty, in his work on American Criminal Law (section 98a): "The necessary intention in the offense of riot is to materially assist each other against all opposition, and putting their design into execution in a violent manner, whether the object be lawful or unlawful." Mr. Bishop, in his work on Criminal Law (volume 2, § 1150), says: "It is the doctrine of the law, beyond dispute, that a riot is an unlawful assembly carried to the extent of actually doing the thing contemplated; but the result does by no means follow that there must be an appreciable space of time between the creation of the unlawful assembly and its proceeding to perpetrate the ulterior wrong. If an assembly, however innocent on original coming together, does riotous things, then all present and concurring in the things constitute themselves, by the fact itself, an unlawful

assembly; and not less so because the hand moves simultaneously with the moving of the mind." It is not necessary, however, to go beyond the decisions of our own court on this question. In the case of *Prince v. State*, 30 Ga. 27, this court held: "A riot cannot be committed without as many as two persons acting in execution of a common intent." In delivering the opinion in that case, Stephens, J., gives a very lucid and satisfactory explanation of such common intent, in the following language: "There must be as many as two persons, and they must do the same act. To be sure, it is not necessary that they should do the same act in the sense that what each one does must be identical with what is done by each of the others. If so, a riot is an impossibility; for it is impossible that the action of each shall not have a certain individuality which will distinguish it from the action of all the rest. In tearing down a house, for instance, one rioter breaks down a door, and another breaks down a window, and a third merely hands a crowbar to one of his associates. Here each one's act is different from the acts of the others, and the act of one of them has in it nothing of violence. But there is an obvious legal sense in which they all do the same act. The common intent, which covers all the individual parts in the action, cements those parts into one whole, of which each actor is a responsible proprietor. The part performed by himself is his by perpetration, and the parts performed by the others, in execution of the common intent, are his by adoption. The principle is that each one adopts the performances of all the rest, and adds them to his own, and thus does the whole, in the sense of the definition, so long as they are acting in execution of a common intent, but no longer." To the same effect, see *Stokes v. State*, 73 Ga. 816, and *Stafford v. State*, 93 Ga. 207, 19 S. E. 50. Under the authorities cited, it is necessary, to sustain a conviction for riot, that the persons doing the unlawful act must have done the same with a common intent,—that is, a common intent to do an unlawful act; and as ruled in the case of *Prince v. State*, supra, when engaged in the execution of the unlawful act, each adopts the particular parts of such act done by the others. But, without a common intent to do one of the acts inhibited by the statute, a conviction for riot cannot be sustained. It follows that the court erred in the charge to the jury of which complaint is made.

3. Other grounds of the motion assign as error the refusal of the court to grant a new trial because the verdict is contrary to law and contrary to evidence. Inasmuch as, under the law governing this offense, it requires the joint action of at least two persons, acting with a common intent in doing an unlawful act of violence, or any other act in a violent and tumultuous manner, and the evidence fails to disclose any unlawful act of violence done, or any other act in a violent

and tumultuous manner, by the plaintiff in error, jointly with any other of the persons charged, the conviction cannot be sustained. It is not to be understood that, in so ruling, this court upholds or approves the action of John Dixon, Jr., in attempting to enter the storehouse of Hill with his gun, nor the words or threats of other parties, as appears in the record in this case. Whatever may have been the grievances of Dixon, he was not authorized by law to attempt to use his gun in the manner shown by the evidence; nor was the conduct of the other parties, who were shown to have used the vile and profane language detailed in the evidence, to be approved. But, however culpable these several parties may have been and are, we cannot, in the absence of evidence showing a common intent in doing an unlawful act of violence, sanction the conviction of the offense of which the plaintiff in error is charged. It is a requirement of the law that this common intent should prevail at the time of the execution of the act. And the judgment of the court below in refusing to grant a new trial is reversed. All the justices concurring, except SIMMONS, C. J., absent, and LUMPKIN, P. J., absent on account of sickness.

(106 Ga. 834)

ALEXANDER v. STATE.

(Supreme Court of Georgia. Nov. 18, 1896.)

CRIMINAL LAW—APPEAL—PROOF OF VENUE.

Where there is an assignment of error that the verdict is contrary to law and the evidence, and the brief of evidence contains no proof whatever of the venue, a new trial will be granted. *Carter v. State*, 48 Ga. 43; *Cloud v. State*, 73 Ga. 126; *Davis v. State*, 8 S. E. 184, 82 Ga. 205.

(Syllabus by the Court.)

Error from city court of Griffin; E. W. Hammond, Judge.

Henry Alexander was convicted of crime, and brings error. Reversed.

J. Chestney Smith, for plaintiff in error. Joseph D. Boyd and O. H. B. Bloodworth, Sol. Gen., for the State.

PER CURIAM. Judgment reversed.

SIMMONS, C. J., not presiding, and LUMPKIN, P. J., absent on account of sickness.

(106 Ga. 717)

SMITH v. SMITH.

(Supreme Court of Georgia. Nov. 16, 1898.)

DISTRESS WARRANT—AFFIDAVIT—AMENDMENT—CLAIM CASE—BURDEN OF PROOF.

1. An affidavit for a distress warrant for rent, which alleges that the defendant is indebted to the affiant in a stated sum for rent due and unpaid, is amendable by an allegation, in substance, that such rent was due by defendant as tenant to affiant as landlord for rent of land for a certain year.

2. When, in a claim case involving a contest

between the claimant, who purchased from a tenant the crop in dispute, and the landlord, who is seeking to enforce against the crop his special lien for supplies, it appears that other property has been levied upon and sold under the lien *fi. fa.*, and no credit entered thereon, it is incumbent on the plaintiff to account for the proceeds of such sale before he can subject the property claimed to the full amount of his execution.

3. Where a distress warrant and a lien execution for supplies are levied upon certain bales of cotton in a warehouse in which are many others, and the cotton is claimed by a third person, the onus is upon the plaintiff in *fi. fa.* to identify the cotton levied upon as the cotton of the defendant in execution. Where, in the trial of the claim case, but one bale is identified, and the jury finds three bales subject, the verdict is contrary to law and evidence.

(Syllabus by the Court.)

Error from superior court, Henry county; M. W. Beck, Judge.

R. F. Smith sued out a distress warrant levied on certain property, and J. E. Smith filed a claim thereto. Judgment for R. F. Smith, and J. E. Smith brings error. Reversed.

B. P. Bailey and M. M. Mills, for plaintiff in error. E. J. Reagan and J. F. Wall, for defendant in error.

-SIMMONS, C. J. 1. R. F. Smith sued out a distress warrant and foreclosed a landlord's lien for supplies against his tenant. These *fi. fas.* were levied upon three bales of cotton in possession of one J. E. Smith, who filed a claim asserting that the cotton was his, and not the property of the tenant. On the trial of the case R. F. Smith was allowed to amend his affidavit upon which the distress warrant had been issued. This was objected to by the claimant, and the objection was overruled by the court. Section 5122 of the Civil Code now allows affidavits of this kind to be amended, and the court did not err in so ruling.

2. It appeared in the evidence that one of the executions above mentioned had been levied upon certain personal property, and that the property had been sold thereunder. There was no credit upon the execution, and no explanation given as to a portion of the funds raised by the sale, except that the plaintiff says in his testimony that he applied a portion of the proceeds of the sale to unsecured debts which the defendant owed him. This was not a sufficient explanation of the application of the proceeds of the sale. The officer making the sale under this *fi. fa.* should have credited the proceeds upon it, and the plaintiff had no right to take a portion of the proceeds and apply them to an unsecured debt. It is inferable from the evidence that the proceeds of the sale were at least sufficient to pay off one of the *fi. fas.*, if not both of them. It was incumbent upon the plaintiff to affirmatively show that the proceeds of the sale were legally applied to these executions or to one of older date against the defendant.

3. Two of the three bales of cotton levied upon were seized in the warehouse of a stranger to this litigation. The record shows that both

the plaintiff and the defendant utterly failed in their evidence to identify these two bales as the property of the defendant in execution. Indeed, both testified that they could not so identify them. The evidence of the claimant was silent upon the subject. It was incumbent upon the plaintiff to show that these two bales belonged to the defendant, or were grown on the farm rented by him from the plaintiff. The plaintiff having failed to carry this burden of proof, a verdict finding these two bales, and the other, all subject to the executions, was contrary to law and evidence. The judge, therefore, erred in refusing to grant a new trial. Judgment reversed. All the justices concurring, except LUMPKIN, P. J., absent on account of sickness.

(106 Ga. 23)

BIRT v. BROWN.

(Supreme Court of Georgia. Nov. 19, 1898.)

PROBATE PRACTICE—AWARD TO WIDOW—APPLICATION TO SET ASIDE.

Where a year's support, upon application of the widow, has been duly and regularly set apart to her from the estate of her deceased husband by proceedings in the court of ordinary, to which no exceptions were filed, and from which no appeal was taken, a petition to the ordinary by the widow, seeking to vacate such judgment with the view of having set aside to her the entire estate, which she alleges is worth less than \$500, is demurrable, when the only ground for the relief sought is a mistake of the appraisers, made before the application for a year's support was filed, by including in their inventory property which did not belong to the estate, and which, if eliminated from their return, would have reduced their estimate of the value of the estate to less than \$500. Especially is this true when it does not appear from the petition that the facts therein stated were not known to the petitioner, and could not have been ascertained by the exercise of ordinary diligence, before the final judgment sought to be set aside was rendered.

(Syllabus by the Court.)

Error from superior court, Putnam county; John C. Hart, Judge.

Action by Ann Birt against E. M. Brown, administrator. Demurrer to the petition sustained, and plaintiff brings error. Affirmed.

Jenkins & Lewis, for plaintiff in error. W. F. Jenkins & Son, for defendant in error.

LEWIS, J. There is no attack made upon the proceedings before the ordinary to set aside the year's support to the widow, even on the ground of any irregularity. Under section 3467 of the Civil Code, if the widow was dissatisfied with the return of the appraisers, it was her right to file objections thereto, and, failing to do so, she acquiesces in their return, and assents to the same being placed by the ordinary upon record as a final adjudication or determination of her right to a year's support. Such a record has the binding force and effect of any other judgment of a court of competent jurisdiction. The statute provides for no contest over the amount of the support thus set aside,

save upon objections filed before the ordinary to the return of the appraisers. In the first instance, when he passes upon such objections he acts judicially, and an appeal lies from his judgment to the superior court. *Phelps v. Daniel*, 86 Ga. 365, 12 S. E. 584. Even conceding that the ordinary has jurisdiction to review such proceedings for a year's support upon application of the widow, her petition in this case utterly fails to show any legal or equitable ground for interference by any court. The only fraud she alleges is a mistake of fact made by the appraisers of the estate, before her application for a year's support was filed, in returning property not belonging to the estate. This return bound no one, and was merely prima facie evidence of what assets the administrator was chargeable with. The plaintiff does not even allege that she did not know the facts concerning the title to the property which she claimed was by mistake returned as a part of the estate. Even if she did not know the fact, by the exercise of ordinary diligence she could certainly have ascertained what property really constituted so small an estate of her deceased husband. A court of equity, even, could not have granted relief against such laches. We think, therefore, the court did right in sustaining the demurrer to the petition. Judgment affirmed. All the justices concurring, except LUMPKIN, P. J., absent on account of sickness.

(106 Ga. 18)

HAWKINS v. COLLIER.

(Supreme Court of Georgia. Nov. 19, 1898.)

APPEAL—REVIEW—INSUFFICIENT RECORD.

1. Where the error assigned to certain extracts from the charge of the court is to the effect that they excluded the defendant's theory from the consideration of the jury, it will be presumed, in the absence of any complaint to the contrary, and where the entire charge is not in the record, that the court, with equal fairness, explained to the jury all the contentions of the defendant, and fully and correctly charged the law applicable thereto.

2. The evidence was sufficient to authorize the verdict, and there was no error in refusing a new trial.

(Syllabus by the Court.)

Error from superior court, Pike county; M. W. Beck, Judge.

Action by J. C. Collier against Mittie Hawkins. Judgment for plaintiff. Defendant brings error. Affirmed.

The following is the official report:

On March 30, 1895, Anderson Hawkins made a deed by which he conveyed to Collier a tract of land containing 100 acres, the consideration recited in the deed being \$90, and at the same time he transferred to Collier a bond for title for another tract, containing 50 acres. The grantor's wife, Mittie Hawkins, on the same day, made a note whereby she agreed to pay Collier, on or before October 1, 1895, 2,000 pounds of lint cotton for rent of the land above mentioned, the note stating

that the land was occupied by her as tenant of Collier. In February, 1895, Collier sued out a distress warrant against Mittie Hawkins for \$170 for the rent of the premises. She set up in defense that the note was without consideration, and was obtained by fraud; that the note and the deed were given, and the bond for title transferred, to Collier as security for the payment of \$33 due him by her husband, and for such sums as might become due him for advances to be made by him during the year 1895, for the purpose of enabling them to make a crop upon the land; that she could not read, and the note was not read over to her, and she did not know what was in it, nor that she was renting the land from Collier; that, at the time the papers were signed, the land was in the possession of her husband, and that there was no surrender of possession by him; also that the plaintiff had been paid all that was due him, and she and her husband were not indebted to him in any sum at the time the distress warrant was sued out. The plaintiff contended that the deed was executed, and the bond for title transferred, to him in payment of a debt, and not as security; that the defendant's husband surrendered possession of the land to him; and that there was an actual renting of the land by the defendant, and a delivery of possession to her as the plaintiff's tenant. The case was before this court at the March term, 1897. 101 Ga. 145, 28 S. E. 632. The second trial resulted in a verdict against the defendant for \$160 principal, besides interest, and the defendant moved for a new trial, which was refused, and she excepted. The motion was upon the grounds that the verdict was contrary to law and the evidence, and that the court erred as follows: In charging: "If this note was given for rent by the defendant, and if plaintiff, J. C. Collier, had put Mittie Hawkins in possession of this land as his tenant, you would not be concerned with the questions as to whether the deed from Anderson Hawkins was for a good consideration or not, because, under the circumstances last supposed, Mittie Hawkins would be estopped from denying Collier's title. If she went into possession of the land as tenant of Collier, she would not now be heard to deny the title of Collier. One cannot enter upon and take possession of land as the tenant of another, and then deny the title of such other party." It is alleged that this charge was error, because it prevented the jury from considering the defense set out in the defendant's counter affidavit, as to the consideration of the deed and of the note, the consideration being the same in both. In charging: "If this deed from Anderson Hawkins was a deed of bargain and sale, bona fide made to convey the title, and was not a mere scheme to protect Anderson Hawkins in his possession of the land, and if this note was given for rent, you should find for the plaintiff, provided it appears from the evidence the defendant was

put into possession of the land by plaintiff; that is, if you find that Anderson Hawkins surrendered the land, and made this deed bona fide as a deed of bargain and sale to convey title to Collier, and if Collier put Mittie Hawkins in possession of the land, and she took possession as their tenant and gave this note for the rent thereof, you should find for the plaintiff. An actual, physical surrender of the premises, by leaving them bodily, and placing Collier in actual possession, would not have been prerequisite to Collier giving Mittie Hawkins possession. If the deed was made for the purpose of conveying title to Collier, and it was delivered to Collier, and if it was then and there understood between Collier and Anderson Hawkins and Mittie Hawkins that Anderson Hawkins' possession or ownership ceased, and that Mittie Hawkins' possession as tenant of Collier began, that would have been a sufficient entry by Mittie Hawkins to constitute her the tenant of the plaintiff." It is alleged that this charge was error, because it prohibited the jury from considering the defense set up in the defendant's counter affidavit and in her evidence, showing that she did not make a rent contract with Collier, although she signed a rent note, not knowing how or when the note was written, and that Collier obtained the note from her by fraud and false representations at the time she signed it, and that it was given to secure a debt of her husband, "who has possession of the land for another crop."

J. J. Rogers and J. F. Redding, for plaintiff in error. S. N. Woodward, for defendant in error.

FISH, J. 1. Plaintiff in error excepted to the portions of the judge's charge specified in the third and fourth grounds of the motion for a new trial. As will be seen by reference to the reporter's statement, the exceptions were, in effect, that such portions of the charge excluded from the jury the defendant's theory that the consideration of the note was not rent, and that she had never rented any land from the plaintiff. The entire charge is not in the record, and there is no complaint that the judge failed to explain to the jury the theory of the defendant, and to charge the law applicable thereto. We must, therefore, presume that all the contentions of the defendant, and all the law pertinent to her defense, were fully, fairly, and correctly given by the court in its general charge. It is impossible to charge upon the respective theories of the plaintiff and the defendant at the same time. In the portions of the charge complained of, the court hypothetically stated the plaintiff's contentions, and charged the jury how they should find if they believed such contentions to be true. There is no pretense that the contentions of the defendant were not stated with equal fairness, and the jury instructed to find for her.

in the event they believed her theory of the case. There was, therefore, no merit in the third and fourth grounds of the motion for a new trial.

2. There was a painful conflict in the testimony of the witnesses for the plaintiff and those for the defendant. The testimony of the witnesses for the plaintiff, if believed, demanded the verdict. The jury believed them, the verdict was approved by the trial judge, and we are not authorized to set it aside. Judgment affirmed. All the justices concurring, except LUMPKIN, P. J., absent on account of sickness.

(105 Ga. 335)

TUCKER v. CROSSLEY.

(Supreme Court of Georgia. Nov. 19, 1898.)

APPEAL—REVIEW—MOTION FOR NEW TRIAL.

The charges complained of were not erroneous. While the evidence seems to preponderate in favor of the plaintiff, there was some evidence to support a finding in favor of the defendant, and, the verdict having been approved by the trial judge, this court will not control his discretion in overruling the motion for a new trial.

(Syllabus by the Court.)

Error from superior court, Jasper county; John C. Hart, Judge.

Action between J. L. Tucker and R. L. Crossley. From the judgment, Tucker brings error. Affirmed.

F. Jordan & Son, for plaintiff in error. J. D. Kilpatrick, for defendant in error.

PER CURIAM. Judgment affirmed. All the justices concurring, except LUMPKIN, P. J., absent from providential cause.

(105 Ga. 316)

MURPHEY v. MCGOUGH et al.

(Supreme Court of Georgia. Nov. 19, 1898.)

SAWMILL—LIEN—FORECLOSURE—COUNTER AFFIDAVIT—DISMISSAL.

1. The proprietor of a sawmill has a lien on the product of the mill for work done on material furnished by others.

2. A counter affidavit interposed to the foreclosure of such a lien, which in terms neither admits nor denies the indebtedness set forth in the affidavit of foreclosure, does not make an issue which can be tried, and should be dismissed on motion.

3. When a counter affidavit to the foreclosure of a lien of the character above referred to has been dismissed on motion of the plaintiff, the case passes out of the jurisdiction of the court, and the process is remanded to the levying officer by operation of law.

(Syllabus by the Court.)

Error from superior court, Monroe county; O. C. Smith, Judge.

Action by J. G. & R. A. McGough against Addie A. Murphey. Judgment for plaintiffs, and defendant brings error. Reversed.

Persons & Persons, for plaintiff in error. Cabaniss & Willingham, for defendants in error.

COBB, J. The plaintiffs, sawmill men, foreclosed a lien against Addie A. Murphey. To the levy of an execution under such foreclosure she interposed a counter affidavit, in which she alleges that she "can neither deny nor affirm that portion of plaintiffs' affidavit of foreclosure wherein it is alleged that she is indebted to them" in the amount named in the affidavit. The counter affidavit then proceeds to give various reasons why she cannot deny the indebtedness, and why she does not affirm it, and alleges that she has sustained damage at the hands of the plaintiffs, and prays that she may be allowed to recoup for the amount due against them. The sheriff accepted the counter affidavit, and also a bond for the eventual condemnation money, which was given to him at the same time, and the papers were returned by him to the superior court for trial. When the case came on for trial a motion was made by the plaintiffs to dismiss the counter affidavit, on the ground that it did not comply with the terms of the statute, in that it did not deny the indebtedness alleged to be due in the affidavit of foreclosure. This motion was sustained by the court, and the counter affidavit dismissed, and this is assigned as error. Plaintiffs then proceeded to prove their claim before a jury; and, at the close of the evidence offered, the defendant made a motion to "dismiss the plaintiffs' lien, upon the ground that no such lien was provided by law, and that the same was illegally foreclosed." This motion was denied by the court, and this ruling is assigned as error. By direction of the court a verdict was rendered for plaintiffs for the amount claimed in the foreclosure proceeding, and upon such verdict a judgment was entered against the defendant and the sureties upon the eventual condemnation money bond for the amount claimed by the plaintiffs. This is also assigned as error.

1. The first question to be determined in this case is, has the proprietor of a sawmill a lien upon the product of the mill for work done on material furnished by others? It is provided by law that "proprietors of planing mills and other similar establishments shall have the same lien as provided in section 2805 for work done on material furnished by others, and when they furnish material they shall have the same liens provided in section 2801 for material-men; and proprietors of saw-mills, when furnishing material for the improvement of real estate, to purchasers from them for that purpose, shall be entitled to the lien provided in said section 2801, to be governed, when the same are applicable, by the rules laid down in said section 2801." Civ. Code, § 2807. If there could be any doubt as to whether a sawmill is a "similar establishment" to a planing-mill, we think this doubt is entirely removed when we consider the section above quoted as a whole. By this section, proprietors of planing-mills and similar establishments are given a lien for work done on material furnished by others, and also on material furnished by themselves; and the latter part of the section, in

effect, says that proprietors of sawmills (that is, that particular class of the similar establishments referred to in the first part of the section) shall also have a lien upon real estate, under certain conditions.

2. There was no error in dismissing the counter affidavit. The counter affidavit must either contest the amount or justice of the claim, or the existence of the lien; it being necessary that the counter affidavit shall set forth "the ground of such denial." The counter affidavit in the present case neither admits nor denies the amount or justice of the claim, and was therefore properly dismissed. Civ. Code, § 2816, subd. 6.

3. The counter affidavit having been dismissed, the court should not have proceeded further with the trial of the case. Therefore whatever was done after the counter affidavit was dismissed was nugatory. A valid counter affidavit is essential to give the court jurisdiction of cases of this character, and, after the counter affidavit has been held to be invalid, the only valid judgment that can be entered by the court is that the execution which was arrested in its progress by the illegal counter affidavit be returned to the levying officer, and that he proceed to enforce the same. Civ. Code, § 2816, subd. 6, declares that "if the person defendant in such execution, or any creditor of such defendant, contests the amount or justice of the claim, or the existence of such lien, he may file his affidavit of the fact, setting forth the ground of such denial, which affidavit shall form an issue to be returned to the court and tried as other causes." In the case of *McConnell v. Bryant*, 38 Ga. 639, an affidavit and counter affidavit filed in a proceeding to enforce a millwright's lien were returned to court in order that the issue thus formed might be tried. At the hearing the defendant was not present, and his counsel had abandoned his case. It was held that the court should require the plaintiff to make out his case, as in other cases in default, by *prima facie* proof of the justice of his claim, before he be permitted to take judgment, and that it was error to order the defendant's affidavit to be dismissed and that the execution which was issued upon plaintiff's affidavit proceed. In this case there was a valid counter affidavit, but the defendant was not in court to insist upon his defense, and therefore the court had jurisdiction to try the case, and if it should be determined that the plaintiff's demand was just, and under the law he was entitled to a lien, a judgment in his favor would have been lawful. It is to be inferred from the headnote and the opinion in that case that the only reason that the order of the court directing the execution to proceed was held illegal was that there was a valid counter affidavit on the files of the court, which retained the case there for determination, and, if the affidavit had been dismissed, that the order entered in that case might have been proper. We are aware that the precise ques-

tion involved in the present case has never been decided, so far as the foreclosure of liens of the character now involved is concerned. But we think that the decisions of this court dealing with the subject in cases where a process may be arrested by similar affidavits are controlling upon the question. The law provides that the defendant in a distress warrant may replevy the property distrained, by making oath that the sum distrained for, or some part thereof, is not due, and giving security for the eventual condemnation money, and "in such case the levying officer shall return the same to the court having cognizance thereof, which shall be tried by a jury as provided for in the trial of claims." Civ. Code, § 4819. In *Habersham v. Eppinger*, 61 Ga. 199, it was held that "the counter affidavit to a distress warrant for rent brings the case into the superior court, and, when said affidavit is dismissed on motion of the plaintiff, the case passes out of the jurisdiction of the court, and is remanded to the sheriff by operation of law; and the dismissal of the warrant on account of the insufficiency of the plaintiff's affidavit to procure it was unauthorized, there being no longer any case in court." To the same effect is *McCulloch v. Good*, 63 Ga. 519. In the case of *Anders v. Blount*, 67 Ga. 41, after dismissing the counter affidavit the court gave judgment for the plaintiff against the defendant and the surety on his bond; and this was held by the court to be erroneous, "because the entire case was out of court when the counter affidavit went out." To the same effect is *Girtman v. Stanford*, 68 Ga. 173. See, also, *Drake v. Dawson*, 66 Ga. 174. When a landlord procures a warrant to dispossess a tenant, the law provides that the tenant may arrest the proceedings by a counter affidavit. When such counter affidavit and the bond provided by law are delivered to the officer who is executing the warrant to dispossess, such officer is required to "return the proceedings to the next superior court of the county where the land lies, and the fact in issue shall be there tried by a special jury as in case of appeal." Civ. Code, §§ 4815, 4816. In the case of *Clark v. Lee*, 80 Ga. 617, 6 S. E. 170, it was held that, where a counter affidavit under the law above referred to was dismissed, the entire case was out of court, and the warrant returned to the hands of the sheriff by operation of law. Justice Simmons, in the opinion, uses this language: "The counter affidavit is the means of bringing the case into the superior court, and giving that court jurisdiction of these kinds of cases. Whenever the counter affidavit is so defective as not to make any issue, or when the same has been dismissed by the court, the whole case goes out of court. There is no case for the court to try. By operation of law the warrant is withdrawn from the court, and returns into the hands of the sheriff or other officer to whom it is directed." While the language in the section

relating to the subject of the counter affidavits in the three different proceedings alluded to is not identical, the purpose of the law in each case is the same; that is, the process issued in behalf of the moving party is final process until arrested by a legal counter affidavit. When so arrested it becomes mesne process, and the case must be determined by the court upon the issue thus made. If what is interposed as a counter affidavit is not such in law, the character of the process does not become changed, but remains final; and the court should deal with it as such, and simply order the process to be returned to the hands of the officer authorized by law to execute it. In the present case, the counter affidavit having been properly dismissed, the court had no jurisdiction to try the case. The verdict and judgment rendered is a nullity, and the execution issued upon the foreclosure of the lien should be again placed in the hands of the levying officer to be enforced according to law. Judgment reversed. All the justices concurring, except LUMPKIN, P. J., absent on account of sickness.

(106 Ga. 16)

HOWELL v. ALLEN.

(Supreme Court of Georgia. Nov. 19, 1898.)

CHATTEL MORTGAGE—FORECLOSURE—AFFIDAVIT OF ILLEGALITY—DISMISSAL.

Where an affidavit of illegality to the foreclosure of a chattel mortgage was dismissed by a magistrate upon the ground that the defendant introduced no evidence, the effect of such ruling was the dismissal of the whole case; and certiorari was the defendant's exclusive remedy, regardless of the amount involved.

(Syllabus by the Court.)

Error from superior court, Talbot county; W. B. Butt, Judge.

Application by M. K. Allen against T. O. Howell. Judgment for plaintiff, and defendant brings error. Affirmed.

J. J. Bull and A. J. Perryman, for plaintiff in error. Persons & Son and M. D. Womble, for defendant in error.

FISH, J. To the levy of a chattel mortgage *fi. fa.* in favor of Mrs. Allen, transferee, for \$60.22, principal, the defendant, T. O. Howell, filed an affidavit of illegality, upon various grounds. The magistrate to whose court the proceedings were returned rendered the following judgment: "M. K. Allen, Transferee, v. T. O. Howell. Illegality to Foreclosure. In Justice's Court," etc. "There being no evidence produced before the court by the defendant in the above-stated case in sustaining said plea, it is the judgment of the court that the above-stated plea be dismissed, and the property found subject to the mortgage *fi. fa.* in favor of the plaintiff in the above-stated case, and all costs of suit." The defendant entered an appeal to the superior court, and

in that court the appeal was dismissed, on plaintiff's motion, upon the ground that certiorari, and not appeal, was defendant's remedy. To this ruling defendant excepted, and assigned the same as error.

The determination of the case depends upon the effect of the magistrate's judgment. If by such judgment the case was dismissed from the justice's court, then nothing remained therein to be taken by appeal to the superior court, and certiorari was the defendant's exclusive remedy. *Toole v. Edmondson* (Ga.) 31 S. E. 25. The affidavit of illegality brought and held the case in the justice's court, and, if the magistrate dismissed that affidavit, then, by operation of law, the whole case went out of court, and the magistrate's jurisdiction over it terminated. This court has several times ruled that the dismissal of a counter affidavit to a distress warrant put both parties and the whole controversy out of court. *Habersham v. Eppinger*, 61 Ga. 199; *McCulloch v. Good*, 63 Ga. 519; *Anders v. Blount*, 67 Ga. 41. See, also, *Murphey v. McGough* (this day decided) 31 S. E. 757. After stating the case as "Illegality to Foreclosure," etc., the language of the magistrate's judgment is: "There being no evidence produced before the court by the defendant in the above-stated case in sustaining said plea, it is the judgment of the court that the above-stated plea be dismissed," etc. The word "plea" as here used, evidently means the affidavit of illegality. The defendant had no other plea or pleading in the case, and the obvious purpose of the judgment was the dismissal of the illegality. While it was error to dismiss it upon the ground that the defendant introduced no evidence, yet the effect of such dismissal was the same as if it had been for a valid reason. That part of the judgment finding the property subject was mere surplusage. We think the effect of the magistrate's ruling was to dismiss the case. Wherefore certiorari was the defendant's exclusive remedy, and the judgment dismissing the appeal was proper. Judgment affirmed. All the justices concurring, except LUMPKIN, P. J., absent on account of sickness.

(106 Ga. 296)

GEORGIA RAILROAD & BANKING CO. v. CROMER.**CROMER v. GEORGIA RAILROAD & BANKING CO.**

(Supreme Court of Georgia. Nov. 19, 1898.)

ACCIDENT AT CROSSING—RATE OF SPEED—NEGLIGENCE.

Where a railroad crossing is in a populous locality, and is much used by the public, but the same is not within the limits of an incorporated city or town, and is not a part of a public road established pursuant to law, what rate of speed in approaching and running over such crossing would be negligence, and what signals ordinary care would require to be given, are matters to be determined by a

jury according to the circumstances of each particular case.

(Syllabus by the Court.)

Error from superior court, Greene county; E. H. Callaway, Judge.

Action by J. A. Cromer, administrator, against the Georgia Railroad & Banking Company. Judgment for defendant, and both parties assign error. Judgment on main bill affirmed, and cross bill dismissed.

Jos. B. & Bryan Cumming and J. B. Park, Jr., for plaintiff in error. Saml. H. Sibley, for defendant in error.

COBB, J. Emma Parrott sued the Georgia Railroad & Banking Company for damages sustained by her growing out of the homicide of her husband by the defendant company. She died pending the suit, and her administrator was made a party. The petition alleged that the deceased was driving a team of mules and a wagon upon the public road in the village of Union Point from the vicinity of the stores on the south side of the railroad crossing to the north side thereof; the crossing being a regular public crossing, 100 yards east of the depot of the defendant. As deceased approached the crossing, the railroad eastward was hidden from his sight for a distance of half a mile by two cotton-seed warehouses erected on the right of way with the knowledge and consent of the company, and by bushes left growing on the right of way, and by a freight car left standing near the crossing and the seed houses. No train was due from the east at the time that deceased started to cross the track, and his attention was fixed upon another train of defendant, which was shifting near the crossing, and to the westward of it. Just as the deceased got upon the crossing a train approached from the east, 30 minutes behind its schedule time, running at the rate of 30 miles an hour. There is no blow post erected at said crossing, and in approaching the same no signals were given, and the speed of the train was not slackened. The collision between the engine of the train and the wagon upon which deceased was riding occurred upon the crossing. It is alleged that "said homicide of her husband was due to the gross negligence of said company in permitting said bushes and houses and freight car to thus obstruct the approach to said crossing, in not having a signal post therefor, in running said train at said high rate of speed in the limits of a town and across a public crossing, and in making no sound or signal in approaching thereto to warn travelers upon the highway." Upon the trial it appeared that Union Point was an unincorporated village, having about 1,000 inhabitants; that the residence portion of the village was on one side of the railroad, and the business houses on the other; and that the crossing in question, which goes from the north to the south side of the town, is

the only crossing immediately within the settlement, and is the one which is used by the inhabitants of the village in passing from one side of the town to the other; that deceased at the time that he was killed was going from the south to the north side of the town; that to the east of the crossing, and on the south side of the track, were two cotton-seed houses, about 12x20 feet each; and that a freight car was between the crossing and the seed houses. The car was on a side track between the seed houses and the main line. The seed houses are from 40 to 50 yards from the crossing. The main line is straight for a half mile to the east. The seed houses and some bushes not taller than a wagon would obstruct a person's view in approaching the crossing. The wagon road which crosses the railroad is not a public road established pursuant to law. When deceased was seen approaching the crossing his attention seemed to be diverted to a train which was shifting on the west of the crossing. The evidence was conflicting as to whether any signal was given, either by whistle or by bell. There was evidence tending to establish that certain persons, section hands, and others, who were in a position to see the approaching train, signaled the deceased, by shout, to call his attention to the train, but he did not seem to hear, or, if he did, did not heed the warning; his attention being, as stated, drawn to the shifting train on the west of the crossing. The engineer testified that he was running about 15 miles an hour when he struck the wagon, and that he gave the station signal before reaching the crossing, and began to slacken his train; that before he commenced to slacken he was running about 45 miles an hour, and thinks that he had reduced his speed to about 15 miles an hour. From the testimony of the engineer and other employes upon the train, it appears that, after the deceased was seen upon the track in a position of peril, all that diligence required was done to stop the train. The jury returned a verdict for the plaintiff for \$600. A motion for a new trial made by the defendant was overruled, and it excepted. No error of law is complained of, and the motion is based solely upon the grounds that the verdict was contrary to evidence, and without evidence to support it.

The collision not having occurred at a public road crossing, the defendant was under no statutory duty to give a signal or check the train in approaching thereto. Civ. Code, § 2222; *Comer v. Shaw*, 98 Ga. 543, 25 S. E. 733. Within the limits of incorporated cities and towns and outside of such limits wherever a line of railroad crosses a road which has been established pursuant to law, a railroad company, in the operation of its trains, is bound to give such signals and perform such acts as are required by statute in the latter case, and those which may be required by such reasonable regulations as the municipal authorities may prescribe in the for-

mer. A failure in either case to comply with the requirements of the law applicable would amount to negligence in law. In the case of *Comer v. Shaw*, cited *supra*, Chief Justice Simmons uses this language: "Where a railroad crossing is in a populous locality, and is much used by the public, even though the provisions of Civ. Code, § 2222, are not applicable, greater care is required of railroad companies with respect to speed and signals than is to be expected at places where the railroad is crossed by unfrequented country roads not established by law as public roads; but noncompliance at such a place with the statutory requirements applicable to public roads established by law is not, as a matter of law, negligence per se. It is generally for the jury to say whether, under such circumstances, the railroad company was negligent or not. This distinction is also to be taken into consideration when we come to consider the conduct of persons attempting to cross the railroad at such places. Where the crossing is one to which the statutory requirements above referred to are applicable, a person about to cross has a right to expect that the railroad company, in the running of its trains, will comply with these requirements; and reliance upon the discharge of its duty in the premises may, in some degree, excuse a want of full diligence on his part in looking out for the approach of a train. Where, however, the statute is not applicable, a person about to cross must assume a greater burden of care than he would be required to assume if the crossing were one to which the statute applied." In the case of *Thomas v. Railroad Co.*, 19 Blatchf. 533, 8 Fed. 729, Wallace, J., says: "Railroad corporations may ordinarily maintain such rate of speed with their trains as they see fit. They may even permit their officers to enjoy the luxury of special trains, and dash over their roads with a single car, almost noiselessly, and at lightning speed. They may use their side tracks near the intersection of highways or private roads for the storing of empty cars. While these things may not be agreeable to the general public, they are, nevertheless, within the privileges with which railroad corporations have been invested; and the public have no right to complain, because they are legitimately within these privileges. But, when these privileges come in collision with the rights of those who use the highways or private roads to cross the railroad, they must give way, because, as to these persons, the railroad corporation is under the obligation of exercising reasonable care to prevent injury. What is reasonable care, or, conversely, what omission of precaution is negligence, can only be defined by general propositions; the application of which must depend upon the circumstances of the particular case." Applying these principles to the case under consideration, it was for the jury to determine whether, under all the circumstances, it was the duty of the railroad company to have

given a signal of the train approaching this crossing, and to have slackened the speed of the same, and, if in this respect there was a failure of duty on the defendant's part, then whether the deceased by the exercise of ordinary care could have avoided the consequences of its negligence in not giving the signal and reducing the speed of the train. It appearing from the record that two juries have decided these issues in favor of the plaintiff, and there being no complaint whatever of the manner in which the case was tried; or in which the judge submitted it to the jury, we will not interfere with his discretion in refusing a new trial. Judgment on main bill affirmed; cross bill dismissed. All the justices concurring, except LUMPKIN, P. J., absent on account of sickness, and LEWIS, J., disqualified.

(106 Ga. 302)

ALBRIGHT v. JONES et al.

(Supreme Court of Georgia. Nov. 19, 1898.)

ANCIENT DEED—EVIDENCE OF FORGERY.

Although a deed purports to be more than 30 years old, and has the appearance of genuineness on inspection, it may nevertheless, after having been introduced in evidence, be shown by any competent evidence to be in fact a forgery.

(Syllabus by the Court.)

Error from superior court, Muscogee county; W. B. Butt, Judge.

Action by E. A. Albright, administrator, against Willie Jones and others. Judgment for defendants, and plaintiff brings error. Reversed.

Blandford & Grimes, for plaintiff in error.
A. A. Carson, for defendants in error.

SIMMONS, C. J. It appears that on the trial of this case, which was an action of ejectment brought against the defendants in error by the administrator of Gideon Jones, the plaintiff closed after making out a prima facie case showing title in his intestate. In resistance to the action, the defendants relied upon a deed dated July 2, 1867, and duly attested, from Gideon Jones to their father, under whom they claimed. Upon the introduction by the defendants of this deed, counsel for the plaintiff stated to the court that their client would assume the onus of showing that the deed was a forgery, and would call witnesses to prove that it was; and, after the defendants closed their case, the plaintiff offered witnesses to prove that the deed was a forgery. The court refused to allow the plaintiff to make such proof, holding that the deed, being 30 years old, proved itself to be genuine, it coming from the proper custody, and having no appearance of anything wrong or suspicious on its face. A verdict for the defendants having been returned, the plaintiff brings his bill of exceptions to this court, assigning error upon the ruling above stated.

It is true that section 3610 of the Civil Code expressly provides that "a deed more than thirty years old, having the appearance of genuineness on inspection, and coming from the proper custody, if possession has been consistent therewith, is admissible in evidence without proof of execution." It by no means follows, however, that such an instrument, after being admitted in evidence, may not be shown, by any competent evidence, to be in fact a forgery. On the contrary, "that an ancient deed may be attacked, like any other deed, for forgery, is well settled." *Patterson v. Collier*, 75 Ga. 427, citing *Mills v. May*, 42 Ga. 623, and *Hill v. Nisbet*, 58 Ga. 587. To the same effect, see, also, *Parker v. Railroad Co.*, 81 Ga. 387, 8 S. E. 871; *Pridgen v. Green*, 80 Ga. 738, 7 S. E. 97; *Sibley v. Haslam*, 75 Ga. 490. Accordingly, we hold in the present case that the trial judge committed error in treating the deed in question as conclusive, rather than merely prima facie, evidence of its genuineness. Judgment reversed. All the justices concurring, except LUMPKIN, P. J., absent on account of sickness.

(106 Ga. 386)

CULPEPPER v. DALLAS.

(Supreme Court of Georgia. Nov. 19, 1898.)

APPEAL—REVIEW.

The evidence was sufficient to authorize the verdict, and there was no error in overruling the motion for a new trial.

(Syllabus by the Court.)

Error from superior court, Harris county; W. B. Butt, Judge.

Action between E. Culpepper and Clarissa Dallas. From the judgment, Culpepper brings error. Affirmed.

G. J. Thornton, for plaintiff in error. R. A. Russell and B. H. Walton, for defendant in error.

PER CURIAM. Judgment affirmed.

LUMPKIN, P. J., absent on account of sickness.

(106 Ga. 303)

SMITH et al. v. SMITH.

(Supreme Court of Georgia. Nov. 19, 1898.)

SECONDARY EVIDENCE—DIRECTING VERDICT.

1. To justify the admission of secondary evidence as to the contents of a lost deed, it must be shown, not only that such a deed once existed, but also that it was properly executed.

2. Under the evidence in the present case there were questions which should have been determined by a jury, and it was therefore error to direct a verdict.

(Syllabus by the Court.)

Error from superior court, Muscogee county; W. B. Butt, Judge.

Action by Sophronia Smith against Solomon

Smith and others. Judgment for plaintiff. Defendants bring error. Reversed.

Blandford & Grimes, for plaintiffs in error. Brannon, Hatcher & Martin, for defendant in error.

COBB, J. Sophronia Smith, as the widow of William Smith, applied to the ordinary for a year's support, which was set apart to her in a city lot described as lot No. 7 of a designated survey, "being the lot upon which William Smith died." No objection was filed by any one to the return of the appraisers, and it was recorded as required by law. After this, three other Smiths, alleging that they were the children and heirs at law of William Smith, and were in possession of the lot, entered what purported to be an appeal to the superior court. Sophronia Smith then brought her petition, praying for the appointment of a receiver to take charge of the property; alleging that there was no administration on the estate of William Smith, and no necessity for any, and that upon his death the three other Smiths took possession of the property, and refused to permit plaintiff to enter thereon; that they were insolvent; and that their only reason for entering an appeal from the judgment of the ordinary was to delay plaintiff in obtaining possession and enjoyment of her year's support. In their answer the defendants alleged that they were in possession under a title derived through a gift from their deceased father more than seven years before his death. A receiver was appointed to take charge of the property pending the litigation. To the order appointing the receiver the defendants excepted, and a decision was rendered by this court declaring that the trial judge did not abuse his discretion in appointing the receiver. *Smith v. Smith*, 96 Ga. 772, 22 S. E. 832. When the case came on for a final hearing, it appeared that the defendants had voluntarily dismissed their appeal from the judgment of the court of ordinary; and the plaintiff moved for a decree that the receiver turn over to her the house and lot, and accrued rentals, less the costs of that proceeding, as her year's support under the judgment of the ordinary, and that the petition abate and be dismissed. The court granted the decree moved for. The defendants excepted, and again brought the case to this court, and it was held that the decree rendered must be set aside. *Smith v. Smith*, 101 Ga. 296, 28 S. E. 665. Thereafter the case came on for a final hearing in the court below. The plaintiff introduced in evidence the petition to the ordinary for a year's support, and the order setting it apart to her in the lot designated in the return of the appraisers. Plaintiff testified that William Smith had resided on the lot in dispute for 20 years, and that none of the defendants except Antoinette Smith, an unmarried daughter, had lived on the place before his death. There was also evidence for plaintiff showing that William Smith for several years immediately preceding his death

had returned the property for taxation in his own name, and evidence tending to show that he had paid all taxes due on the same up to the time of his death. Joseph Moore, a witness for plaintiff, testified that he owned the south half of the lot named in the return of the appraisers, and that he had seen William Smith on two or three occasions pay Mrs. Anna Maria Harris different sums of money for the place on which he died, but witness did not know whether it was Smith's money, or that furnished by his children, and did not know whether Mrs. Harris had ever made a deed thereto either to Smith or his children; that the place on which Smith died is under one inclosure, and includes all of lot No. 6 of the survey above referred to, and the north half of lot No. 7; that witness sold the north half of lot No. 7 to Nancy Smith, the first wife of William Smith, and mother of defendants, and made her a deed to it; and that William Smith claimed the place on which he lived and died up to the time of his death. The plaintiff disclaimed in open court any claim under the year's support set apart to her to the north half of lot No. 7, which was conveyed by Joseph Moore to Nancy Smith. The evidence for the defendants was, in substance, as follows: Squire Smith, one of the defendants, testified that the place in dispute is all under one inclosure, and includes lot No. 6 and the north half of lot No. 7; that lot No. 6 was bought by his father for defendants at their instance; that their money paid for it, and a deed was made to them. The deed was made by Mrs. Anna Maria Harris and her husband, Daniel Harris, and was witnessed by two or three witnesses. Witness did not remember their names, but thought one of them was named Chapman or Chapple, or some such name. He had seen the deed, which was in the possession of his father the last time he saw it, and is now lost; had tried to find the deed, and so had his father before he died. His sister Antoinette Smith lived on lot No. 6 ever since it was bought by defendants, and so did his father. The other children lived there also at various times. His father never claimed lot No. 6, and the defendants always paid the taxes. Witness could not read writing, but had heard the deed read over by others, and had kept the deed for some time. He had never lived on the place, but claimed an interest in it. Antoinette Smith, one of the defendants, testified that she had lived on the place where her father died ever since it was bought by defendants, who furnished the money. Solomon Smith, another one of the defendants, testified that the place on which his father died was under one inclosure, and included the whole of lot No. 6 and the north half of lot No. 7. There were two houses on the place; one being on lot No. 6, and the other on the north half of lot No. 7. His father died in the house on lot No. 6. Witness had lived on the place ever since it was

bought, except when temporarily away at work. Defendants were turned out of both lot No. 6 and the north half of lot No. 7 by the sheriff, under an order from the judge. Defendants gave the money to their father to buy lot No. 6 for them, which he did. The lot was bought from Mrs. Anna Maria Harris and her husband, and they gave defendants' father a deed to the same. Witness had seen the deed many times. It was kept in a drawer in the house, and was witnessed by two or three persons, whose names witness did not remember. The deed was made to defendants, and is lost. Witness has read it several times, and has tried to find it, but has not seen it since his father died. J. B. Owens testified that he was a policeman of the city of Columbus, and, while inspecting the lot on which William Smith died, he asked Smith if he would sell the place, and Smith replied that he could not, as it belonged to his children. John Hargett testified that he tried to buy the place from William Smith, and that Smith told him that he could not sell it, as it belonged to his children. Lillie Dawson testified that William Smith never claimed the place as his own, but said it was his children's. At the conclusion of the testimony the plaintiff made a motion to rule out the testimony of the defendants relating to anything "about a deed from Anna Maria Harris and Daniel Harris to the children of William Smith, deceased." The court sustained the motion, ruled out the testimony, and this is one of the errors assigned. The court then, upon motion of plaintiff, directed the jury to find a verdict in favor of the plaintiff, and this ruling is also assigned as error.

1. We do not think there was any error in ruling out the parol evidence offered to prove the contents of the deed claimed to have been made by Mrs. Harris and her husband to defendants. In the case of Calhoun v. Calhoun, 81 Ga. 91, 6 S. E. 913, it was held that, to justify the admission of secondary evidence as to the contents of a lost deed, not only the previous existence of the deed must be shown, but that it must also be shown to have been properly executed; and Justice Simmons, in the opinion, uses this language: "We think the proper rule of law in regard to the admissibility of secondary evidence is, not only that the plaintiff must show the existence of the deed, but that he must show that it was properly executed. It is possible that the deed may have been written and signed by the grantor, and yet may never have been executed according to law." See, also, Durham v. Holeman, 30 Ga. 619; Bigelow v. Young, *Id.* 123; White v. Clements, 39 Ga. 232. Even if the evidence offered was sufficient to establish the fact that the alleged deed once existed, there was no evidence whatever going to show that it had been properly executed.

2. We think, however, that the court erred in directing a verdict. The evidence intro-

duced was not of such a character as to require a finding either for one party or the other, but raised questions which should have been determined by a jury. If the evidence for the plaintiff was to be believed, William Smith had been in adverse possession for more than 20 years, and therefore the title acquired by the widow under the year's support set apart to her was superior to the claim of his children. If the testimony for the defendants was to be believed, William Smith had not been in adverse possession during the length of time claimed, but his possession was permissive only, and recognized by him as such; there being testimony to the effect that on three separate occasions he publicly disclaimed title to the property, and asserted that it belonged to his children, who are the defendants in the case. The case must be tried again, and a jury allowed to pass upon the issues made by the pleadings and evidence. Judgment reversed. All the justices concurring, except LUMPKIN, P. J., absent on account of sickness.

(106 Ga. 746)

TAYLOR v. STATE.

(Supreme Court of Georgia. Nov. 18, 1898.)

MURDER—INSANITY AS A DEFENSE—MALICE—INSTRUCTIONS.

1. The rule of law in force in this state which relieves one from criminal responsibility for the commission of an unlawful act on account of mental disease is: If a man has reason sufficient to distinguish between right and wrong in relation to a particular act about to be committed, he is criminally responsible. An exception to this rule is, where a man has reason sufficient to distinguish between right and wrong as to a particular act about to be committed, yet, in consequence of some delusion, his will is overmastered, and there is no criminal intent: provided, that the act itself is connected with the peculiar delusion under which the prisoner is laboring. Tested by this rule of the law, the evidence in the case fully supported the conviction for murder.

2. A charge in the following language: "The popular idea of malice in its sense of revenge, hatred, ill will, has nothing to do with the subject [legal malice]. It is an intent to kill a human being in a case when the law would neither justify nor in any degree excuse that intention, if a killing should take place as intended,"—states a correct principle of law, and it was not error for the presiding judge to have given it in this case.

3. There is no error in the charge of the court complained of, nor in the failure to specifically charge the jury in relation to the probative value of the evidence which showed or tended to show insanity in the family of the accused. While such specific charge would have been proper, it was not demanded by the evidence in this case; certainly not without a written request so to charge.

(Syllabus by the Court.)

Error from superior court, Bibb county; W. H. Felton, Jr., Judge.

Abner L. Taylor was convicted of murder, and brings error. Affirmed.

Geo. S. Jones, C. H. Hall, Jr., and Du Pont Guerry, for plaintiff in error. Roland Ellis, Robt. Hodges, Sol. Gen., and J. M. Terrell, Atty. Gen., for the State.

LITTLE, J. Abner L. Taylor was brought to trial in the superior court of Bibb county under an indictment charging him with murder. The specific charge in the bill of indictment was that on the 10th day of July, in Bibb county, he feloniously and maliciously killed Minnie L. Taylor by cutting her with a knife. On arraignment the defendant pleaded not guilty. The jury returned a verdict finding the defendant guilty, and sentence in accordance with the verdict was imposed. The defendant filed a motion for a new trial on several grounds, which will hereafter be considered. The motion to set aside the verdict and grant a new trial was refused, and to the order of the court overruling and refusing the new trial the defendant excepted.

The evidence adduced at the trial, as it appears in the record, is voluminous. The material portions of it are as follows:

For the State.

C. H. Logue testified: "Minnie L. Taylor was my daughter. The accused, Abner Taylor, was married to her March 18, 1897. They had one child, born March —, 1898. I was present when my daughter was injured by the defendant. It occurred at my house, in Bibb county, 9 or 10 o'clock in the morning. Two weeks prior to that date, my daughter was at the house of Mrs. Taylor, mother of the accused. Eli Taylor, brother of the accused, started home with her, and she came by my house to see her sister, who was sick. We had my daughter's baby at my house at the time. When my daughter came to my house she agreed to stay a day or two, and I told Eli I would carry her home. The child was at my house because my daughter could not nurse it. We kept it there to raise it on the bottle, as they had no milch cow. On the day my daughter was injured, Eli came there after her to go home. She did not wish to go. Eli then left the house, and went down the road. About 25 or 30 minutes after Eli left, the accused came along. A few minutes afterwards I again saw Eli. My attention was first attracted to the accused, who I saw walking quite fast. I was sitting on the porch, and my daughter was back in the house. When the accused was about 30 steps from the gate, he asked me where Minnie (my daughter) was. I told him she was in the house. He asked me to tell her to come out there, he wanted to talk to her. I called to her, and she refused to go. The accused then came to the gate, called to her, and told her to come out there. She asked him what he wanted. He replied that he wanted to talk to her a few minutes. I then spoke, and said, 'If you want to talk, and will talk right and reasonable, come in, and have a chair.' He came on in, and I handed him a chair, which he did not notice, but walked in the door, and asked his wife why she didn't come home. She replied, 'Why didn't you

come after me?' He then said 'Ain't you going back?' and she said, 'No, I'm not.' He then pulled out a pistol, and fired at her, and missed her. I was standing 4 or 5 steps distant, and picked up a piece of ax handle which was lying there, and struck at his hand, but missed him. He then fired, and shot me in the head. He broke and ran through the house, and I pursued him. As he jumped out of the door, I threw the ax handle at him, and struck him on the back. I then started to get something else with which to protect myself, and he turned, and shot me in the side. I then walked back and fainted. In a minute or two I came to my senses, and he was chasing her around through the house, stabbing her with a knife. She was hallooing. He inflicted eight wounds,—six in the back and two in the breast. It looked like these wounds were made with a knife, dirk, or something of that sort. I didn't see it. This happened on Sunday morning. My daughter died Monday evening at 4 o'clock. Frank Jones was there when Taylor came up; also my wife and daughter; also my mother and Eli. I did not see Eli do anything. I saw Ab running after his wife, and Eli around after him. My daughter would have been 22 years old in November next. I never heard the accused make any threats about his wife. My gate was 12 or 15 feet from the house. The accused first asked me where was Minnie. He told me to tell her to come out there, he wanted to see her. She refused to go. When she refused to go she said she was not going. He called again, and told her himself, and she said she was not coming. When he walked to the door, and asked my daughter why she didn't come home when he sent for her, she said: 'Because I didn't intend to. You wouldn't come, and you have not treated me right, and I am not going unless you do.' And he says, 'You are not going?' She says, 'No, I am not.' He drew his pistol, and shot her. After he shot me, he ran through the house to the back door, and was going into the back yard. No one was out there. At that time my daughter was in the back room. He was not going in that direction. He went out because I was after him with a stick. As he jumped out, I threw the stick, and hit him. He turned, and shot me in the thigh. He then came back in the house after my daughter. I fainted away for a minute or two. When I came to, he was running around the house and through the house and in the room. She was screaming. I did not hear him say a word. I saw him make a motion once or twice. I did not see the knife. She offered no resistance. Eli was running right behind Ab, and got within 5 or 6 feet from him. He was following Ab, and Ab was following my daughter. My daughter had been at home a right smart during her sickness. When she was first taken sick, she stayed at home a month. She relapsed, and stayed

there nearly a month. She would go home, and stay a week or two weeks, and she would come to my house and stay a week or two. She visited me like other daughters that are married to their parents, occasionally, only as I would go or send after her in case of sickness. I had to go and bring her back and forth a time or two, and bring her to town to the doctor. I don't know whether Ab refused or not. Last fall they were living in my house, and their things were there, and he and her stayed at his brother-in-law's. Me and my wife went to see them. I went to the field where he was stacking fodder. When I come back, she was ready to go home. Both got in the wagon, and we started off. We got a hundred or two hundred yards. He come down the road, and cursed, and said that if she didn't come back somebody would die. I did not know that I was carrying my daughter off without his consent. I was not present when he objected. My wife was there. I don't know whether she was present when he objected or not. I don't know whether he objected or consented. My wife and I were not keeping Mrs. Taylor away from Ab. We were doing everything we could to help them along, and help her in her sickness. She has been feeble nearly all the year since she was confined, and some time before. We did all we could to help her, and tried to build her up. It is not a fact that I was trying to keep her away from him, intending that she should not go back and live with him. He made some complaint about her going away. I could hear of it, about her going. The baby was at my house, and stayed there from the time it was a month old. It was five or six miles from my house to where he lived. When Ab came to my house the day of the occurrence, he did not have his pistol or weapon in his hand. I never saw it. There were no indications of anger, only the threats he made beforehand, that made her afraid to go to him. He looked like he was angry and mad. He was looking that way at the time of the saying and before anything was done. When I first saw him approaching the gate, he made the impression at that time on my mind that he was angry. He looked pale. Looked like he was mad. He looked paler than usual. He looked pale enough for me to notice it at a distance. He was tolerably pale. I could tell he did not look natural. I had seen him that way before. I have seen him mad before, but not altogether as mad as he was then. I did not notice anything else peculiar about him. Ab and I were not at outs. We were on good terms. I was with him, if he was not with me. He had never shown any animosity at all to me before, only at times last fall; but outside of that everything was always pleasant between him and me, so far as I know. He never made any complaint to me or I to him. It was always pleasant between us except that at one time we had

a few words. It didn't amount to anything. The next time we met it was all right. That was the time I let his wife go back to him."

Miss Gussie Logue testified: "Mrs. Taylor was my sister. I was present the time she was cut by her husband. When Mr. Taylor came to the house, I was in bed. I had been sick about five weeks. When he came, my sister was in the back room, and he called her. The first thing I heard, he came to the gate, and called her. He told father to tell her to come out here. She said she was not going to do it; for him to come in there. He came in, and said there was not but one thing he wanted to know, and that was, was she going home with him; and she told him no, she was not; that he treated her so mean she could not live with him, and she was not going. And he pulled out a pistol, and shot at her, but father hit at him, and missed him, and he shot father. At the time he shot at my sister, I was standing in the floor. Father ran through the house out of the back door, and threw the ax handle at him. He turned, and shot father through the thigh; and he taken out after my sister, and run her through the house, and commenced cutting her. I saw them when they were going around the house. He was stabbing her every time he got close enough to her. He had a knife. They went out of the back door the first time, and run around the left side of the house, and kept running around the house until he got through cutting her. He left her in the yard. They run through the house one time. My sister was in the back yard when he stopped cutting her. He then went and got in the wagon, and went off. His brother took him off. They went off in the wagon. His brother did not take hold of him, but begged him off. My sister went in the house, and sat on the bed, until some one came and put her to bed. She was bleeding from the wounds when she came in. She died Monday evening. Taylor did not say anything as to why he was running after my sister. My sister begged him to quit, and let her alone, and he would not do it. My grandmother was in the house. My sister had been at home about two weeks. She had gone to his mother's on a visit, and came by our house to see us. When she got there, I had been so sick she would not go home and stay. She decided to stay a week or two. Papa told her to stay. I was there when Eli came for her. She didn't go with him. Ab appeared about 5 or 10 minutes after Eli went off. I have heard Ab Taylor say many times—(he was always quarreling about her going to see her people)—he said that was all she cared about, was her people, and all she studied about. He made some threats. He told her he was going to move her clean off, where she could not see her people, and she told him if he did she would quit him, and he said if she did he would kill her. That was about a month before he did kill her. I was at his house when he told her so. My sister

was cut eight times. After my father struck at Ab and missed him, he ran out the back door. My sister went in the side door. He then turned, and shot my father, and my father fell and fainted. Then Ab came through the house, and says, 'Where is Minnie?' I says, 'I don't know.' About that time Minnie run through the house, and run out of the back door. She had gone in the little room. She went out the front door, and got in the rear, and he found her out. She didn't have any weapon; did not threaten him; didn't insult him. When I first saw him, I noticed he looked black in the face when he come in, he was so mad. I had never seen him look that way before. I had seen him mad before, but not as mad as he was that time. He seemed to be furious, and his face looked black. I did not notice any other peculiarity about his face. When he came in he had nothing in his hand. The cutting killed my sister. She died from the wounds."

For the Defense.

Mrs. Martha Taylor testified: "I am the mother of the accused. Am a widow. I think my son is about 27 years old. My son was strange from his cradle up. All of his life he has had strange ways. I call them crazy ways. I don't know what they were; anything. He would run around the house and through the house, and me after him. He would look wild and strange and frightened. He would run in and around the house, and I would try and catch him, and would look wild and frightened. If I got close, he would look at me, and stop, and hollow and scream. On those occasions there had not been anything the matter. I had not done anything to him, or threatened him. Maybe he would be at work, not noticing anything. When he was running around, he would look back like he was looking at something, or laughing part of the time. Looked like he was nearly frightened to death. If he was afflicted any way when he was a child, I don't know anything about it, only when he was a little baby he had spasms, like most little babies do. He had them until he was about two years old. I have not seen him running around and screaming lately, but he had this running around and screaming all the time he was in my presence at times. He was a schoolboy, 8 or 9 years old, when he did that way,—about running around and screaming. I remember when he was married. I have not seen a great deal of him since. During the time since he married, when I would see him, he did not talk much. I would ask him why he didn't talk, and he would say, 'Oh, mama, I am living in torment; I am in so much trouble.' The trouble was not with his wife particularly, but with his people,—her people, her mother and father, her mother especially. He was complaining that they would not let her stay home. If they did not have her on the road, they wanted her at their house, and she was never there at home,

and he didn't want her to work; he wanted her for company. Whenever he would talk to me in these latter days, he would talk about nothing, only wild, rambling talk about his troubles. I stayed at his house one week since he was married. His wife was sick at that time. He was as good and kind as could be, although sick himself, but he never was too sick to go and wait on his wife. I have seen him sit behind her for hours. I wanted to relieve him. He would say, 'No; go away.' Her mother was there most of the time. An old colored woman did the work. His wife wanted him to wait on her. If he was not present, any one would do, but, if he was, it didn't matter how poor and sick he was, he must come in preference to any one else. I told her several times he was sick, and lying down; 'let me do it,' and she says, 'No, no; I want him to do it.' She said he could do it better than any one else, and could rest her better if he sat behind her. If the house was crowded, he would lay down by the door, and if he could get a chance to lay down and rest he would lay down by the side of her. I have known him to lay at her feet when there was but little room. He put himself to trouble to get little things that she wanted, and when they were not at the station he went to other places and got them. He ate but little during that time. Whenever he heard Minnie's voice, he went to her. He didn't need any one to call him. He was as kind as any one could be to a little baby, when I was there. He was anxious about her. He would sit there and cry, night and day, and he frequently brought cool water a quarter of a mile from the spring, although there was a good well there. When they were first married they stayed at my house. They got along as loving as they could be, and were very affectionate. I never heard of their quarrelling, nor an unkind word passing between them. My oldest child was named Charles. He is dead now. He died crazy, and had fits sometimes. He was eight years old before he walked. He was four years old before he could sit up. He was six years old before he had any teeth. He was seven years old before he ever took anything in his hand. He had fits and spasms, and when he was not at that he was crazy. When he was crazy, he would tear up anything, break dishes, beat the back of his hand. He died crazy. I don't remember when he had his last fits before he died, but he was crazy, and he would sort o' get over that a little, and directly he would have a fit. After he got rid of it, he told he, 'Mama, don't grieve after me; I am going home to Jesus.' He told me that about sundown, and at seven o'clock, I think, he died. He never did an hour or a half hour's work in his life. He did not know how to work. I knew William Taylor very well. He was Ab's first cousin. He was in the asylum. Never got grown before he was sent to the asylum. Charlie was 18 years old when he died. Was never at

himself enough to go without an attendant. When I would go after water, or anything of that kind, Charlie would have to hold to my apron or dress, and I have toted many a pail with him holding to my dress. I couldn't leave him and go after the water. I don't know about Abner liking his wife going to her father's so much. He had a heap to do without her company, and he hated to do without it. He hated to have her gone so much. He begged her to stay at home with him. She was gone the most of her time, and he tried to get her to stay home, and to come back. I don't know that he was vexed at her staying away. He was near troubled to death. That is what he was grieving about, because he was staying at home, and attending to his farm, and cooking for himself, and couldn't see Minnie. He would say, 'I have got to go in that house at night and dinner, cook my little bite at dinner, and Minnie is not here.' She has been leaving him off and on since shortly after the marriage. She went all the time, and towards the last she stayed at her father's the biggest part of the time. I don't know what he was intending to do. He would send for her to come home, and they would not let her come, and Mrs. Armstrong would go for her, and they would not let her come. I mean her mother and father would not let her come. They were the real cause of her keeping away from him. They put it on Minnie. When Mrs. Logue was there, and her daughter was sick, and her son was sick, and my son was sick at the same time, she put a good deal of work and labor on my son, more than was right in his condition when he was sick. She didn't have any mercy on him at all. She treated him with very little consideration, and it hurt my feelings. He was a hard-working man, and did his part by his wife, more than he was able to do, and attended to his business well. His business was farming. I suppose he was a good farm hand. That was what the neighbors said. He never had spasms since he was a little boy. I allowed those spasms were the kind that children frequently have. I have seen other children with the same kind of spasms. I remember the last visit to my house of Minnie and Ab. She went to her mother's from my house. Ab was at my house with her when she left. I don't suppose they were mad then. He asked her to go by home, and see her folks, and come on home. 'I will have some hands in the morning, and I would like for you to get home.' That's the way they talked. They came to my house Saturday evening at 4 o'clock, and remained there until Sunday afternoon. While they were there, he treated her just as kind as he could, and was affectionate to her. He insisted on her promising to come home after she went to her father's, and she would not promise him, because she told me the night before that her mother was not going to let her go home. I have heard him mention, once

or twice I know, that he was going to get Minnie up there, and keep her at home so lonesome, and 'I had rather be dead than alive that way.' I believe they were virtually the cause of the whole trouble; not her father so much as her mother. Her mother was the whole cause of it, and he was the kind of a man that mostly went by her say so."

Mrs. Sarah E. Johnson testified: "I visited the house of Ab Taylor and his wife several times during the month of March. The accused called me to come and see his wife. I went there during the month every two or three days, sometimes every day. His wife was very low, and dangerously sick. She had had a child, and had milk leg and fever. Taylor waited on her while I was there. He was right there all the time. She called on him all the time. She called on him and her mother in preference to any one else. She called on him to hold and nurse her. He was not well, but was poorly a part of the time. In that condition he waited on her whenever she called on him. I have been there day and night. He did anything she called on him to do, and was ready and willing. Would wait on her in any way. She had to be held up in bed. He would do it. I saw him a great many times sitting behind her, crying, holding her. He and her mother gave her medicine and food. I have known her to call him when he was at the table. He would go and wait on her without eating. Never saw him sleep much. He would lie down and rest in the same room. He was wakeful and attentive; in and out all the time, when not nursing her. Never saw him mistreat her, or give her a cross word. He treated her as kind as a man could treat his wife, and did all he could for her. He acted nicely and sensibly while I was there. Seemed to be thoroughly at himself, and to know how to nurse her. He sat behind her the biggest part of the time, day and night."

Mary Sanders testified: "I knew the accused and his wife. I went to their house when she was sick. Taylor came and hired me to wait on her in March of this year. She was very sick during the month; in a serious condition. I stayed there until the 29th. Then her father came, and she went home with him on the 30th. Her mother and Mr. Taylor waited on her, and gave her medicine and food. Taylor done what he could. There was a good deal to do. She was helpless, and had to be lifted about. He left his crop, and stayed and waited on her. He himself was sick a good deal of the time. He was very irregular at his meals, and must have lost a good deal of sleep from his attention to his wife. He was anxious, uneasy, and was very much troubled about her. He cried a good deal. She had spells of weakness, when it looked like she would die. It troubled him very much, and he cried every time she had a spell. He was kind and affectionate to his wife. They were always loving. I saw them together after she got over her dangerous spell. He would treat

her as good as he could. They were very affectionate towards each other. Mrs. Taylor preferred the accused to wait on her always. I did not notice anything unusual or remarkable about him, except he was sad. Did not hear accused say anything about her going home with her father. I saw him after she went. He did not like that much. He took it pretty hard. It did not make him mad. He didn't rear. He did not like it, but he took it out in crying. Whenever I did see Mr. Taylor, he was looking mighty curious. I noticed Taylor being shabby, wouldn't shave, and going with his clothes half put on him. He didn't look brave like he did when his wife got sick. He went about with his head down, moping about. He was not noticing anybody. I noticed whether he spoke to people or not. We all laughed about it. If you spoke to him, he would speak, and if you didn't he wouldn't speak. He would not talk. He looked like a man whose wife had left him. I imagine he looked like a man whose wife had left him. He looked like a man that had lost his family."

Mrs. Laura Armstrong testified: "Knew accused and his wife. Visited Mrs. Taylor a number of times after the birth of her child, while she was sick. During that time Taylor was very attentive, devoted, and affectionate to his wife; extremely so. Frequently the wife insisted on the husband waiting on her, and refused attention from others. He gave about all his time to his wife, night and day, administering medicine, food, and stimulants, although part of the time he himself was quite feeble. Have known him to quit his food to wait on her, and then not return to eat. He lost much sleep. At intervals would work around the house, so as to be on hand to serve his wife. When accused waited on his wife, he cried a great deal. He was an extremely poor man, but provided for his wife in all particulars the best he could."

A duly-certified copy from the records of the court of ordinary of Bibb county was introduced, showing that William Taylor, on the 30th day of December, 1893, was adjudged to be of unsound mind, and was committed to the lunatic asylum, on proceedings instituted under the Code. These proceedings were had on affidavit to the effect that Taylor was of unsound mind, and the affiant apprehended, and had reason to apprehend, that the public safety was in danger by his being at large.

J. J. Johnson testified: "Knew Taylor and his wife. Not related to either. Visited their house when Mrs. Taylor was sick. She required careful nursing. Taylor did most of the nursing when he was able. He was sick part of the time himself. Even when sick he remained close to her. I saw him nurse her a very great deal. He was affectionate and kind to her. I thought he was anxious and uneasy about her all the time. Apparently he was in a great deal of trouble, and showed it by crying. He had a pallet in the corner to sleep on. Every time he was called he

would come. He acted like anybody else would whose wife was about to die, I thought."

Mrs. Frances Herron testified: "Knew the accused and his wife. Not related to either. Taylor came to get me to go and stay with his wife, whom I found was not well, when I got there. The baby at that time was about 3 months old. I remained 3 weeks. Mrs. Taylor was not in bed when I went. Her father had carried her to town to the doctor, and brought her back. Taylor was as good to his wife as he could be,—as kind as he could be. Never said a harm word to her, and they seemed to be happy. He was not at home much, but in the farm at work; but when at home they were just as peaceable as could be. At night they sang together. They were together when he was not at work, and sought each other's company. Saw many acts of affection between them, and never saw a more affectionate and happy and loving couple. Never knew him to be rough nor quarrel with her, nor she with him. He waited on her. He employed me to go there. When she left to go to his mother's she and I went together there. Taylor acted like a good, sensible husband. I did not see anything out of the way in his actions. He did not cut up like a bad-tempered man, or like a crazy man."

Charles Nelson testified: "I am the brother-in-law of the accused. I married his sister. I have known him about seven years. I lived at the same house with him three months last fall. He was then married. Did not see much wrong of Ab and his wife when they lived at my house. They lived kindly and affectionately; quarreled very little. They would quarrel a little whenever she wanted to go to her father's. He would persuade her not to go. She would contend to go, and raise a quarrel with him. He would not abuse or mistreat her; nothing more than to persuade her not to go. They never quarreled about anything else. He was affectionate to her. They were always loving. Never heard him speak an unkind word to her. Never knew him to strike or abuse her, nor to neglect her. She was not altogether loving and affectionate towards him. All the trouble that I saw was her wanting to go home to her father's. She would pout when he would object. Outside of this, there was nothing on her side that I know of. I have been to their house when she was sick, a number of times. I lived about fifty yards from them. The accused was sitting behind her, holding her, a great portion of the time, and waiting on her, giving her water and medicine and food. During this time he slept and ate very little. He was sick himself during the time. She would frequently call him, and he would go immediately, and wait on her. Sometimes she would call him from the table. He was very anxious about his wife, and showed his anxiety. I never heard him talk but little at that time. He exhibited his fear and grief and anxiety by crying. He did a good deal of crying. I saw him crying by the bed once or twice, and once in the yard.

He thought his wife was dying. He made all the provisions for her he could in the way of medicine and food. He was a poor man; got his living by labor; worked on the farm with Mr. Armstrong. I saw them at home but little when she was well. They got along very well, and seemed to be happy. I have seen Ab when his wife was at her father's. There was a great deal of difference in his appearance then and when his wife was at home. He had a dull countenance, and had little to say, and would talk about nothing but his wife going home, and not staying with him. If I introduced other subjects, he wouldn't notice them. When his wife went home, he would come to my house. He said he could not help from grieving about it. He did not see any cause for her to go. When she was gone, did not seem to have anything on his mind but her, and talked about nothing but her going away. He said he did not think she ought to go off and leave him, and he persuaded her not to go; that he had nobody there to wait on him and help him; and that she ought to stay with him. He did not speak harshly of her, nor abuse nor condemn her about going. There was a difference in his appearance and action when she was gone. He was nervous, couldn't hold himself still when he was talking about her going home to her father's. He was in his nervous condition every time she went. He would keep talking about it, and pay no attention to any other subject. He would go to my house to get his meals when he would not have time to cook. I noticed he did not talk right when he was talking about his wife going off. He would speak things that did not sound right. He would have a nervous disposition. Never knew them to quarrel about anything except her going away. She stayed away too much. She left him there where he had to wait on himself, and he complained about it, and said she ought to be there to help him. He never got mad about anything else, that I know of, except her going away. The longer she stayed, the less he liked it. He did not make any effort to get her to come back. She always set a time to come, and he would look for her at that time. He would send somebody after her to get her to come back. He did make some effort to get her back, only he did not go himself. He sent me once. He was a pretty curious sort of a man. He was a man that would talk loud. The last conversation I had with Ab about her being off and coming home was the 3d of July. He asked me did I reckon she would ever come back home any more. I told him I did not know whether she would or not. This was at my house, about 12 o'clock. He then turned and walked out. That was all he said. He said that he and her mother and her father could not get along, and he did not like to go up there; they did not like him, and he did not like that; and neither liked the other. That state of affairs continued for some time. He seemed to be nervous, and talked about his

wife, and said she ought to be home, helping him."

George Burnett testified: "I knew Ab Taylor and his wife. Lived about 300 yards from Taylor. Saw him occasionally during the year. He seemed to be of very good disposition when his wife was at home, and act like he was glad. Wanted to do everything she asked him; and he was jolly and wanted to laugh and talk and joke; and he and I would frequently tussle. When his wife was away, he did not have much to say. He would act like he did not know what to do, act strangely, be first in one place and then in another. At times he worked, and then he would quit, and go to the house. When he come in contact with other people, sometimes he would speak, and sometimes he would not. He didn't act that way when his wife was at home. Noticed him plowing. He had peculiarities. He would stop, talk to himself, and murmur to himself, as he went along plowing. When his wife was at home, I did not notice that. When I spoke to him, and asked questions, he replied in a natural manner, perfectly sensible. He looked like he was downcast on account of her leaving him, and very much bothered about her going off. When she was away, he did not joke with the boys; he would not wrestle. When she was at home, he would joke and wrestle. I never went to his house when his wife was at home. Have heard him mumbling to himself a number of times during the year."

Frank Bartlett testified: "Knew Ab Taylor and his wife for 8 or 10 years. Lived with Mr. Armstrong this year, three or four hundred yards from where the accused lived. Have seen but little of him except in passing. Have seen a little peculiarity on the part of the accused when he was at work. Seemed to be troubled in some way. Would not be attending to his work. That was when his wife was gone. Everything worked along smooth when she was there. I noticed the difference in passing. He wouldn't work, and pay attention to his farm, when his wife was gone, as if she was there. Did not work regular. Have heard him talking when he was plowing. Did not understand him. Nobody there. But never noticed him doing that way when his wife was at home. He acted like he was in trouble. I had taken him to be a pretty sensible man,—man of good sense. There was nothing crazy about his work that I noted. He would get downcast, and worried, whenever his wife would go off and leave him. It looked like the least little thing would worry him then."

Armstrong testified: "Know the accused. Seen his wife once or twice. Not related to either. They lived on a place of which witness was in charge this year. Met Taylor first in April last. Noticed peculiarities in his conduct. His actions were a little strange for a sane man, since I became acquainted with him. He usually went with his head down; walk right up against you before he would speak.

Would talk about his family mostly,—his trouble with his wife. Talked about killing himself,—drowning himself. Was in trouble. Would talk but little about anything else. I would talk about his crop. He would reply that when he got his family at home, and settled down, he would show me how he could work. It seemed, when he was talking to me, that the trouble that existed between him and his wife and people would be on his mind. He frequently talked about killing himself to get out of trouble. He always spoke of his wife in a very kind manner. He blamed her father and mother for the trouble; not his wife. He said he didn't blame his wife for anything. She was an inoffensive one, of the easy kind, that could be led off easy, persuaded. When his wife was gone, he was in a restless state. Would leave his work, and be gone for a day. I have seen him, in plowing, stop, walk back as if looking for something. He would not pick up anything. He would skip about in his work. He worked well when his wife was at home. Never saw him with his wife but once or twice. He once asked me to go by his house, and see his baby. I went in, and had a little talk with his wife. He seemed to be contented, and so expressed himself. I did not notice any of the moping about while she was there. I could frequently hear him singing at night, late, 10 or 11 o'clock, and on one occasion I heard him, before day, hallooing, singing, and praying. That particular night I listened two or three hours. The last time it was about 2 or 3 o'clock in the morning when he attracted my attention. He would commence right after supper time. I don't know whether he went on that way all night or not. I couldn't understand the words he was singing. I could hear the tune. I thought he was speaking like a man with a mind that was not right. When I first met him, I thought his mind was weak. From what I have known of him, and the way he was acting, I would judge that his mind was unsound, and badly diseased. I don't know that I ever noticed any peculiarities besides those mentioned. I saw him Saturday before the killing. He was coming in from work. Eli Taylor came, and asked me if he could get a mule to go after Ab's wife. I told him he could. And he saw my boy hitch up the spring wagon, and he asked him if he wouldn't drive him by, and bring her, and he said he would. When my son returned, he didn't bring his wife, and when the accused found she did not come he asked my son if she came. He said, 'No.' Then he asked, 'Why?' and he said her mother wouldn't let her come. Then he said he would go after her himself, and he said he was going to bring her when he went, and if these old people interfered with his bringing his wife away he would kill them. That was the language he used exactly. At that time he was perfectly crazy and wild. He turned blue, almost. He was the maddest man I ever saw. He was as nervous as I ever saw a man. At that time

he was attempting to help unhitch the mule from the wagon. He was all to pieces. He couldn't hold on to anything. He said if those old people interfered he would kill them,—his mother and father-in-law. He said they had worried and tormented him about his family. That he couldn't stand it any longer. That he had rather be in hell. I said to him: "That is a harsh statement. I have seen more of the world than you, and you say you are in great trouble, and if you carry the remarks you are making into effect they will get you into more trouble. Get all that out of your mind. If they have made up their minds they don't want this woman to live with you, and she don't want to do it, I don't know of any law to force her to live with you; and if she don't want to stay I wouldn't want her to do it. You went to the court house to get your privilege, and that is the place to go and get separated." He didn't say anything to that, but talked a while. Sunday morning he came, and asked if he could get a horse and buggy to go after his wife, and I said, "How long are you going to be gone?" He said, "Until 10 or 11 o'clock." That was the last time I saw him. After the singing until two o'clock in the morning, I met him the next day, and I said to him, "You must have been very happy last night," and he asked, "Why?" and I replied, "Your singing and praying." He said no, he was troubled. I told him he ought to kick off all of this trouble business. My son went after his wife for him, and he returned, and told Ab his wife hadn't come, and he supposed the reason was the old people wouldn't let her. That was the time he got so mad and flew all to pieces. He was intensely angry at the time. The same evening I advised him that, if his wife didn't want to live with him, to leave her alone. That was the evening before the killing. He said his wife wanted to stay away from him on account of her father and mother. The next morning he got my spring wagon, and started off. I did not see Eli with him at the time they started. They left while I was at breakfast. On that Saturday evening he talked in an angry tone when he was talking about his family. When he brought up that subject he talked like a man off his hinges. He never expressed dislike for his mother-in-law and father-in-law. He did not like the way they were meddling with his family. He said, if they separated him and his wife, he would kill them. He made that remark Saturday afternoon. Next morning he seemed to be as calm as usual, but was in a melancholy state, downcast and troubled. He seemed to be in a state of unrest all the time. I have been so myself. Men in such condition do not act all alike. The stronger the mind, the better able the man is to bear it. I have never known a sane man to act like this man in my life. I think a man that would be up and praying at 2 or 3 o'clock at night would be crazy. He wouldn't do it when his wife

was at home. I think that he was not of sound mind, because I heard him singing at 2 o'clock in the morning, and his actions in walking up and down the road. He nearly run into me once or twice. He was not a raving man, or anything like it. Was a good worker. I think that a man who would skip from a place that was grassy, and go over to where there was none, was not sane. I think he was trying to skip the grass. He never showed any signs of laziness. He skipped coffee weeds and crab grass, and went where there was not much grass. He would sing late, and hoe grass in spots, and get mad when the old lady and old man wouldn't let his wife come home. The longer she stayed away, the harsher he got. He held his head down oftener. His mind seemed to be in a worse state, in the manner I have mentioned."

Emory Jackson testified: "Knew where Taylor and his wife lived this year. Visited them a few times; several times at night. Taylor was there, and so was his wife; the latter being in a feeble condition, apparently very sick. Taylor and the neighbors were waiting on her, and were very attentive in nursing her. He was very kind. I saw him crying several times. Her demeanor towards him was very kind. She wanted him to wait on her principally. She wouldn't let anybody nurse her but her husband, a great deal of the time. Apparently she was very ill. Taylor acted like any man whose wife was sick. I do not know of anything remarkable about the way he acted."

E. S. Smith testified: "I knew accused. I knew Charles, the brother of the accused, who was living, and did not have mind enough to take care of himself. I also knew the cousin of the accused, William Taylor. He was sent to the asylum. I have known the accused since he was born, but little of him since he was a man. I would say that during boyhood his mind was impaired. He was rational at times, and at other times not. If he was disturbed, or undertook to meditate, his reason would become dethroned, and I would not think he was of sound mind under those circumstances. I considered the mother of the accused a weak vessel. She had hobbies and foolish ways, such as a person of unsound mind would have. I have not seen the accused for six or seven years until this trial. I have not been with him to any extent since boyhood. Then he acted, ordinarily, like other persons, unless he became excited or worried. Then he acted in a different manner,—get wild,—and, if he did a thing, after he got over one of those mad fits or wild fits, he wouldn't recollect it. When he got excited, he was more excited than other people. He appeared like a madman. He would rear and tear and curse when he was not more than five or six years old. Nobody guarded him, but I never heard him referred to by any of his associates except as a fool."

W. J. Herron: This witness testified on direct examination only in reference to the mental condition of Mrs. Martha Taylor to the effect that she had spells, and acted in a very curious manner. On cross-examination he stated: My wife is her half-sister. That one of the children of Mrs. Taylor was an idiot, but nothing was the matter with the rest of the boys, that he knew. That the spells which Mrs. Taylor had came on occasionally. Witness had been at the house of Mrs. Taylor when accused and his wife were there. Does not know whether there is anything the matter with the accused or not. Never saw anything the matter with him.

W. S. Holley testified: Knows the accused. He arrested him. At the time he arrested him he was stabbing himself in the breast, and looking at his person where he was trying to make the lick. Had his shirt, coat, and vest open. This was in Williamson's peach orchard. "He saw me before I saw him. I was following a track. When I got to him, he was badly frightened. Was bleeding freely, and seemed to be considerably exhausted. The first words he spoke were to ask me to carry him to his mother's house; that he would be dead in a few minutes. He said he was not sorry for anything he had done except trying to kill himself. He said he had killed his wife, and that the knife I got from him was the knife that he killed her with. He said he was satisfied he had done what he had been wanting to do at the time he was talking about killing his wife. I had a warrant for him. Am the constable in the district. This was on Thursday morning after the killing on Sunday. I had been hunting for him during that time. When I went up to him he did not act the part of a man out of his mind. He seemed to be weak. He had been lying out and taking the rain, and was wet. He seemed to be frightened, and told me he was. He said that he had been told that the crowd was going to lynch him; that he was nearly scared to death. He talked about his brother Ell, and asked if I thought they were going to get him into any trouble over it. He said he hoped they would not. That Ell was a good boy, and didn't have anything to do with it. He was arrested on Thursday morning, about two miles from Logue's, and about three hundred yards from his mother's, and about four miles from where he lived."

B. L. Langston testified: "Knew the accused about 16 years ago. Knew him when he was a little boy. He was always strange. Couldn't tell what was the matter with him. Did not seem to be real bright. Was easy to pick at, and when he got mad was hard-headed, and when he got angry he could not control himself at all. We would have to get out of his way when he got mad. Afterwards he would claim not to recollect anything about it. At one time he got me down, and like to have injured me seriously. I had

been picking at him, and the longer I picked the madder he got. When he got mad he wanted to fight, and would fight. I was too young at that time to consider whether he was bright or not. I would talk at him to see him spit. He would slobber all over himself. After he caught me, and jumped on me, I did not pick at him any more. I can't say that I saw him do anything else that was remarkable."

Ell Taylor testified: "The accused is my brother. He is about 27 years old and I'm 24. I knew the wife of the accused. After they married, they lived in the house with me and my mother. Got along peaceably and all right, being kind and loving all the time, and were affectionate towards each other, and never heard them quarrel. Subsequently they moved to the Armstrong place. I went there while his wife was sick, and once or twice since. When his wife was sick, they were very friendly. He waited on her, and was very attentive to her, and it seemed that she would rather for him to wait on her than anybody else. He was sick a part of the time she was. His conduct was very loving towards his wife. I saw him crying several times. After she got better, and up, he treated her as well as he could. Was kind and loving. About two weeks before the killing I carried them from his house to my house. On that visit they acted as kindly as they could. From there I carried his wife to her mother's. When we were leaving him at my house, he said he would go down the railroad, and cut us off, if she wanted to go by her mother's. The understanding was for her to go by, and stay about an hour, and meet him up the railroad, and I was to carry them home. I carried her to her mother's, but did not carry her home, because Mrs. Logue said she wanted her to stay two or three days with her sister, who was sick. When I found my brother, and did not have her with me, he seemed very sad. He did not look like he did before. He went back to my house, and stayed until dark, and then went home. Mr. Logue told me he would carry her home Tuesday or Wednesday, but she never went. It was two weeks exactly before the killing that I carried her there. During those two weeks I saw my brother from Wednesday to Saturday. I noticed that he was badly torn up, and did not think they were going to let his wife come back any more. He said he did not believe they were going to let her come back. During that time he talked about his wife mostly, and about his troubles. It seemed that his wife was on his mind. He would not talk about much of any. Sometimes he would talk a little about other things, but would go right off about his wife again. He said he believed he would get along all right if he could get his wife back, but that he did not believe she was going to come back. He acted strangely, and looked strange. He would stop his plow, and said

he didn't have any heart to work, and could not work. I saw him Saturday before the killing. He was talking mostly about his wife—getting her back home—and wanting me to go after her; but he didn't believe she would come. I saw him along through the day. I did not see him that evening and night except in passing. Didn't have any conversation with him. I stopped my plow about 3 o'clock, to go after his wife, and asked Mr. Armstrong, who was going that way, if he wouldn't go by, and get Ab's wife. After Armstrong and his wife came back, and Ab's wife didn't come, he seemed to be all to pieces. He cursed and took on powerfully. He said he was going after her next morning. Seemed to be excited when he was talking about it, and nervous. I told him his wife would come back all right. He said no; that he didn't believe they were going to let her come back. After he got through cursing, I saw him go into his room, before he went to bed, and kneel down and pray. Just before he prayed he had been cursing. He cursed me, himself, Logue and his wife. The next morning my brother and I got up, and hitched up the wagon, and I went after her. I told him to get off, and go to my house, and I would go and bring her there, and he could talk to her, and I went by Logue's. My brother did not go. The understanding was he was going up the railroad to my house, and I was going to get his wife up there, and he was to take her and carry her home. When I went to Logue's, I didn't get his wife. When I failed to get her, I started to my house. I met my brother 100 or 150 yards from Logue's. When I met him, he asked me where was Minnie, or what was she going to do. I told him they wouldn't let her come. He started on. I jumped out of the wagon, and told him to stop. I saw the pistol. He said that if I didn't stop he would shoot me. He jumped up, and said, 'God damn my soul,' and went running towards Logue's house. I went, and got in the wagon, and turned it around, and followed him. I did not see him any more before he got to the house, but saw him in the porch as he went in the door. I was going on, and I heard a pistol fired. I was then turning out of the big road going up to Logue's house, and was 25 or 30 yards from the house. When the next shot fired I was getting out of the wagon. I then run in the house. When I got there, my brother was snapping the pistol at his wife. She was running around over the house, he after her. He jumped out of the back door, and I did so, and took the pistol from him. I caught hold of his right arm, and thought I would carry him to the wagon, but he slung loose, run in the house, and when I got there he was cutting his wife. After that he went out of the door. I caught hold of him, and carried him to the wagon. When I met my brother, and told him his wife wouldn't come, he looked like a wild man. After that I

carried him up to my house. I took out the mule, and he went in the house. I heard mother hollering and screaming, and I went in, and he come out of the door. I put her to bed. She had fallen on the floor. I don't know what transpired between him and mother. He went off a little piece, and came back over to my house from there. On Monday evening we tried to get him to let us take him and bring him to jail. We heard that they were going to lynch him. He would not consent. He refused to talk. Down at Armstrong's, in the afternoon, when Armstrong tried to get Ab's wife to come back, when he reported to Ab that she would not come, Ab took on a good deal. He acted like he was angry, and all to pieces. He cursed old man Logue and everybody else. He said he was going the next day and get her, and if they didn't let her come he was going to kill Mr. Logue. The next day after I went up for her I met Ab, and told him she was not coming. He cursed, and started up the road, and put his hand in his pocket. When I got there, old man Logue had already been shot. I only saw my brother stab his wife three times. I did not know there was going to be trouble at old man Logue's when we started up there. I thought there would be a fuss. I did not have any idea there would be a killing. I didn't know he was going to kill anybody. He did not make any effort himself to hide. I controlled his movements. My reason for hiding him was that I saw by the papers they were talking about lynching him."

For the State in Rebuttal.

M. J. Newberry testified: "Have known the accused nearly four years. He has worked with me two and a half years. I had opportunity of seeing his conduct. He acted like a sane man to me. I considered him the best farmer I had. He had the best judgment of any man on the place. He had two brothers there. His judgment was a great deal better than theirs. I saw him occasionally before the killing. He seemed to me to be sane."

J. J. Amason testified: Knows the accused. Had worked on his farm two years. Had opportunity for seeing and observing him. He did not conduct himself in a strange manner. Was a pretty straight fellow; faithful worker. Was about grown at the time. "Was of sound mind, because I was with him every day, and couldn't detect anything otherwise. It has been ten years since he worked with me. Have seen him occasionally since. Never saw anything wrong with him. Knew him after he was married. Seemed to be of perfectly sound mind."

George Dillon testified: "Accused worked with me a short while in 1897. Am not an expert; but accused was a good farmer, and a good farm hand."

Dr. C. D. Redding testified: "Attended Mrs. Taylor when she was sick. Accused was also unwell during that time, and I prescribed for

him. Knew the accused well. Have known him 3 years or more. He has not been a man of unsound mind since I knew him. Have seen him twice a month for two or three years. When I prescribed for him it was for a little nervousness, and he was complaining of a headache, caused from being up during the excitement at his house. Minnie L. Taylor, wife of the accused, came to her death from stab wounds made with a knife. The wounds were mostly in the back; one right in front. I should not have considered any one of those wounds mortal. It was the general effect on the system—the nervous shock—that produced the death. Neither of the wounds struck any vital part. Knew Mrs. William Taylor. Called to see her after this murder. She was nervous and excited, and needed something to quiet her. There was no fit, or anything of that kind. I considered her a woman of very good judgment. I saw accused soon after he was arrested. Didn't consider his wounds serious at all. Thought they were made with intent to commit suicide, and inflicted by the person himself. When I visited the wife of the accused when she was sick, the conduct of the accused towards his wife was very affectionate, and very kind, and he was much interested in wanting her to get well. He was very anxious about his wife, and, I thought, much concerned. He was devoted and attentive to her when I was there, and tender in his conduct. I can't say that he was extremely attentive and affectionate. He did all that was required of him. Was anxious that she should get well and live."

Frank Roquemore testified: "The dead woman was my cousin. Have known the accused since I was large enough to recollect anybody. My acquaintance continued with him until five years ago. He appeared like any other man—sound."

Mrs. Nancy Herron testified: "The accused is my nephew. I never noticed anything about him to show that he was a man of unsound mind. Never was in his company much. I thought he had very good sense."

For the Defense in Surrebuttal.

Samuel Armstrong testified: "Knew the accused and his wife. Have seen Taylor when his wife was away from home. Seemed to be in a great deal of distress and trouble. Talked with him during this time. He would refer to his wife and her parents causing the trouble between them. I went after his wife for him on Saturday afternoon before the trouble. I did not get his wife. After I failed to get her, I went back home. When I went back, accused lost all control of himself, and got nervous. He tried to help me unhitch, but was in such a jerk that he lost control of himself. He said, if there was a poor man in trouble, he was one of them. He moaned, grumbled to himself about the mistreatment the parents had caused him. I never heard him utter a word against—her. I heard him make the

threat that he did not want to go up there, because he knew, if he did, old Logue would begin to abuse him, and that he had stood it as long as he could. I told him that his wife said come up and spend Sunday. I heard him say that he did not want to go up there on account of the abuse of Mrs. Logue. He said he knew they would cause him to shed blood if he went up there. He spoke of shedding Logue's blood. He seemed to be out of trouble when his wife was at home, and in good heart, and went about his work in a cheerful way. He said every time he went there they began to abuse him about living on Armstrong's place. It seemed they wanted him to live there, where his wife would be at home. He would tell the reason they were pulling her back and forth. They wanted him to live with them, and he did not expect to do so. That was the first of the year, before he set in. It was on Saturday night that he said that he wouldn't stand it any longer, and I suppose the cutting took place the next day. That is my understanding. He said if he had any more of that it would cause bloodshed."

The original motion for new trial sets out the following grounds: "(1) Because the said verdict is contrary to law. (2) Because the said verdict is contrary to the evidence, and without evidence to support it." The grounds of the amendment to the motion are as follows: "(1) Because, insanity at the time of the homicide being the defense, and defendant's counsel contending before the jury and the court that the proof showed that the defendant loved his wife (the deceased), and was unusually and tenderly devoted to her, and that he could have had no sane motive for killing her, that he had no animosity or ill will towards her, that defendant at the time did not have sufficient reason to distinguish between right and wrong, and that if he did, he was, at the time, laboring under a delusion that so overmastered his will that he was unable to form in his mind an intent to commit a crime, the court erred in charging the jury as follows: 'The popular idea of malice in its sense of revenge, hatred, ill will, has nothing to do with the subject [legal malice]. It is an intent to kill a human being in a case when the law would neither justify, nor in any degree excuse, that intention, if the killing should take place as intended.' (2) The court erred in charging the jury as follows: 'If the jury are satisfied beyond a reasonable doubt of the guilt of defendant of the offense of murder, and do not desire that he should suffer the death penalty, the form of your verdict would be, 'We, the jury, find the defendant guilty, and recommend that he be imprisoned in the penitentiary for life.' If the jury find that the evidence establishes beyond a reasonable doubt that the defendant is guilty of the offense of murder, and do not desire to reduce his punishment to imprisonment in the penitentiary for life, but do desire that he should suffer the death penalty, the form of your verdict would be, 'We, the jury, find

the defendant guilty." This defendant respectfully submits to the court on this motion for a new trial that the question of mercy in his case under the law was not a question of desire on the part of the jury as to whether defendant should suffer the one penalty or the other. (3) Because the court erred in charging the jury as follows on the same subject—that of the reduction of the punishment: "It is not controlled by any rule of law or evidence; it is not controlled by anything except the wishes of the jury trying the case,"—this defendant now contending that such instruction was an erroneous construction of the statute. (4) Because the defendant says he not only introduced evidence of his own condition, conduct, sayings and doings, peculiarities and troubles, appearances, grievances, and afflictions, as shown by the brief of file with this motion, but that he also introduced evidence showing (as appears in said brief) insanity in his mother, in his brother Charles, and his first cousin Wm. Taylor, for the purpose of establishing insanity in defendant's family as evidence of his own insanity at the time of the killing, in connection with all the other evidence in the case; and his counsel, in arguing the case before the jury, most earnestly stressed the evidence of insanity in the family, and yet the court, in its entire charge to the jury, took no notice of this line of testimony, but omitted the same entirely. (5) Because the defendant's counsel, in their argument before the jury, most earnestly stressed all the evidence (as contained in said brief) of defendant's condition, conduct, sayings, doings, peculiarities, troubles, appearances, afflictions, and manner of the killing, and the appearance and conduct of defendant at that time, and the absence of any sane motive for such a deed, as going to show defendant's insanity at the time of the killing; and the court in all of its instructions fail to advise the jury as to any of this evidence, or as to any of the evidence in the case introduced by the defendant to show his insanity, except by submitting the entire case in a general way, as shown by the charge, which is of file as a part of the record in this motion duly approved by the court."

1. The question raised by the assignments of error set out in the first two grounds of the motion is, is the verdict contrary to law and the evidence in the case? So far as the fact of the homicide is concerned, that is established to have been done by the plaintiff in error beyond all controversy. There is no contention as to the details which accompanied the act, and which are brutal and horrible in the extreme, and which, if the plaintiff in error, at the time he cut his wife, was possessed of a sound mind, must justly bring upon the perpetrator the severest punishment known to the law. It was not contested that the plaintiff in error killed his wife at the time and in the manner set out in the bill of indictment. The only defense urged in his trial was that he was not legally responsible

for the criminal act, because of mental incapacity, at the time of its commission, to form a criminal intent. It is not our purpose, in dealing with the question as to what condition of the mind will free an individual who commits an act of violence, itself unlawful, from that responsibility to society and law which is imposed on all rational human beings, to discuss at any great length the many and varied theories and doctrines touching the law of insanity. The principle upon which insanity, used as a term to include all the varied forms of mental disease, bars a legal conviction for an act which would otherwise be criminal is founded is that, since a criminal intent is an indispensable element in every crime, a person mentally incapable of entertaining such intent cannot incur legal guilt. 2 Bish. Cr. Law, c. 26. The application of the principle to the facts of a particular case frequently becomes very difficult in a conscientious attempt to ascertain the truth, by which, on the one hand, society is to be protected, and, on the other, that one smitten by disease, although bearing the outward form of a man, yet destitute of reason, may not be held to the same accountability to law as one who is clothed and in his right mind. A learned expert in diseases of the mind says: "No cases subjected to legal inquiry are more calculated to puzzle the understandings of courts and juries, to mock the wisdom of the learned, and baffle the acuteness of the shrewd, than those connected with questions of imbecility." Ray, Insan. § 104. In the correct ascertainment of the rules which, when applied, will or will not relieve a person charged with crime from the responsibility of his act, another learned author, in defining insanity, has most strikingly said: "The path to truth is not necessarily upward and away, but the golden kernel is oftener found in the sands below than in the clouds above. The books disclose mighty judicial efforts to reach up and grasp the definition of insanity. The results have been a discord. Descending from the peaks to the valley, and then looking for the simple and obvious, insanity, in the criminal law, is any defect, weakness, or disease of the mind rendering it incapable of entertaining or preventing its entertaining in the particular instance the criminal intent which constitutes one of the elements in every crime." 2 Bish. Cr. Law, § 381. It is not necessary, however, so far as we are concerned, to traverse the almost illimitable field of theory and speculation to ascertain the principles of law which govern, when insanity is relied on as a defense in a trial under a criminal charge in this state. In the recent case of Flanagan v. State, 30 S. E. 550, this court, stating the proposition of law, ruled in the case of Roberts v. State, 3 Ga. 310, as follows: "If a man has reason sufficient to distinguish between right and wrong in relation to a particular act about to be committed, he is criminally responsible. An exception to this rule, how-

ever, is, where a man has reason sufficient to distinguish between right and wrong as to a particular act about to be committed, yet in consequence of some delusion the will is overmastered, and there is no criminal intent, provided that the act itself is connected with the peculiar delusion under which the prisoner is laboring," said: "The doctrine of the Roberts Case was announced directly after this court was organized, and has never since been questioned or doubted by this court. It is cited with approval in the leading works on criminal law and medical jurisprudence written in this country, and by many decisions of the different state courts. Its doctrine is the one which has been adopted generally by the modern text-writers on criminal law, and, we believe, by a majority of the state courts. Not only is this principle approved by all of these authorities, but we think it commends itself as being sound and reasonable." There is, therefore, no uncertainty as to the rule of law which governs this class of cases in this state. It is: If a man has reason sufficient to distinguish between right and wrong in relation to a particular act, about to be committed, he is criminally responsible. Exception: If a man has reason sufficient to distinguish between right and wrong as to a particular act about to be committed, yet, in consequence of some delusion arising from a diseased mind, his will is overmastered, and he is impelled to do that act, there is no criminal intent, provided the act itself is connected with the peculiar delusion under which the prisoner is laboring.

Thus we find the law, and the question under this division of the opinion is, was the verdict in this case contrary to the law and evidence? Did the plaintiff in error, at the time he cut and killed his wife, know that it was wrong for him to inflict the wounds? We have carefully read every line of the evidence contained in the record, and are of the opinion that no part of it either shows or tends to show any such weakness or disease of mind as would cause the plaintiff in error not to know it was wrong and against the law to take the life of his wife. If we take all the testimony relating to the mental condition of the plaintiff from his childhood to the day of the commission of the offense, and give it literal effect, it does not establish the affirmative of the proposition. His mother testified that he was strange from his cradle up, and had strange and curious ways. It was proven, to a certain extent, at least, that he had a demented brother, who died young, and a cousin who had been committed to the asylum. It was proven further that after he married, when his wife was away from home, and only then, he was low-spirited, moody, and absent-minded; that he was heard singing and praying at his house in the night; that he would talk to himself; that he would skip the weeds and grass in working his crop; that when plowing he would sometimes

go back as if looking for something, but pick up nothing; that he was nervous, and acted strangely. These and many other strange things he did when his wife was away; none of them when she was at home. On the other hand, while he was a poor man, he provided well for his wife. He was passionately fond of her. He nursed her assiduously when she was sick. He obtained nurses for her. He was a good farmer, a man of good judgment, and, so far as the evidence goes, while he may not have ascended high in the intellectual scale, there is an absence of evidence showing that he was registered so low as to be unconscious of a legal or moral wrong. He was certainly a man of strong passion, if he was weak intellectually. It was shown that he was a fighter as a boy. As a man he expressed hostility to the father of his wife, and threatened in a certain event to have blood. The event occurred, and he did shed his blood. We will not go further into the details, which appear in the report of the evidence. "The mental capacities of men differ. A particular mind may be weak, ill formed, or diseased,—in other words, insane,—in a degree not relieving from criminal responsibility." See 2 Bish. Cr. Law, p. 224, note 2, for many authorities cited. Even admitted insanity must, to relieve from criminal responsibility, reach the standard fixed by the law. *Loyd v. State*, 45 Ga. 57; *State v. Geddis*, 42 Iowa, 264; *Cunningham v. State*, 31 Am. Rep. 360. We have not found any evidence in the record which goes to show that the plaintiff in error, at the time he attacked and repeatedly stabbed his wife, did not have reason sufficient to distinguish between right and wrong in relation to that act. But it is claimed that the plaintiff in error, at the time he inflicted the wounds upon his wife, from which she died, was laboring under a delusion that his wife's father and mother were endeavoring to bring about a permanent separation between him and his wife, and that his wife was consenting thereto. It seems to us, after an examination of the brief of evidence, that it was established as a fact that the wife of the plaintiff in error remained away from his house a considerable portion of time. Of this fact he bitterly complained. It also seems that she was always welcomed at her father's home. It might be inferred from some of the evidence that her mother was especially anxious for her to be there. But, however this may be, whether the intention to cause the daughter to separate from her husband existed as a fact, or was a delusion of the plaintiff in error, neither the fact, nor the delusion under which he labored, giving to the plaintiff in error the full benefit of the exception to the rule of the knowledge of right and wrong as to the act committed, could, under the evidence, avail him anything. At most, under the evidence, it could be claimed that the plaintiff in error acted under the delusion that the parents of the wife intended to per-

manently separate them, and under this delusion he slew his wife. This would not relieve him from criminal responsibility. The exception to the rule which was laid down in the *Flanagan Case*, *supra*, is: Where a man has reason sufficient to distinguish between right and wrong as to a particular act about to be committed, yet, in consequence of some delusion, the will is overmastered, and there is no criminal intent: provided, that the act itself is connected with the peculiar delusion under which the prisoner is laboring. The proposition applicable to this case would, then, be this: The plaintiff in error had reason sufficient to know it was wrong for him to kill his wife, but at the time he did so he was laboring under a delusion of the mind that the parents of the wife were endeavoring to separate them, and she was consenting thereto, and this delusion overmastered his will; therefore he is not criminally responsible. This cannot be a sound proposition. To it must be added the qualification that the act of killing his wife is connected with the peculiar delusion under which he labored. The killing must have been connected with the overmastering delusion. It cannot be parallel to a case where a man, otherwise sane, is laboring under a delusion that a friend who comes to his house is a burglar, and acting under the delusion he slays to prevent the burglary; or that friends who are around him are enemies, seeking to do him an act of violence, and he slays them to prevent the violence. Here the act is connected with the delusion, so that it would not be unlawful if the facts about which he were deluded were true. The legal defect in the proposition urged as a defense is a want of connection between the alleged delusion and the act. In *Hadfield's Case* (27 Howell, St. Tr. 1281), in which the speech of Mr. Erskine, which has since been looked to as authority on delusions of the mind, was made, the facts upon which the doctrine was applied and the accused acquitted were that the accused had a delusion that he had constant intercourse with Almighty God; that the world was coming to an end; that he must sacrifice himself for its salvation. He became impressed therefrom with the insane delusion that he must be destroyed, but ought not to destroy himself. In order to bring this about, he shot at the king, in order that he might be arrested and executed. The act must, to relieve, be connected with the delusion. While Mr. Bishop says that the doctrine should be cautiously received, because delusion of any kind is strongly indicative of a generally diseased mind, he nevertheless lays down the doctrine to be: "If the defendant insanely believed something, which, were it true, would not legally justify his act,—as, in the language of the English judges, 'if his delusion was that the deceased had inflicted a serious injury to his character and fortune, and he killed him in revenge for such supposed injury,'—he would be liable to

punishment." 1 Bish. Cr. Law, § 393, citing 10 Clark & F. 200; *Bovard v. State*, 30 Miss. 600; *State v. Mewherter*, 46 Iowa, 88.

We have said this much in deference to the argument and brief of the counsel for the plaintiff in error, who, without fee or reward, have so faithfully and ably represented his cause in the court below and here. But we do not think that the plaintiff in error, under the evidence, can claim exemption from criminal responsibility for his act because of any delusion of the mind connected with the act. It seems to us that the evidence shows him to be a man of fair sense and judgment, passionate, strange, and sometimes moody, rendered desperate in the belief, for which there were strong grounds, that his wife, instigated by her parents, had separated herself from him, and for this, notwithstanding the great affection he cherished for his wife, he shot her father, and killed her. Some suggestions have been made by Mr. Bishop which are applicable here. All men are erring. Mere error, therefore, does not relieve from punishment. All have vicious propensities. Therefore a mere propensity to evil does not excuse the doer. All are only in a limited degree deterred from wrongdoing by fear of its consequences. The mere fact, therefore, that one was not afraid of punishment when doing a thing does not show him to have been insane. All are more or less regardless of the demands of conscience. So the mere fact that the prisoner showed a hardened heart does not prove him insane. After a careful review of the entire case, a close scrutiny of the evidence upon which the conviction rested, and a consideration of the legal principles which govern the case, we cannot say that the verdict was against the law or the evidence in the case, but in accord with each.

2. It is further contended that the court erred in charging the jury as follows: "The popular idea of malice in its sense of revenge, hatred, ill will, has nothing to do with the subject [legal malice]. It is an intent to kill a human being in a case when the law would neither justify, nor in any degree excuse, that intention, if the killing should take place as intended." Counsel for plaintiff in error insist that while, as an abstract proposition, the charge was correct, yet, as the defendant's counsel contended that the proof showed that the plaintiff in error loved his wife, and was tenderly devoted to her, and that he had no animosity against her, and no motive for killing her, and that at the time of the killing plaintiff in error did not have sufficient reason to distinguish between right and wrong, or, if he did, he was at the time laboring under a delusion that so overmastered his will as that he was unable to form an intent to kill, and in view of this contention and theory of the defense, that the charge should not have been given. With this contention we do not agree. The defendant's counsel admitted the homicide, but claimed that because of insanity or an over-

mastering delusion there was no criminal intent to do the act, and hence could be no conviction. The state, on the other hand, denied the insanity, and claimed that the act was done maliciously, and was, in law, murder, for which the defendant was responsible. The clause of the charge excepted to was a part of the charge which dealt with malice as a necessary ingredient of the crime of murder. The immediate words which preceded the particular part to which exception is taken are: "The legal meaning of the term 'malice' is not confined to particular animosity to the deceased, but extends to an evil design in general." The jury were sufficiently instructed as to the law of insanity as a defense for crime, and it was proper and appropriate also to charge the law relating to murder, which necessarily involved explanation of what is malice necessary to support a conviction for the offense. We consider the charge complained of as good law, and appropriate to be charged in the case.

3. It is further complained that the court charged the jury as follows: "If the jury are satisfied beyond a reasonable doubt of the guilt of defendant of the offense of murder, and do not desire that he should suffer the death penalty, the form of your verdict would be, 'We, the jury, find the defendant guilty, and recommend that he be imprisoned in the penitentiary for life.' If the jury find that the evidence establishes beyond a reasonable doubt that the defendant is guilty of the offense of murder, and do not desire to reduce his punishment to imprisonment in the penitentiary for life, but do desire that he should suffer the death penalty, the form of your verdict would be, 'We, the jury, find the defendant guilty.' And in charging further, in reference to a recommendation to life imprisonment, that: 'It is not controlled by any rule of law or evidence; it is not controlled by anything except the wishes of the jury trying the case.'" It was contended by the able counsel for the plaintiff in error that these clauses of the charge make the recommendation to imprisonment for life, or the refusal to so recommend, depend on the wishes of the jury, whereas such recommendation might be exercised by the jury in the quality of mercy, or be controlled in deference to some line of public policy. It is undeniably true that if, in returning a verdict of guilty, where the facts authorize a conviction for murder, the jury being actuated by a wish or desire to show mercy to the accused, incorporate in their verdict a recommendation to life imprisonment, or does so or fails to do so from motives of public policy, that this is but an exercise of the right with which they are invested. But this power to recommend, and thus fix the punishment, does not necessarily arise from regard to public policy, or a wish to exercise mercy. These reasons may influence the jury, or other reasons may. The jury is not limited or circumscribed in any respect. It is in their discretion whether they

will or will not recommend, and the law prescribes no rule for the exercise of that discretion. Pen. Code, § 63; *Hill v. State*, 72 Ga. 131; *Thomas v. State*, 89 Ga. 490, 15 S. E. 537. It is possible that there may be better words to use in this connection than to say that the reduction of the punishment is to be governed by the wishes of the jury in that regard. For ourselves, we think little, if anything, can be added to the words of the statute, without qualifying it. Yet, after all, as the whole matter—the recommendation as well as the refusal to recommend—is in the power and discretion of the jury, which, when exercised, no tribunal can review, or call in question the exercise of that discretion,—it is a matter which the wishes of the jury must determine; and we cannot hold it error to so charge.

4. The last two grounds of the motion allege error because the court failed, although the proof justified it, to specifically charge the jury the probative value of evidence which showed insanity in the family of the accused, and while, to make out the defense of insanity, the condition, conduct, sayings, doings, peculiarities, troubles, appearances, and afflictions of the accused were shown in evidence, that the court failed to advise the jury as to any of this evidence, except by submitting the entire case in a general way. An examination of the charge discloses that it was clear, comprehensive of the issues made, and correct in the propositions of law stated. The judge might have gone more into detail, but neither the justice nor the law of the case demanded it. Had proper requests to do so been made, his refusal might have afforded a legal ground of complaint. In the absence of requests to charge in detail propositions of law made appropriate by the evidence, the charge must be held to be sufficiently full, and as covering the issues of the case. It is painful to be the medium through which the law condemns and fixes on any human being a judgment which takes away his life. This case has had our careful consideration. We find no errors either requiring or authorizing a reversal of the finding of the jury or rulings of the trial judge, and his judgment is affirmed. All the justices concurring, except SIMMONS, C. J., absent. LUMPKIN, P. J., absent on account of sickness.

(105 Ga. 335)

EVANS v. BLOODWORTH.

(Supreme Court of Georgia. Nov. 19, 1898.)

APPEAL—REVIEW—RECORD.

This court cannot review a judgment of the judge of the superior court refusing to sanction a petition for certiorari, when no copy of the petition is embodied in the bill of exceptions, or attached thereto, and verified by the judge. *Railway Co. v. Whitehead* (March term, 1898) 30 S. E. 814.

(Syllabus by the Court.)

Error from superior court, Wilkinson county; John C. Hart, Judge.

Action between J. W. Evans and L. S. Bloodworth. From a judgment refusing a writ of error, Evans brings error. Dismissed.

John P. Chatfield, for plaintiff in error.
J. W. Lindsey, for defendant in error.

PER CURIAM. Writ of error dismissed.

LUMPKIN, P. J., absent on account of sickness.

(106 Ga. 886)

EARLY COUNTY v. ALEXANDER.

(Supreme Court of Georgia. Nov. 19, 1898.)

APPEAL—REVIEW.

The evidence warranted the verdict; no error of law was complained of; and the court did not err in overruling the motion for certiorari.

(Syllabus by the Court.)

Error from superior court, Early county; H. C. Sheffield, Judge.

Action between Early county and W. H. Alexander. From a judgment overruling a motion for writ of certiorari, the county brings error. Affirmed.

R. H. Sheffield, for plaintiff in error. P. P. Du Bose, for defendant in error.

PER CURIAM. Judgment affirmed. All the justices concurring, except LUMPKIN, P. J., absent on account of sickness.

(106 Ga. 300)

WASHINGTON v. MARCRUM.

(Supreme Court of Georgia. Nov. 19, 1898.)

APPEAL FROM JUSTICE—DISMISSAL.

There was no error in sustaining a motion to dismiss an appeal, when it appeared to the court that appellant's counsel had taken the papers from the magistrate's office, and had kept them in his custody until it was too late for the justice to file them in the superior court within the time required by law.

(Syllabus by the Court.)

Error from superior court, Muscogee county; W. B. Butt, Judge.

Action between R. L. Washington and W. M. Marcrum. From an order dismissing an appeal from a justice, Washington brings error. Affirmed.

A. A. Dozier, for plaintiff in error. Eugene Ray and Goetchins & Chappell, for defendant in error.

LEWIS, J. Under section 4468 of the Civil Code it is made the duty of the justice of the peace or notary public to transmit an appeal to the clerk of the superior court at least 10 days before the next superior court. If there should be a failure on the part of the justice to comply with this statute, growing out of his own negligence, and not through any fault of the plaintiff, this would not be sufficient ground for dismissing the appeal. It was ruled in the case of Robison

v. Medlock, 59 Ga. 598, that an appeal from a justice's court cannot be dismissed for the delay of the magistrate, it not appearing that the appellant either caused the delay or sanctioned it. Cannon v. Sheffield, 59 Ga. 103; Pearce v. Renfro, 63 Ga. 194. In this case, however, the delay was not at all the fault of the magistrate, but is attributable to the negligence of plaintiff's counsel in taking the papers from the magistrate's office, and not seeing that they were returned in time for transmission to the superior court, within the period required by law. The decisions above cited make the rule as to the transmission of an appeal identical with that touching writs of error to this court. Section 5571 of the Civil Code provides that, "in case the bill of exceptions and copy of the record shall not reach the clerk of the supreme court before the cases from the circuit to which it belongs shall have been disposed of, said cases shall not be dismissed on account of a failure to return or send up the same at the proper time," etc. In construing the law on this subject with reference to writs of error, this court has held that, if the delay in the transmission of the record is attributable to the fault or negligence of the plaintiff in error or his counsel, the writ of error will be dismissed. Strong v. Railway Co., 97 Ga. 693, 25 S. E. 379. Judgment affirmed. All the justices concurring, except LUMPKIN, P. J., absent on account of sickness.

(106 Ga. 1)

FIREMAN'S FUND INS. CO. v. PEKOR.

SUN MUT. INS. CO. v. SAME.

(Supreme Court of Georgia. Nov. 19, 1898.)

INSURANCE POLICY—PAYMENT OF PREMIUM—DELIVERY—STIPULATIONS AS TO AMOUNT OF INSURANCE.

1. It is not essential to the validity of a policy of fire insurance, issued in renewal of one previously taken out by the insured, that he should pay in cash the renewal premium, provided the agent of the company, with its express or implied assent, himself pays, or undertakes to become responsible to it for, such premium, in order that credit may be extended to the insured. Nor, under such circumstances, is it necessary that there should be manual delivery of the policy to the insured before a loss by fire occurs, where the policy has actually been issued by the company, and is simply retained by the agent for his individual protection until reimbursed by the insured.

2. A stipulation in such a policy to the effect that, should the insured fail to comply with a covenant on his part to "at all times maintain a total insurance upon the property insured * * * of not less than 75 per cent. of the total cash value thereof," he shall be deemed to be "a co-insurer to the extent of the deficiency, and in that event shall bear his * * * proportion of any loss occurring under this policy," is not in contravention of section 2110 of the Civil Code, which provides that "all insurance companies shall pay the full amount of loss sustained upon the property insured by them, provided said amount of loss does not exceed the amount of insurance expressed in the policy," and which declares that "all stipulations in such policies to the contrary shall be null and void."

(Syllabus by the Court.)

Error from superior court, Muscogee county; W. B. Butt, Judge.

Actions by C. F. Pekor against the Fireman's Fund Insurance Company and the Sun Mutual Insurance Company. The actions were consolidated. Judgment for plaintiff, and defendants bring error. Reversed.

C. J. Thornton and King & Spalding, for plaintiffs in error. W. A. Wimbley and E. D. Burts, for defendant in error.

FISH, J. By agreement between counsel, these two cases were consolidated and argued together before this court, as the controlling question presented for decision is common to both. Aside from this question, we find it necessary to deal specially with one only of the various points raised by the plaintiffs in error, none of the others being of sufficient merit or importance to require notice. Before undertaking to discuss the main issue involved, we shall direct our attention to the minor question last referred to, which is made in but one of the cases now before us.

1. It was strenuously insisted by counsel for the insurance company that, under the circumstances detailed in the plaintiff's petition, no valid and binding policy had been issued to him by the Fireman's Fund Insurance Company, for the reason that its agent had no authority to extend credit to the plaintiff, and, up to the time the loss by fire occurred, he had paid no portion of the premium, which was the sole consideration moving to the company under the contract sought to be enforced. In this connection exception is taken to the overruling of a general demurrer to the plaintiff's petition, and error is assigned upon various portions of the charge of the court bearing upon this issue. In point of fact, the plaintiff's petition alleged, certainly with sufficient clearness to withstand a general demurrer, an arrangement with a general agent of the company, the effect of which was to create a contract in all essential respects alike to that indicated in the first headnote. No new question is therefore presented for determination, for the contention above outlined is effectually disposed of by the decision of this court in the case of *Mechanics' & Traders' Ins. Co. v. Mutual Real Estate & Building Ass'n*, 98 Ga. 262, 25 S. E. 457, the facts of which were similar to those appearing in the case at bar. We need only add, therefore, that the law as there laid down was correctly announced in the instructions given by the court, of which complaint is now made.

2. It appears that each of the instruments upon which suit was brought contained the following recital and stipulation: "It is a part of the consideration of this policy, and the basis upon which the rate of premium is fixed, that the assured shall at all times maintain a total insurance upon the property insured by this policy of not less than 75 per cent. of the total cash value thereof, as cov-

ered under the several items of this policy, and that, failing to do so, the assured shall become a co-insurer to the extent of the deficiency, and in that event shall bear his or her or their proportion of any loss occurring under this policy." The question presented for decision is whether or not this stipulation is properly to be regarded as repugnant to the act of November 23, 1895, now embodied in section 2110 of the Civil Code, the material provisions of which are quoted in the second headnote. In the argument here, counsel for the plaintiffs in error undertook to explain that the purpose of this act was to declare invalid a stipulation which had previously been inserted in fire insurance policies, to the effect that, irrespective of the amount named in the policy as the extent to which the holder was ostensibly insured, no recovery should be had thereunder for a sum greater than three-fourths of the sound value of the property destroyed. We cannot, however, take judicial cognizance of what stipulations it was customary to incorporate in such policies prior to the passage of the act of 1895, in order that we may thus be able to arrive at the real or supposed evil at which the statute was aimed. Disregarding, therefore, the contention above stated, we conclude, from an examination of the terms of the act itself, read in the light of the law then obtaining, that its purpose was to declare void every stipulation whatsoever, the practical operation of which would be to defeat a recovery for the full loss sustained, provided the same was not in excess of the amount named in the face of the policy, and provided, further, that the insurer had undertaken to assume alone the entire risk incident to an insurance against fire of the property destroyed. We add the latter proviso, although it is not to be found in the act under discussion, for the following reasons: Section 2109 of the Civil Code provides: "The assured may recover the full amount of his loss: provided, the same is within the amount insured. If he has several policies on the same property, the recovery from each company will be pro rata as to the amount insured." The provisions of this section were of force when the act of 1895 was passed. Code 1882, § 2814. Not having been thereby repealed, expressly or by necessary implication, they occupy their present position in our new Code, and are therefore to be considered in connection with section 2110, which sets forth in substance the terms of that act. Construing this latter section together with the one which precedes it, the conclusion is irresistible that there was no intention on the part of the legislature to declare that, notwithstanding there were several policies covering the same property, the assured could nevertheless, in the event of its total or partial destruction, recover from each company the face value of the policy issued by it, if the damage by fire suffered was equal thereto, regardless of the question whether the aggregate amount re-

covered from all the companies was or was not out of all proportion to the amount which would indemnify the assured against the loss sustained by him. It has long been the settled policy of this state that wagering contracts are not to be tolerated. Section 3668 of the Civil Code, the provisions of which have been of force for over a quarter of a century, declares unequivocally that all such contracts shall be void. As was held by a majority of this court in *Bank v. Loh* (Ga.) 81 S. E. 459, the object of all legitimate insurance is to secure indemnity only, and a policy of life insurance which contemplates anything beyond indemnity is a mere wager. Beyond all doubt, "to indemnify the assured against loss," not to arbitrarily pay him the face value of the policy in the event of damage by fire to the property insured, is essentially the only office a policy of fire insurance can legally perform. Civ. Code, § 2089. Accordingly it is apparent that we are not at liberty to assume that the general assembly intended that the act of 1895 should be given a construction which would result, in the case of co-insurance on the property insured, in a recovery against each company of the full amount of its policy, where the damage by fire suffered was in excess thereof, but far below the aggregate amount of the face value of all the policies held by the assured. On the contrary, we are constrained to hold that the act in question was intended to be read in connection with the provisions of section 2109, as we have accordingly done. That this section does not stand repealed is evidenced by the fact that the legislature, in adopting our present Code, allowed it to take a place therein, and to be immediately followed by the provisions of the act of 1895, under one general head, devoted to a codification of the various existing laws relating to "fire-insurance contracts." Surely, where several companies together carry a common risk, each in proportion established by the face of its policy as compared with the total amount of the insurance effected, no greater sum than its pro rata share of the loss sustained can be recovered by the assured from any one of such companies. Indeed, no recovery at all can be had from a given company, unless necessary to indemnify the assured; so, if he has effected insurance with seven companies, for instance, and six of them discharge in full his just claim, the liability of the seventh company will be to its co-insurers, not to the assured himself. *Insurance Co. v. Gwinn*, 88 Ga. 65, 13 S. E. 837.

Co-insurance being, then, expressly recognized by our Code as entirely legitimate and proper, it is pertinent to inquire into the nature of the contract by which the same may be effected. The doctrine as to contribution between co-insurers is based upon the ground that "where several policies in different offices insure the same party upon the same subject-matter against the same risk, as there can be but one loss and one indemnity,

the several offices, as between themselves, must contribute proportionably to the loss, though each is liable to the insured for the entire loss, unless there is a special agreement that each shall be liable only for its proportional part. The several insurers are regarded as if they were one, each standing as a co-surety with the other, according to the amount which he undertakes, just as if all had underwritten the same policy. To avoid circuity of action, the pro rata limitation was introduced." 2 May, Ins. § 434. In this state it is unnecessary for a co-insurer to stipulate with the assured against liability for the entire loss; for it is expressly provided by law that, in the event the latter "has several policies on the same property, the recovery from each company will be pro rata as to the amount insured." Civ. Code, § 2109. Reduced to its legitimate analysis, the contract between the assured and the co-insurers appears to be as follows: No one of the latter assumes the entire risk, and consequently can in no event be called upon to pay the entire loss. They combine to carry the whole risk, and to assume responsibility for any indemnity which may justly be demanded. Each bears only such a proportion of the risk as he contracts to undertake, and his pro rata of the indemnity to which the assured is entitled in case of loss should be measured accordingly. For instance, suppose the owner of property worth \$20,000 desired to place thereon insurance to the amount of \$15,000, and, while no one of three companies was willing to assume the whole risk, each readily agreed to share an equal proportion thereof, and thus become responsible for one-third of any loss which might occur not in excess of the total amount of the insurance issued in accordance with such an arrangement. Clearly, in such a case, it could not be said that the contract was in its essence vicious, or violative of the policy of the law as declared by the act of 1895, which apparently seeks to hold an insurer liable to the extent of the face of the policy, where the loss incurred is equal to or exceeds the amount therein stated, whenever he undertakes to assume alone the entire risk, and exacts premiums upon that basis. Again, suppose a company, declining to assume the entire risk, agreed to undertake the liability of a co-insurer to the extent of one-third of the risk, with the express understanding that, if the assured failed to comply with an undertaking on his part to procure other companies willing to assume the remaining two-thirds of the risk, he himself should be considered as carrying that proportion of the same, and in no event should the company's liability exceed its just pro rata of the losses, to wit, one-third thereof,—a proportion exactly corresponding with the measure of risk the company was paid to assume. Such a contract would seem to be far from iniquitous. If a perfected arrangement for co-insurance is beyond reproach, why may

not parties legitimately contract with a view to bringing about an arrangement of this kind, and stipulate that the insurance issued shall be upon that basis, instead of upon the plan upon which single policies are ordinarily issued? We understand the stipulation contained in the policies now under consideration to have no other object than to evidence an agreement between insurer and assured that the former should occupy the position of a co-insurer undertaking to assume only a fractional part of the risk, and therefore liable for no greater proportion of any loss which might occur.

It is urged by counsel for the defendants in error that this stipulation is intended to operate as an evasion of the law, and is a mere subterfuge to which insurance companies have resorted. If the requirement imposed upon the assured of keeping up additional insurance to a given amount were one with which it would be impossible or extremely difficult for him to comply, there would be a great deal of force in the suggestion of counsel. But we do not understand that it is at all impracticable or difficult for the owner of property which is a fair risk to obtain insurance "of not less than 75 per cent. of the total cash value thereof." At any rate, we are not judicially informed that such a requirement may not readily be met, and are not, therefore, in a position to say it is obviously so unreasonable as to indicate a purpose on the part of the insurer to place the assured in a situation where he cannot comply with his obligations, in order that nonfulfillment thereof may be urged as a reason why the amount of recovery under the policy should be reduced below the sum therein specified as the limit of liability. Had the assured in the present case complied with his covenant to carry a total insurance of 75 per cent. of the value of the property insured, clearly he could claim of the insurance companies who issued policies on this express understanding and condition only their pro rata of the loss sustained. He offers no excuse whatever for his failure to comply with his solemn agreement. To allow him to profit by his breach of covenant would be to permit him to take advantage of his own wrong. He appears in this court, not as one who can lay any claim to having conscientiously tried to comply with his legal and moral obligations under a contract to which he voluntarily assented, but in the attitude of one who seeks to evade and override his agreement upon the ground that the policy of the law prohibited his entering into the same, and accordingly he is not, in strict law, bound thereby. This inclines us, without reluctance, to administer the law as we find it, in its strict, technical sense. The act of 1896, being in restraint of the common-law right of freedom to contract, is not to be extended by implication beyond its precise terms. After careful consideration, we are not prepared to hold that it comprehends

and prohibits such a stipulation as that with which we have, in the present litigation, been called upon to deal. Judgment reversed. All the justices concurring, except LUMPKIN, P. J., and LITTLE, J., absent on account of sickness.

(106 Ga. 21)

CLIFTON et al. v. NORTHEM.

(Supreme Court of Georgia. Nov. 19, 1896.)

EXEMPTIONS—SALE—EFFECT.

1. The sale of personal property by the head of a family, without an order of court for such purpose, is void when made after the same has been duly set apart under the exemption laws of the state. Where, therefore, property has been levied upon and claimed on the ground that it was exempted from levy and sale, such claim may be sustained in court, although it should appear that there was a sale of such property by the head of the family, without authority of law, before the claim was filed.

2. The evidence in this case did not demand a verdict for the plaintiff in *fi. fa.*, and the court erred in directing such verdict.

(Syllabus by the Court.)

Error from superior court, Miller county; H. C. Sheffield, Judge.

An execution in favor of W. J. Northen, for use, etc., was levied on property to which a claim was interposed by J. S. Clifton and another. There was a judgment for plaintiff in execution, and claimants bring error. Reversed.

R. H. Powell & Son, for plaintiffs in error.
W. C. Worrill and Anderson, Felder & Davis, for defendant in error.

SIMMONS, C. J. Twelve bales of cotton were levied upon by the sheriff as the property of Clifton. He gave a forthcoming bond therefor. Mrs. Clifton, his wife, filed an application with the ordinary for a homestead and exemption of certain property, including the cotton above mentioned. This was granted, due notice having been given the creditors. Clifton sold the cotton, and turned the proceeds over to his wife, and afterwards filed a claim to the cotton as homestead property. On the trial of the case, when these facts appeared, the judge directed a verdict for the plaintiff in execution, and the claimants excepted. It seems from the record and the briefs of counsel that the theory on which the judge directed the verdict was that Clifton had disposed of the cotton, and parted with all title thereto, before the claim was interposed, and that, therefore, he could not sustain his claim. This theory is clearly applicable if the sale of the cotton was legal. A party who has no interest in property cannot claim it as not subject to an execution levied upon it. If he has sold it, and parted with all his interest and title, he has no ground upon which to predicate a claim. But, where property has been set apart as a homestead by a judgment of the court of ordinary, the owner has no longer the right to make any disposition of it, by sale or

otherwise, except under an order of the judge of the superior court. The property is by that judgment set apart as a homestead or exemption for the owner's wife and minor children, and deprives him of the right to sell it except as prescribed by law. If, therefore, this cotton was set aside as an exemption to Mrs. Clifton, the husband had no authority or power subsequently to sell it. Any attempted sale by him was void; the title did not pass; and he could, as the head of the family, interpose the claim. *Hart v. Evans*, 80 Ga. 330, 5 S. E. 99.

It appears that, when Clifton sold the property, he did not obtain from the judge of the superior court an order to do so, as required by law. The sale was therefore, if subsequent to the approval of the application for homestead, void. Of course, if he sold the cotton before such approval, the above principle would not apply. Before the property was actually set apart by the judgment of the ordinary, the owner had full power to dispose of it. *Stowers v. Mathews*, 98 Ga. 371, 25 S. E. 452. Clifton's evidence shows that he was himself in doubt as to whether he had sold the cotton before or after the approval of the application for homestead, but, according to his best recollection, it was afterwards. This was a question of fact, and should have been submitted to the jury for determination. Judgment reversed. All the justices concurring, except LUMPKIN, P. J., absent on account of sickness.

(106 Ga. 12)

HOLLIS v. RODGERS et al.

(Supreme Court of Georgia. Nov. 19, 1896.)

EXECUTION — LEVY — DEFECTIVE DESCRIPTION — AMENDMENT — NEW TRIAL.

1. It appearing to the court, upon the trial of a claim case, that there was a defective description in the entry of levy upon the property in dispute, it was not erroneous for the court to suggest an amendment, and allow the same to be made by the sheriff accordingly.

2. The evidence was sufficient to sustain the verdict; the charge complained of was not erroneous, and no reason therefore appears why the judgment overruling the motion for a new trial should be disturbed.

(Syllabus by the Court.)

Error from superior court, Talbot county; W. B. Butt, Judge.

Action by Rodgers, Wortham & Co. against M. W. Hollis. Judgment for plaintiffs on levy of execution. Defendant's wife interposed claim. Judgment finding property subject, and claimant brings error. Affirmed.

J. M. Mathews and C. J. Thornton, for plaintiff in error. J. J. Bull, for defendants in error.

SIMMONS, C. J. An execution against M. W. Hollis was levied on certain land, to which a claim was interposed by his wife. On the trial the jury returned a verdict finding the property subject, and, the claimant's

motion for a new trial being overruled, she excepted.

1. The entry of levy upon the property in dispute was defective, in that it was exceedingly indefinite as regards the description of the premises levied on. The court suggested, however, that this defect might be cured by amendment, and thereupon, on motion of the plaintiffs, the sheriff was permitted to amend his entry so as to conform to the facts. To this action of the court exception is taken. We see no merit in the complaint urged that it was improper for the trial judge, on his own motion and in the presence of the jury, to suggest this needful amendment. The entry of levy, though defective as to description, was not void for uncertainty. *Elwell v. Security Co.*, 101 Ga. 496, 28 S. E. 833. Section 5116 of the Civil Code expressly provides that "the sheriff or other executing officer may amend his official entries and returns so as to make such entries and returns conform to the facts of the case at the time such entry or return was made." Even where the executing officer falls altogether "to make an official return which by law he should have made, such entry or return may be made nunc pro tunc by order of the court, so as to make the proceedings conform to the facts at the time the entry should have been made." Civ. Code, § 5117. So, where it appears upon the trial of a case that the entry made by the officer is defective, the same may be amended instantan. "The sheriff may do this of his own motion, or the court, upon sufficient evidence, may order the sheriff to amend the levy so as to make it conform to the facts of the case." *Hollis v. Sales* (Ga.) 29 S. E. 482. It will therefore be seen that the action of the court deprived the claimant of no substantial right, but merely had the effect of so directing the progress of the trial that the real questions at issue might be properly presented and passed upon.

2. It appears from the record that suit was instituted against Hollis on February 20, 1894. Judgment against him was rendered during the following September term of the court. The claimant relied on a deed from her husband, dated July 30, 1894, made in consideration of an alleged past indebtedness to her, which she testified arose as follows: In 1872 she got \$175 from an aunt, which amount she immediately loaned to her husband, who agreed to pay her 12 per cent. interest. At the end of each succeeding year a settlement was had between them, whereupon both the principal and interest were again loaned to him. As to this account of the transactions between them, the claimant was corroborated by the testimony of her husband, who further swore that at the date of the execution of his deed to her the indebtedness amounted to "over \$1,400," and the deed was made in consideration of \$800 of the amount stated. In this connection, the court charged the jury: "Transactions between husband and wife to the prejudice of

his creditors are to be scanned closely, and the bona fides clearly established; and a conveyance by the husband to his wife, made pending suit against him, and only a few days before the rendition of judgment, and leaving him nothing out of which payment of the judgment can be collected, is prima facie fraudulent, and this you must determine from the evidence. And, if the wife claimed her husband was indebted to her, you can look to see if the husband did owe her; look to how long he owed her; what rate of interest was charged; look to all the testimony, to see if the conveyance was bona fide." Exception is taken to this charge on the ground that "reference to the interest and the time the debt was owing is error." We fail to perceive any error in this charge. It was peculiarly well adapted to the facts of the present case. The transaction between the claimant and her husband was a matter calling for close scrutiny by the jury, and it was clearly within the province of the court to direct their attention to such of the details as would seem to furnish light upon the all-important question whether the alleged contract did or did not betray itself as fraudulent. Anything out of common appearing in alleged dealings between a husband and his wife should invariably be looked to in passing upon the bona fides of the same. Certainly, the payment of 12 per cent. interest, compounded annually, may be said to be outside the scope of usual and legitimate business transactions; while a contract of such suicidal tendency, covering a period of over 20 years, with the results testified to, is neither more nor less than remarkable. That the jury took this view of the transaction between Hollis and his wife is not, therefore, sufficient to excite surprise; and we share, in common with the trial judge, the opinion that the evidence before them touching the bona fides of her claim to the property levied on warranted a finding in favor of the plaintiffs in *fi. fa.* Judgment affirmed. All the justices concurring, except LUMPKIN, P. J., absent on account of sickness.

105 Ga. 837)

HOLSEY et al. v. PORTER et al.
(Supreme Court of Georgia. Nov. 25, 1898.)

APPEAL—REVIEW—MOTION FOR NEW TRIAL.

1. Where a case has been tried by a jury, and a verdict rendered therein, and the losing party desires to have the correctness of the verdict reviewed by this court, a motion for a new trial is indispensable.

2. There being no error of law complained of, and a review of the verdict being sought by direct bill of exceptions, without a motion for a new trial, the writ of error is dismissed. *Sanders v. State*, 10 S. E. 629, 84 Ga. 217, and cases cited; *Ford v. Wilson*, 11 S. E. 559, 85 Ga. 109; *Gibson v. Maxwell*, 11 S. E. 615, 85 Ga. 235; *Hyfield v. Sims*, 13 S. E. 554, 87 Ga. 280.

(Syllabus by the Court.)

Error from superior court, Talbot county; W. B. Butt, Judge.

Action between J. E. Holsey and others and Janie E. Porter and others. From the judgment, Holsey and others bring error. Dismissed.

J. J. Bull, for plaintiffs in error. J. L. Willis and J. M. McNeill, for defendants in error.

PER OURIAM. Writ of error dismissed. All the justices concurring, except LUMPKIN, P. J., and LITTLE, J., absent on account of sickness.

(106 Ga. 49)

PARKER et al. v. MATTHEWS.
(Supreme Court of Georgia. Nov. 25, 1898.)

EXECUTION—CLAIMS OF THIRD PERSONS—EVIDENCE.

1. In a claim case, where plaintiff in *fi. fa.* has made out a prima facie case of title in the defendant to the property in dispute at the time of the levy, and the claimants show no title to, nor any interest whatever in, the premises, they cannot attack the plaintiff's *fi. fa.* on the ground that the same had been paid off since it issued.

2. The verdict in this case being contrary to the evidence, the court erred in overruling the motion for a new trial upon the general grounds therein stated.

(Syllabus by the Court.)

Error from superior court, Talbot county; W. B. Butt, Judge.

Action by M. G. Parker & Co. against F. A. Matthews. On levy of execution, J. F. Matthews interposed claim. Verdict finding property not subject, and plaintiffs bring error. Reversed.

J. M. Matthews and J. J. Bull, for plaintiffs in error. Persons & Son, for defendant in error.

LEWIS, J. An execution from a judgment rendered July 2, 1887, by the justice's court of the 743d district G. M. of Taylor county, in favor of M. G. Parker & Co. against F. A. Matthews, "per J. F. Matthews, agent," for \$100 principal, besides interest and costs, was, on September 27, 1894, levied on certain land in Talbot county as the property of the defendant, and a claim was interposed by J. F. Matthews individually and as agent of Beulah A. Pickard and Sarah T. McMichael. On the trial of the case there was a verdict finding the property not subject. The plaintiffs moved for a new trial on the ground that the verdict was contrary to the law and evidence. The motion was overruled, and they excepted.

The entry of levy by the officer shows that possession was in the defendant in *fi. fa.* at the time of the levy. Plaintiffs in *fi. fa.*, in addition to this, introduced a deed to the defendant F. A. Matthews, conveying the land in dispute, executed on November 20, 1872. There was no testimony whatever that the claimants ever had any legal title to or interest in the property. J. F. Matthews, one of the claimants, who was the hus-

band of the defendant in *fi. fa.*, simply testified that he and his family had lived on the land many years. The wife constituted part of the family. There was nothing in this testimony inconsistent with the defendant's possession in her own right under a deed that had been executed more than 20 years before. There was a conflict in the testimony as to whether or not the *fi. fa.* had been paid off, and the verdict of the jury was doubtless based upon the idea that claimants had sustained their contention on this issue, and that, therefore, the property was not subject. It appears from the record that the burden of proof was upon the claimants to establish their title to the premises in dispute, the plaintiffs having certainly made out a *prima facie* case showing title in the defendant in *fi. fa.* Instead of meeting this issue, the record fails to show that claimants had any interest in the premises; and the question presented for our consideration is whether mere strangers to the title to property levied upon can, by filing a claim, make an issue with the plaintiffs in *fi. fa.* that their execution has been paid off and canceled. Had the claimants shown they had any interest in the land, although it may have been by virtue of a title acquired since the judgment, and therefore subject to the lien of such judgment, they could unquestionably have attacked the plaintiffs' execution by showing that it had been satisfied. But, after the burden has been cast upon them of proving their title to the premises in dispute, they cannot meet this issue by showing that the lien of the judgment has been canceled by payment. Such an issue concerns no one but the plaintiffs and defendant, unless some property right of others is involved by an effort to enforce the execution. Were the rule otherwise, then there might be an indefinite number of trials to determine a single question simply by the interposition of claims by those who have no interest in the question. The cases of *Hines v. Kimball*, 47 Ga. 587, and *Smith v. Lockett*, 73 Ga. 104, are entirely different from the one we are now considering. It appears from those cases that there was simply a motion by claimants to dismiss the proceedings issued in favor of the plaintiffs upon the ground of fatal defects appearing upon the face of the record. These motions were evidently entertained by the court before the merits of the cases were entered upon. The right of a claimant to quash a *fi. fa.* or dismiss an attachment because void upon its face can no more be questioned than the right of the plaintiff to dismiss a claim for any fatal defect appearing upon the face of the papers. In the case of *Beers v. Dawson*, 8 Ga. 556, it was decided that a claimant cannot set up an outstanding title in a third person to protect himself and defeat the plaintiff in execution. Lumpkin, J., delivering the opinion in that case, says: "The claimant makes oath that the property levied

on is his. The object of this proceeding is to enable him to protect his own property from sale, and not the property of any one else. The plaintiff in *fi. fa.* comes into court to litigate the title of the claimant, and not that of some third person, between whom and the claimant there is no privity. Is it not absurd for the claimant to make oath, as he is required to do, that the property is his, and then show on the trial that it belonged to another? What right has a volunteer thus to interpose between the creditor and his debtor? What is it to him that somebody has the title, other than the defendant, provided he himself has none?" With equal force we might say, what right has a volunteer to interpose between the creditor and debtor by making an issue that the debt has been paid. In *Wade v. Hamilton*, 30 Ga. 450-452, Stephens, J., in his opinion, recognizes the soundness of the previous rulings of this court "that the claimant is not entitled to interrupt or interfere with the process of the plaintiff against the defendant in execution, except upon the strength of his own interest in the property, analogizing the claimant to a plaintiff in ejectment or trover, who must recover upon the strength of his own right, and not upon the want of right in his adversary. An uninterested person cannot interfere to raise the issue of subject or not subject, but surely he may so interfere whose very interest renders the property not subject." See, also, *Stirke v. Johnson*, 99 Ga. 298, 25 S. E. 648. Claimants in this case therefore have utterly failed to overcome the *prima facie* case made against them, and the verdict of the jury in their favor was contrary to the evidence. Judgment reversed. All the justices concurring, except LUMPKIN, P. J., and LITTLE, J., absent on account of sickness.

(106 Ga. 20)

WARDLAW et al. v. McNEILL

(Supreme Court of Georgia. Nov. 26, 1898.)

ADVERSE POSSESSION—COLOR OF TITLE.

A decree in chancery, declaring that certain described lands, title to which is in the defendant in the case, shall be held by the defendant in trust for the sole and separate use of the plaintiff, is admissible in evidence as color of title, upon which the plaintiff and those claiming under him may base a claim to a prescriptive title.

(Syllabus by the Court.)

Error from superior court, Chattahoochee county; W. B. Butt, Judge.

Action by J. M. McNeill, administrator, against W. E. Wardlaw and M. C. Wardlaw. On levy of execution, W. E. Wardlaw and others filed a claim. Judgment for plaintiff, and claimants bring error. Reversed.

Brannon, Hatcher & Martin, Miller & Miller, and Hickey & Fort, for plaintiffs in error. C. J. Thornton and J. M. McNeill, for defendant in error.

COBB, J. An execution issued upon a judgment rendered on September 25, 1876, against W. E. Wardlaw and M. C. Wardlaw, was levied upon certain lands, and a claim thereto was interposed by W. E. Wardlaw and E. T. Hickey, as trustees for their children, and by L. Pearl Hickey. At the trial the plaintiff introduced evidence to the effect that M. C. Wardlaw obtained title to the lands in 1846 and 1852, went into possession of them, and remained in possession until his death, which occurred in 1886; and that his widow, Mary Jane Wardlaw, then held possession of the property until her death, in 1895; also that in 1876 the lands were set apart as a homestead to M. C. Wardlaw as the head of a family consisting of himself and his wife. The plaintiff also introduced in evidence tax digests showing that the lands in dispute were returned for taxes in the name of M. C. Wardlaw for the years 1877 and 1881. The claimants introduced in evidence tax digests showing that the lands were returned for taxes in the name of M. C. Wardlaw as agent for his wife in the years 1882, 1883, 1884, 1885, and 1886, and that from 1886 to 1895 they were returned in the name of Mary Jane Wardlaw. They introduced also the will of Mary Jane Wardlaw, probated January 6, 1896, by which she devised all of her property to the children of W. E. Wardlaw and the children of Mrs. G. C. Hickey, and appointed W. E. Wardlaw and E. T. Hickey trustees for them; also the will of her father, probated June 9, 1854, by which he gave to her and her children a seventh interest in his estate, not to be subject to or belong to her husband, but to be for the sole and separate benefit of herself and her children. M. C. Wardlaw was appointed by the last-mentioned will as trustee to manage the property. The claimants offered in evidence the record of a suit brought in 1883 by Mary Jane Wardlaw against M. C. Wardlaw, and a consent decree rendered therein in 1884, in which suit she alleged that the proceeds of her share of the property devised to her by the will of her father had been converted by her husband, the defendant, to his own use, and invested in other property in his own name; and she prayed for an accounting, and that he be required to convey and turn over to her her interest in such real and personal property held by him as had been purchased with the trust fund. The decree was as follows: "It appearing to the court that said Micajah C. Wardlaw, as trustee for Mary J. Wardlaw and her children, two in number, did, on November 1, 1854, come into possession of \$4,000, and that said Micajah C. Wardlaw did for his own purposes use and appropriate the same, and that said fund now amounts to \$12,270, one-third of which amount was for the sole use and benefit of Mary J. Wardlaw, and it further appearing, that all the real and personal property of said Micajah C. Wardlaw was purchased with the fund aforesaid, and is admitted by

defendant in said bill to have been so purchased, it is, the premises considered, and all parties consenting thereto, ordered and decreed by the court that said Micajah Wardlaw do hold the title of the following real estate, to wit [describing a part of the land in dispute in the present case], and the following personal property [describing it], in trust for the sole and separate use of said M. J. Wardlaw until the further order of this court." It was admitted that the plaintiff was not a party to the bill and decree. On objection of the plaintiff, the court refused to allow the bill and decree, or the decree, to go to the jury; and to this the claimants excepted. The claimants offered to prove by W. E. Wardlaw that he was one of the defendants in the execution, that the debt was made prior to the constitution of 1868, and was his individual debt, and was closed by a note dated May 20, 1870, which was signed by his father, M. C. Wardlaw, as security, the note being the foundation of the judgment on which the execution issued. On the objection of the plaintiff, the court refused to allow this testimony to go to the jury, and to this the claimants excepted. E. T. Hickey testified that Mrs. M. J. Wardlaw took possession of the land in dispute immediately after the decree was rendered in her favor in 1884, and remained in peaceable possession of the same until her death, in 1896, and after her death the claimants went into possession of it. The court, on motion of plaintiff's counsel, directed the jury to return a verdict finding the property levied on subject, and to the action of the court in directing this verdict the claimants excepted.

The exception as to the refusal of the court to allow the testimony of W. E. Wardlaw, referred to above, to go to the jury, was not argued before this court, either by brief or otherwise; and, such being the case, under repeated adjudications, we treat the point as having been abandoned.

In the brief filed by counsel for plaintiffs in error it is not contended that the decree offered in evidence was admissible for any other purpose than as color of title. Of course, it could not bind the judgment creditor, who was no party to the proceeding in which the decree was rendered. *Elwell v. Security Co.*, 101 Ga. 496, 28 S. E. 833. Was it admissible as color of title upon which to found a prescription? In the case of *Beverly v. Burke*, 9 Ga. 440, Judge Lumpkin asks the question, what is meant by color of title? and then proceeds to answer it in the following manner: "It may be defined to be a writing, upon its face professing to pass title, but which does not do it, either from a want of title in the person making it, or from the defective conveyance that is used; a title that is imperfect, but not so obviously so that it would be apparent to one not skilled in the law. The very fact of setting up a statutory title excludes the idea of a rightful or legal title. The length of the possession, and its

nature and character, are the only tests." In *Field v. Boynton*, 33 Ga. 239, it is said that color of title is "anything in writing connected with the title which serves to define the extent of the claim." In *Burdell v. Blain*, 66 Ga. 169, color of title is defined as "anything in writing which serves to define the extent and character of the claim to the land, with parties from whom it may come and to whom it may be made. A paper of this character is admissible as color of title on which to base a prescription." See, also, *Veal v. Robinson*, 70 Ga. 809. It was provided by the decree that M. C. Wardlaw should hold the title to certain real estate in trust for the sole and separate use of M. J. Wardlaw until the further order of the court. There being no parties to this proceeding except Wardlaw and his wife, of course no one is bound by this judgment impressing the title which Wardlaw held with the trust in favor of his wife except himself and his wife, and those who claim under either, subsequent to the rendition of the decree. The rights of the creditor whose judgment was in existence at the time of the rendition of the decree are not affected in any way by the decree as a judgment. If at the time of the rendition of this decree M. C. Wardlaw had delivered to his wife an instrument in writing, in which he declared that he held the real estate described in the decree in trust for her sole and separate use, it would not be contended that such a writing would not be color of title upon which a prescription could be based. Is it any less color of title because the writing happens to be a decree of a court which is assented to by both parties to the transaction, instead of a private writing delivered voluntarily by one party to the other? While the decree does not bind anybody as a judgment except the parties to the litigation and their privies, it is evidence in favor of any one who claims under it, and when necessary as a link in a chain of title it may be introduced in evidence against persons who are not parties to the litigation. In the case of *Barr v. Gratz's Heirs*, 4 Wheat. 213, Mr. Justice Story uses this language: "Another error alleged is that the court allowed the decree of the circuit court, in the chancery suit between Michael Gratz and John Craig and others, to be given in evidence to the jury. In our opinion, this record was clearly admissible. It is true that, in general, judgments and decrees are evidence only in suits between parties and privies. But the doctrine is wholly inapplicable to a case like the present, where the decree is not introduced as per se binding upon any rights of the other party, but as an introductory fact to a link in the chain of the plaintiff's title, and constituting a part of the muniments of his estate. Without establishing the existence of the decree, it would be impossible to establish the legal validity of the deed from Robert Johnson to the lessors of the plaintiff, which was made under the authority of that decree; and under such cir-

cumstances to reject the proof of the decree would be, in effect, to declare that no title derived under a decree in chancery was of any validity except in a suit between parties and privies, so that in a suit by or against a stranger it would be a mere nullity. It might with as much propriety be argued that the plaintiff was not at liberty to prove any other title deeds in this suit, because they were *res inter alios acta*." In the case of *Hardwick v. Hook*, 8 Ga. 354, it was held that: "A decree in chancery is evidence, not merely of the fact of its rendition, but also of all the consequences resulting therefrom. It may be given in proof against persons who were not parties to the bill, in support of the plaintiff's right or title to sue." Judge Lumpkin, in the opinion, says: "But it is said that Hardwick was not a party to the bill, and that, therefore, the decree was inadmissible against him; that it was *res inter alios acta*. Judgments and decrees are not only evidence of the fact of their rendition, but of all the legal consequences resulting from that fact, whosoever may be the parties to the suit in which it is offered in evidence. The record may be introduced where it constitutes one of the muniments of the party's title to an estate, as where a deed was made under a decree in chancery. *Barr v. Gratz's Heirs*, 4 Wheat. 213. So, here it is competent, by the decree, to establish the plaintiff's right, as receiver, to maintain this action. The defendant is not affected by it. He is entitled to every defense which he might have had had the action been brought by Harris, the creditor, and Brantley, the trustee of Mrs. Walden." See, also, *Bussey v. Dodge*, 94 Ga. 584, 21 S. E. 151. The decree should have been admitted in evidence solely for the purpose of showing color of title upon which to base a prescription. Such a decree, in connection with evidence showing adverse possession for seven years, would give a title by prescription as against the lien of a judgment rendered against the defendant in the decree before the prescription began to run, if there was no levy on the property until after the prescriptive title had ripened. *Johnston v. Neal*, 67 Ga. 528. If, however, it should appear that the suit between Wardlaw and his wife was collusive and fraudulent, then no prescription could be based upon such a decree as color of title. Civ. Code, § 3589. Judgment reversed. All the justices concurring, except LUMPKIN, P. J., and LITTLE, J., absent on account of sickness.

(106 Ga. 34).

SCHEURMAN v. CITY OF COLUMBUS et al.

(Supreme Court of Georgia. Nov. 25, 1898.)

SALE FOR CITY TAXES—ADVERTISEMENT.

There is no law requiring the marshal of the city of Columbus to advertise the sale of property levied on for city taxes in the news-

paper in which the sheriff's advertisements are published.

(Syllabus by the Court.)

Error from superior court, Muscogee county; W. B. Butt, Judge.

Suit by Joseph Scheurman against the city of Columbus and others. Judgment for defendants, and plaintiff brings error. Affirmed.

O. J. Thornton, for plaintiff in error. F. D. Peabody, for defendants in error.

LEWIS, J. The plaintiff in error, by his petition, sought to enjoin the city of Columbus and its marshal from a sale of his property levied upon by an execution for city taxes, and advertised for sale. The prayer for injunction was denied, and plaintiff excepted. The only ground in the petition here insisted on by plaintiff's counsel why the injunction should have been granted was that the advertisement did not appear in the paper in which the sheriff's sales were advertised, but in another newspaper published in the city. Section 732 of the Political Code provides that "the time, place, and manner of the sale of property, both real and personal, for taxes due to municipal corporations in this state, shall be the same as that provided by law for sheriff's sales for state and county taxes." This provision in the Code has been substantially, and almost literally, incorporated in the charter of the city of Columbus. 2 Acts 1890-91, p. 512, § 22. This court, in the case of *Bacon v. City of Savannah*, 86 Ga. 303, 12 S. E. 580, syl. point 12, in construing that section, has declared that the words "time, place, and manner of sale" do not embrace the newspaper in which the sale is to be advertised, and consequently the law does not require that sales for municipal taxes shall be advertised in the same newspaper in which sheriff's sales are advertised. Judgment affirmed. All the justices concurring, except LUMPKIN, P. J., and LITTLE, J., absent on account of sickness.

(106 Ga. 35)

SWIFT et al. v. DEDERICK.

(Supreme Court of Georgia. Nov. 25, 1896.)

PURCHASER PENDENTE LITE—DECREE—EFFECT.

Where a suit has been brought by a creditor against his debtor, based upon a promissory note secured by a deed to land, in which the plaintiffs seeks not only to obtain a general judgment against the debtor, but also to enforce his special lien upon the land arising by virtue of his security deed, a purchaser from the defendant pending the litigation is affected by the final judgment rendered in the case; and where the final verdict and judgment in the case sets up a special lien upon the property, and thus sustains the validity of the deed set forth in the petition, such purchaser cannot attack the deed for usury.

(Syllabus by the Court.)

Error from superior court, Muscogee county; W. B. Butt, Judge.

Action by P. K. Dederick against Mrs. Hatcher. Judgment for plaintiff. On levy of execution, Lottie I. Swift and others interposed claim. Judgment finding property subject to execution, and claimant brings error. Affirmed.

O. J. Thornton and A. E. Thornton, for plaintiff in error. Goetchins & Chappell, for defendants in error.

COBB, J. On November 19, 1892, Mrs. Hatcher executed a promissory note for \$6,500, with coupon notes for the interest thereon at 8 per cent. per annum, payable to the order of Dederick, and a deed conveying to him certain land as security for the payment of the notes. She failed to pay the notes, and Dederick brought suit against her, alleging that the deed was a first lien on the land described therein, and praying for a judgment for the amount due, and for such other judgment and relief as, under the law and facts, he was entitled to. The land upon which plaintiff claimed to have a first lien was properly described in his petition. No defense was filed, and on November 16, 1896, a verdict was rendered against the defendant for the amount sued for, and a judgment was entered thereon, which provided that it should be a special lien upon the land described in the deed. An execution upon this judgment was levied upon the land after a reconveyance to the defendant had been filed and recorded, and a claim was interposed by Mrs. Swift and Mrs. Strupper. The claimants derived title through a deed from Mrs. Hatcher, which was executed and delivered on October 6, 1896, while the suit above referred to was pending against her. At the trial the claimants contended that the deed from Mrs. Hatcher to Dederick was void because infected with usury. There was evidence introduced by them which they claimed established the truth of their contention. The judge directed the jury to return a verdict finding the property subject to the execution, and to this ruling the claimants excepted. The contention of the claimants was that, the deed from Mrs. Hatcher to Dederick being void, because infected with usury, the title had never passed out of her until she executed the deed to them, and that, therefore, the rights which they acquired by their deed were superior to those which Dederick acquired under the judgment based upon what they claimed was an absolutely void deed. The contention of the plaintiff in execution was that, conceding that the deed from Mrs. Hatcher to Dederick was infected with usury, and therefore void, the judgment rendered in favor of Dederick on the suit filed to collect the debt and enforce a special lien upon the property described in the pleadings and in the judgment having the effect of concluding Mrs. Hatcher on all questions relating to the validity of the debt or the deed given to secure it, the claimants, who purchased from her while the suit was pending, were also

concluded on all questions affecting the validity of the conveyance. The suit by Dederick was for a double purpose: (1) To secure a general judgment upon his debt; and (2) to secure a judgment that he had a first lien upon the land described in the deed which he held, and which was fully described in his petition. If Mrs. Hatcher had any defense which would defeat the collection of the debt, or which would defeat the plaintiff in his effort to secure a first lien upon the land, she was afforded opportunity before judgment to set up these defenses by proper pleadings. A plea of usury filed by her, and sustained by evidence, would not only have entirely destroyed the security, but would have resulted in reducing the amount recovered by the plaintiff to the extent of the usury proven. Having the opportunity to set up this defense, and having failed to do so, she is undoubtedly concluded by the judgment on all such matters. "A judgment of a court of competent jurisdiction is conclusive between the same parties and their privies as to all matters put in issue, or which under the rules of law might have been put in issue in the cause wherein the judgment was rendered." Civ. Code, § 3742. In the case of *Stewart v. Stisher*, 83 Ga. 297, 9 S. E. 1041, Chief Justice Bleckley says: "The note on which the judgment was founded from which the *fi. fa.* issued contained a waiver of homestead and exemption. This waiver is now resisted on the ground that the debt was usurious, and the court admitted evidence to show that such was the fact; but we think that the question is closed by the judgment. No usury appears upon the face of the note or the record." In *Hightower v. Beall*, 66 Ga. 102, it was held that, where a deed was made to secure a debt, which was afterwards sued on, and judgment confessed, a deed back to the debtor made, and the *fi. fa.* levied on the land, the defendant could not set up that the deed was void by reason of usury in the debt, the record showing no indication thereof. See, also, *Owen v. Gibson*, 74 Ga. 465. Do the claimants, who bought pending the proceeding which resulted in a judgment declaring, in effect, that the deed made by Mrs. Hatcher to Dederick was a valid conveyance, stand in any better position than Mrs. Hatcher, their predecessor in title, in reference to this matter? "Decrees ordinarily bind only parties and their privies; but a pending suit is a general notice of an equity or claim to all the world from the time the petition is filed and docketed; and if the same is duly prosecuted, and is not collusive, one who purchases pending the suit is affected by the decree rendered therein." Civ. Code, § 3936. The rule has been also stated in this way: "One who is neither a party nor a privy, or purchases pendente lite, is not bound, but he who purchases or goes into possession during the pendency of the suit is bound, by the decree that is made against the person from whom he derives title. The law is that he

who intermeddles with property in litigation does it at his peril, and is as conclusively bound by the results of the litigation, whatever they may be, as if he had been a party to it from the outset." 1 Herm. Estop. § 186. The author just quoted, in discussing the same question, also uses this language: "As all people are supposed to be attentive to what passes in a court of justice, it is to prevent a greater mischief, that would arise by people's purchasing a right under litigation and then in contest, that this principle has been established. A purchase of a right which is undergoing a judicial investigation is a fraud upon the plaintiff, and is so far considered a nullity that it cannot avail against his title." Id. § 187a. See, also, 13 Am. & Eng. Enc. Law, 893; *Edwards v. Banksmith*, 35 Ga. 213; *Carmichael v. Foster*, 69 Ga. 372; *Weems v. Harold*, 75 Ga. 868. That the doctrine of *lis pendens* applies in any case where the suit is brought for the specific recovery of real property is well settled, and if the suit in the present case had been one in ejectment to recover the property to which the claimants acquired title pending the suit, there would be no question that a judgment in ejectment would bind the purchasers pendente lite. But does the same principle apply where the purpose of the suit is not to recover the specific property, or to assert title to an interest therein, but where the whole purpose of the suit is to enforce only a lien upon it? In the case of *Stokes v. Maxwell*, 59 Ga. 78, it was held that purchasers of land subject to the lien of a mortgage who buy after the mortgagor has been sued and served with the rule nisi to foreclose the mortgage, will be concluded by the judgment of foreclosure; and in the opinion Judge Jackson distinguishes that case from *Williams v. Terrell*, 54 Ga. 463, in that in the latter case the purchasers acquired title before the foreclosure proceedings were instituted. In the case of *Wilson v. Wright*, 72 Ga. 848, the doctrine of *lis pendens* was applied in a case where the purchaser acquired title from the defendant in a pending suit which had been brought for the purpose of enforcing an attorney's lien upon the property, and the property in the hands of such purchaser was held to be subject to the lien which was finally established by the judgment in the case. Even if the decisions cited are not conclusive upon the question that this doctrine is applicable to suits brought simply for the purpose of enforcing a lien, the reason of the rule makes the doctrine applicable. If one against whom another has a right to assert a lien, being sued, can, by transferring the property pending such a suit, require his creditor to litigate again with the vendee, it will be at once seen that the question can never be settled. The doctrine of *lis pendens*, properly understood and applied, will prevent a stranger from dealing with any of the parties to a pending proceeding in which a title to, or an interest in, or a lien

upon designated and described real property is sought to be enforced after the proceeding is filed, and before the final decree, so as to acquire any interest in the premises involved capable of withstanding the force of the decree, or frustrating its full legal effect. *Faulkner v. Vickers*, 94 Ga. 531, 21 S. E. 233. In the case of *Ryan v. Mortgage Co.*, 96 Ga. 322, 23 S. E. 411, the plaintiff, who had acquired title from a debtor, who had, before the conveyance, executed a security deed to the same property, was allowed to attack the security deed on the ground that it was infected with usury, notwithstanding the fact that a judgment on the note had been rendered against the debtor. It appears from the facts of the case that the plaintiff purchased before any proceeding was filed to obtain judgment on the debt, or to set up a special lien upon the land. If Mrs. Ryan had acquired her title pending the proceeding which resulted in a judgment against the debtor, she would have been precluded from attacking the deed. The deed given by Mrs. Hatcher to Dederick may or may not have been infected with usury. If it was, the judgment against her concludes her from now raising the question, and the claimants, who purchased from her pendente lite, are likewise concluded. There was no error in directing the jury to return a verdict finding the property subject to the execution. Judgment affirmed. All the justices concurring, except LUMPKIN, P. J., and LITTLE, J., absent on account of sickness.

(106 Ga. 40)

GEORGE v. McALLISTER.

(Supreme Court of Georgia. Nov. 25, 1898.)

LIS PENDENS—PURCHASER PENDENTE LITE.

This case is controlled by the decision of this court in the case of *Swift v. Dederick* (this day rendered) 31 S. E. 788.

(Syllabus by the Court.)

Error from superior court, Morgan county; John O. Hart, Judge.

An execution in favor of James McAllister was levied on property to which a claim was interposed by Calvin George. There was a judgment for plaintiff in execution, and claimant brings error. Affirmed.

J. D. Kilpatrick, for plaintiff in error. W. R. Mustin, for defendant in error.

COBB, J. On December 1, 1887, Antoinette and George Henry executed and delivered to Butler three promissory notes, and a deed to certain land to secure the payment of the same. On November 20, 1888, Butler indorsed upon the deed the following entry: "For value received, I hereby sell, assign, and transfer the within deed to secure a debt, and also to secure which the within deed was given, with all and singular the rights and privileges thereto belonging, to J. H. Hunter, without recourse on me in any manner." On November 6, 1889, J. H.

Hunter indorsed upon the deed the following: "For value received, I hereby sell, assign, and transfer the within deed to Jas. McAllister, without recourse on me in any manner." The notes were also transferred by Hunter to McAllister. On February 10, 1891, McAllister brought suit against Antoinette and George Henry upon the three notes, the petition alleging the facts above stated, and praying for a general judgment against the defendants, and also for special lien upon the land in controversy. The defendants pleaded that the deed was infected with usury. Two trials of the case were had. Upon the first trial the jury found in favor of the plaintiff, and that a special lien upon the land be set up as prayed. The defendants made a motion for a new trial, which was overruled, and the case came to this court, when a new trial was granted. *Henry v. McAllister*, 93 Ga. 667, 20 S. E. 66. On March 9, 1895, after the decision was rendered by this court, Antoinette Henry executed and delivered to Calvin George a deed conveying the land in controversy to secure a debt which she owed him. Subsequent to the execution of this deed the case came on for trial again, and resulted in a verdict in favor of the plaintiff. A motion for a new trial was overruled, and the case came again to this court, when the judgment was affirmed. *Id.*, 99 Ga. 537, 26 S. E. 469. After the affirmance of the judgment by this court an execution from the judgment entered upon the second verdict was issued, and a deed by Butler conveying the land to the defendants for the purpose of levying the execution thereon was filed and recorded, and the execution was levied upon the land. Calvin George interposed a claim, alleging in his claim affidavit that the deed from Antoinette and George Henry to Butler was void for usury. At the trial the claimant assumed the burden of proof, and introduced in evidence a deed showing title in Antoinette Henry, and also the deed from Antoinette Henry to claimant, and the agreement by the claimant to reconvey the land to her upon payment of the note. The plaintiff introduced the deed from Antoinette Henry to Butler, and the notes to secure which it was given, and also the judgment against Antoinette Henry and George Henry, and the pleadings and verdict upon which it was based. The jury, by direction of the court, rendered a verdict finding the property subject. The claimant made a motion for a new trial, which was overruled, and he excepted. George having purchased the property while the suit in which McAllister was seeking to enforce a lien upon the land now in controversy was pending, whatever interest he acquired under the deed was subject to the rights of McAllister as finally determined by the judgment rendered in the litigation with Antoinette and George Henry. *Swift v. Dederick* (this day decided) 31 S. E. 788. The matter in controversy between McAllister and

the Henrys was whether the Henrys owed McAllister, and, if so, whether McAllister had the right to enforce the payment of the debt by a sale of the land which he described in his petition. The pending suit was notice to George of the controversy. If the suit finally resulted in a judgment declaring that McAllister had the right which he was contending for, it is immaterial upon what ground such right was granted to him, so far as the binding effect of the judgment upon the Henrys and purchasers pendente lite from them was concerned. A judgment, as in this case, that the plaintiff was entitled to the rights claimed in the pleadings because the defendants were estopped from setting up, as against him, the plea of usury, is just as conclusive upon the defendant in the case and purchasers pendente lite from him as if the judgment had been that there was no usury in the transaction. Judgment affirmed. All the justices concurring, except LUMPKIN, P. J., absent on account of sickness, and LEWIS, J., disqualified.

(106 Ga. 42)

MARSHALL v. CHARLAND.

(Supreme court of Georgia. Nov. 25, 1898.)

EXECUTION AGAINST DECEDENT'S ESTATE—CLAIM BY WIDOW—USURY.

Where a year's support has been set aside to a widow prior to the pendency of a suit which resulted in a judgment setting up a special lien upon the property set apart to the widow, such judgment being founded upon a security deed by the deceased husband conveying the property to the plaintiff, on the trial of a claim filed by the widow to this property, levied upon under a *fi. fa.* issued upon the judgment, she had the right to attack the deed as being void for usury.

(Syllabus by the Court.)

Error from superior court, Talbot county; W. B. Butt, Judge.

Action by Mrs. S. O. Charland, administratrix, against Raines, administrator of S. J. Marshall. On levy of execution Mrs. Marshall filed a claim. Demurrer to the petition was sustained, and claimant brings error. Reversed.

J. J. Bull and O. J. Thornton, for plaintiff in error. J. H. McGehee, for defendant in error.

COBB, J. On March 1, 1887, Solomon J. Marshall executed to the Georgia Loan & Trust Company certain promissory notes, and, as security for the payment of the same, a deed, under section 1969 of the Code of 1882. The notes were immediately transferred to one Johnson, and by him to Mrs. Charland, as administratrix. On August 22, 1893, suit was brought upon the notes by Mrs. Charland, as administratrix (for whom the record does not disclose), against Raines, administrator of Solomon J. Marshall. A general judgment was obtained therein against the defendant, and a special judgment against the

land described in the security deed. The execution from this judgment was, on October 7, 1895, levied upon the land as the property of the estate in the hands of the administrator, and a claim was interposed by Mrs. Marshall, the widow of Solomon J. Marshall. The claimant also filed an equitable plea, in which she set up that the notes which were the foundation of the judgment were usurious, and the deed therefore void; that the maker of the notes and the deed was her husband, and after his death the land embraced in the deed was set apart to her by the ordinary as her year's support, and under the statute the title to the land vested in her; that the plaintiff and Johnson and the Georgia Loan & Trust Company were in collusion for the purpose of obtaining usury, and concealing the amount charged; that the amount of usury charged was unknown to the defendant, and she prayed discovery as to the amount from the plaintiff and Johnson and the trust company, and that the latter be made a party defendant. When the case was called for trial, plaintiff demurred orally to this plea, and moved to strike it, because it set up usury in the deed given by Solomon J. Marshall in his lifetime to secure a debt, and, the claimant being the wife of Solomon J. Marshall, and the foundation of her claim being a year's support set apart since his death, she could not attack the judgment upon which the *fi. fa.* levied was issued. The court sustained the demurrer, and to this the claimant excepted. The claimant introduced in evidence her application for year's support, and the order appointing the appraisers, and their return, and the judgment of the ordinary approving their return at the August term, 1892. Claimant offered evidence to show that the deed from her husband, upon which the plaintiff relied, was infected with usury. The court refused to admit the evidence, and the claimant excepted.

The title of the claimant under the proceedings setting apart to her a year's support having been acquired before the suit was filed to enforce a special lien on the property set apart to her, she would not be precluded, under the operation of the doctrine of *lis pendens*, from attacking for usury the deed which is relied upon as the foundation of the lien sought to be enforced under a judgment rendered on proceedings begun after title to the year's support had vested in her. She stands in the same position as if she had purchased the property from her husband, and a purchaser from him before proceedings begun to enforce the security deed made by him would be allowed to attack such a security deed for usury. The doctrine of *lis pendens*, of course, has no application to such a case. In the case of *Ruker v. Womack*, 55 Ga. 399, Judge Bleckley uses this language: "Where the doctrine of *lis pendens* applies, privies are concluded by a final judgment on the merits in a case pending when they purchased; but there is, perhaps,

no instance in the whole law where privies in estate are held affected by the result of litigation in a suit commenced by or against a predecessor in title after he has transmitted all the title he ever had." This case therefore is controlled by the case of *Ryan v. Mortgage Co.*, 96 Ga. 322, 23 S. E. 411, and is to be distinguished from the case of *Swift v. Dederick* (Ga.) 31 S. E. 788, for the reason above stated. The equitable pleading, not distinctly averring that the year's support was set apart to Mrs. Marshall before the suit filed by Mrs. Charland was begun, was probably demurrable; but when, at a subsequent stage of the case, it appeared in the evidence of the claimant that the year's support proceedings were complete before Mrs. Charland's suit was begun, the claimant should have been permitted to introduce evidence showing that the debt of the plaintiff in execution was infected with usury. If this was established, the deed given to secure the debt was void, the title to the land had never passed out of S. J. Marshall during his lifetime, and the rights of the widow under the year's support set apart to her were superior to those of the plaintiff in execution under the judgment that she was seeking to enforce. Judgment reversed. All the justices concurring, except LUMPKIN, P. J., and LITTLE, J., absent on account of sickness.

(106 Ga. 25)

WILKINSON COUNTY v. LINDSEY.

(Supreme court of Georgia. Nov. 25, 1898.)

STATE COURTS—JURISDICTION—RULE AGAINST ATTORNEY.

A state court has no jurisdiction to rule an attorney at law for failure to pay over to his client money collected on process from a federal court.

(Syllabus by the Court.)

Error from superior court, Wilkinson county; John C. Hart, Judge.

Petition by the county of Wilkinson for a rule to require J. W. Lindsey to pay into court certain moneys collected by him as attorney for petitioner. From a judgment dismissing the petition, plaintiff brings error. Affirmed.

The following is the official report:

This was a petition by the county of Wilkinson to the superior court of that county for a rule to require the defendant to show cause why he should not pay into court, for the use of the petitioner, certain money collected by him as attorney at law for the county. The defendant pleaded that the court was without jurisdiction to entertain the petition, because in the acts complained of he was not acting as an attorney at law of any court established by the laws of this state, but was acting as an attorney at law of the circuit court of the United States for the Southern district of Georgia, and did not use or invoke any process issuing out of any state court, but used and invoked exclusively the process and powers of

the circuit court of the United States and of the supreme court of the United States; that he is a duly-authorized practicing attorney in the circuit court of the United States, and was such at the time of the acts complained of, and that that court alone has jurisdiction of the matter. It was agreed by counsel for both parties that this issue should be tried before the judge without the intervention of a jury. It was admitted that the defendant was a citizen and resident of Wilkinson county, and a member of the bar of the superior court of that county, at the time of the filing and service of the plaintiff's petition, and was also a member of the bar of the United States circuit and district courts for the Southern district of Georgia, and that the money in question was collected alone through the processes of the United States court, and not in the state court, and was paid over to the defendant as attorney for the plaintiff under an order of the United States court, upon an intervention filed therein by him and another attorney. The court sustained the plea to the jurisdiction, and dismissed the case, and to this the plaintiff excepted.

Preston & Ayer, for plaintiff in error. Desau, Bartlett & Ellis and F. Chambers, for defendant in error.

SIMMONS, C. J. The official report sufficiently states the facts. Under these facts, it will be seen that the sole question for decision in the case is whether an attorney at law, who had been admitted to practice in the courts of this state, and who also had been admitted to practice in the courts of the United States, can be ruled in a state court for money collected by him under the judgment and process issuing from a court of the United States. Our Civil Code (section 4771 et seq.) provides, in substance, that an attorney at law who has collected money for a client by virtue of his office is subject to the summary remedy of a rule against him for failure to pay over the money to his client. If, upon the hearing, the rule is made absolute against him, and he fails to obey the order of the court, an attachment issues against him. This summary remedy is a power incident to all courts of general jurisdiction, whether conferred by statute or not; and has been exercised, as far as I can learn, from time immemorial. It is a power that courts of general jurisdiction have always exercised, to compel their officers to perform their official duties. We have in Georgia two kinds of courts, state courts and federal courts. They are created and organized by two separate and independent governments. Each court has the power given it by the constitutions or by statute. Hence, an attorney at law may be an officer of both courts. He occupies a dual relation,—an officer of the state court, and likewise an officer of the federal court. Where he appears as an officer of the state court, and assists that court in the administration of justice, he is amenable to

that court for his official conduct, either while in the presence of the court or where he is executing the process thereof. In the same manner he is amenable to the federal court, where he acts as an officer of that court. When, therefore, as an officer of the federal court, he collects money under the judgment and process of that court, and fails to pay it over to his client, in our opinion he cannot be ruled in a state court for his failure to comply with his duties which originated in the federal court; nor do we think that, if he collected money for his client by virtue of the judgment and process of the state court, he would be amenable to rule in the federal court for failure to pay it over to his client. As before remarked, the two courts are separate and distinct. The federal court could not rule a sheriff of this state for a failure to pay over money after he collected it, for the reason that he is not an officer of that court while performing the duty of executing the process of the state court. For the same reason, in our opinion, the federal court could not rule an attorney of the state court for the failure to pay over money belonging to his client, because, in discharging this duty,—the duty of collecting and paying over money under the process of the state court,—he is not an officer of the federal court. We therefore think that, while Mr. Lindsey was an officer of both courts, in the performance of his duty in collecting and paying over the money under the process from the federal court the state court had no jurisdiction to rule him and compel him to pay the money collected to his client. If he had been an attorney and an officer of the courts of Alabama, or of any other foreign state, and collected money for a client under process of a court in that state, he would not be subject to rule by a court in this state, although he was an officer in the courts of this state. Counsel for plaintiff in error mainly relied, in his argument before us, upon an article written by Mr. Babcock in 46 Cent. Law J. p. 23 et seq. We have carefully read that article, and the authorities cited therein. It seems to us that the main object of the article was to show that courts of general jurisdiction have the right, by summary process, to disbar an attorney for acts of moral turpitude, or other acts which show him unfit to be a member of the bar. We do not contest the existence of this power in any court of general jurisdiction. Any court of general jurisdiction which has power to admit and license attorneys to practice at the bar has jurisdiction to disbar an attorney for acts committed which show him to be unworthy to hold the office of an attorney. And this is so whether those acts are committed in the presence of the court or in any other court. If an attorney should be guilty of larceny, or burglary, or other crime of moral turpitude, any court which had a right to license him to practice law, and of which he is an officer, has the right and jurisdiction to expel him, in order to rid the profession of an unworthy member. It is true

that Mr. Babcock, in his article above referred to, does seem to say, in one portion of the article, that any court which has general jurisdiction can rule an attorney for his failure to pay over money to his client, whether he collected the money by virtue of its process or of the process of another court. A number of authorities are cited by him to sustain this proposition. We have read them carefully, and, in our opinion, they do not sustain him. Every one of them, as far as we now recollect, relates entirely to proceedings of disbarment. No one of them we found related to a rule compelling the attorney to pay over money. The nearest one to the subject was the case *In re Tyler*, 71 Cal. 353, 12 Pac. 289, and 13 Pac. 169; *Id.*, 78 Cal. 307, 20 Pac. 674,—where it seems that the supreme court of that state took jurisdiction to disbar an attorney for his failure to pay over to his client money collected under the process of an inferior court. Moreover, it appears that Tyler was not only guilty of a failure to pay over money, but was also guilty of fraudulent conduct in taking a fee on both sides. We have searched diligently, and find no case where a federal court assumed jurisdiction to rule an attorney for failure to pay over money collected under the process of the state court; nor do we find any case where a state court assumed to rule an attorney for money collected under the process of the federal court. We therefore think that the trial judge did not err in finding in favor of the plea. Judgment affirmed. All the justices concurring, except LUMPKIN, P. J., absent on account of sickness.

(106 Ga. 52)

THORPE v. BUTT, Ordinary, et al.

(Supreme Court of Georgia. Nov. 25, 1898.)
SPECIAL ACT—COUNTY COURTS—UNIFORM LEGISLATION.

The act of 1872, which provided for the establishment of county courts in certain counties, and for the appointment of judges thereof, and which gave those judges jurisdiction over county matters, was not unconstitutional at the time of its passage, as being a special law which changed a general law; nor was it violative of paragraph 1 of section 3 of article 11 of the constitution of 1877, which provides that whatever tribunal or officers may be thereafter created for the transaction of county matters shall be uniform throughout the state. (Syllabus by the Court.)

Error from superior court, Marion county; W. B. Butt, Judge.

Action by V. M. Thorpe against W. E. Butt, ordinary, and others. Judgment for defendants, and plaintiff brings error. Reversed.

Simeon Blue, J. E. Sheppard, and Shipp & Sheppard, for plaintiff in error. Geo. P. Munro and J. J. Dunham, for defendants in error.

SIMMONS, O. J. The ordinary of Marion county issued certain tax executions against Thorpe, a tax collector, and his sureties

These were placed in the hands of the sheriff, who made levies thereunder. Thorpe filed an equitable petition, seeking to enjoin the executions on the ground that the ordinary had no jurisdiction to issue the executions, as the judge of the county court had exclusive jurisdiction over all county matters. This petition was dismissed on demurrer, and the injunction refused.

The plaintiff in error insists that the judge of the county court, under the act of 1872 (Civ. Code, § 4176), has exclusive jurisdiction of all county matters, and that, therefore, there being a county court in Marion county, it was the duty of the county judge, and not of the ordinary, to issue these executions. The defendants in error insist that under the decision in the case of *Lorentz v. Alexander*, 87 Ga. 444, 13 S. E. 632, the act of 1872 creating county courts was a special act of the legislature in a case provided for by general law, and was, therefore, unconstitutional; the general law being that the ordinaries had jurisdiction of county matters in all counties where the legislature had not created a board of commissioners of roads and revenues. They also insist that this act is in violation of paragraph 1, § 3, art. 11, of the present constitution, declaring that whatever tribunal or officers may "hereafter" be created for the transaction of county matters shall be uniform throughout the state. While it is true that this court, in the case mentioned above, did decide that the county court act of 1872 was a special law, it did not decide that it was for that reason unconstitutional. At the time that act was passed there was no constitutional restriction on the legislature as to the passage of special acts in cases provided for by general law. *Burks v. Morgan*, 84 Ga. 627, 10 S. E. 1096. When the act of 1872 was passed, the constitution of 1868 was in force. That constitution did not contain the same provision as to special legislation as does the constitution of 1877. It was competent for the legislature at that time to pass a special law giving jurisdiction over county matters to the county judges, and thereby change the general law which gave it to the ordinary in every county where no board of commissioners of roads and revenues had been created. The act approved October 13, 1879, amending the act of 1872, is not unconstitutional. It simply prescribes the procedure and practice in the county courts. *Peed v. McCrary*, 94 Ga. 487, 21 S. E. 232. This act was passed in conformity to paragraph 1 of section 9 of article 6 of the constitution of 1877. It was not necessary for the legislature to pass such an act in regard to the tribunal or officers having jurisdiction of county matters. The law already provided for the practice and procedure of such tribunal or officers, which were uniform throughout the state. The constitution provides that "whatever tribunal or officers may hereafter be created by the general assembly for the transaction of county matters

shall be uniform throughout the state, and of the same name, jurisdiction and remedies, except that the general assembly may provide for the appointment of commissioners of roads and revenues in any county." Article 11, § 3, par. 1. It will be seen at a glance that this provision of the constitution applies only to those tribunals and officers "hereafter" created,—created subsequently to the adoption of the constitution of 1877. It can, therefore, not apply to officers created and jurisdiction conferred before this provision became part of the state constitution. The jurisdiction given to county judges under the act of 1872 was given at the time the act was passed and approved. It does not matter whether a county immediately availed itself of the provisions of that act or not. Whenever it did so, and the county court was established under the act, the judge of that court had exclusive jurisdiction of all county matters. The act was constitutional and valid at the time it was approved, although it may not have gone into effect in Marion county for several years thereafter. When the court was established in that county as provided in the act, the act then took effect as to the county. For these reasons, we think the trial judge erred in refusing the injunction. Judgment reversed. All the justices concurring, except LUMPKIN, P. J., and LITTLE, J., absent on account of sickness.

(106 Ga. 55)

MERCHANTS' & MECHANICS' BANK v. TILLMAN et al.

(Supreme Court of Georgia. Nov. 25, 1898.)

SUBROGATION—VOLUNTEERS—MORTGAGES—INJUNCTION.

One who advances money to pay off an incumbrance upon realty, at the instance of the owner thereof, and upon the express understanding that the advance made is to be secured by the immediate execution of papers which will constitute a first lien on the property, is not a mere volunteer; and, in the event the new security thus taken turns out to be defective, the person parting with his money on the faith thereof, if not chargeable with culpable and inexcusable neglect in the premises, will be subrogated to the rights of the prior incumbrancer under the security held by him, unless the superior or equal equities of others would be prejudiced thereby. Under such circumstances, the holder of a junior mortgage, being placed in no worse position by the transaction, could not complain that subrogation would operate to injuriously affect his vested rights; and in case he is seeking to gain an unconscionable advantage by subjecting the property to the payment of his mortgage, as ostensibly the highest lien thereon, to the prejudice of the person who had paid off the prior incumbrance, the writ of injunction will lie to prevent a sale of the property until the respective rights of the parties can be passed upon and finally adjudicated by a court of competent jurisdiction.

(Syllabus by the Court.)

Error from superior court, Muscogee county; Z. A. Littlejohn, Judge.

Suit by W. L. Tillman and others against

the Merchants' & Mechanics' Bank. There was a judgment for plaintiffs, and defendant brings error. Affirmed.

Brannan, Hatcher & Martin, for plaintiff in error. W. A. Wimblish and E. D. Burts, for defendants in error.

FISH, J. The record before us presents for decision the single question whether or not the plaintiff in the court below could invoke in his behalf the doctrine of equitable subrogation. Doubtless, under the circumstances disclosed, he may be in need of the protection sought; yet, as this is not the criterion which should be applied in determining his right to demand the aid of the courts, we will, before undertaking to deal with the peculiar facts of this case, enter upon a brief discussion of the general principles upon which equitable jurisdiction in this class of cases is based, with a view to ascertaining his attitude as regards the other parties at interest.

As defined in the American & English Encyclopædia of Law (24 Am. & Eng. Enc. Law p. 187), "subrogation is the substitution of another person in the place of a creditor or claimant, to whose rights he succeeds in relation to the debt or claim asserted, which has been paid by him not voluntarily, and contemplates some original privilege on the part of him to whose place substitution is claimed." To afford relief and protection to a mere volunteer, an uninvited intermeddler in the affairs of others, is not remotely contemplated by the doctrine under discussion. *Sheld. Subr.* (2d Ed.) § 240; *Harris, Subr.* § 792; 3 Pom. Eq. Jur. § 1212; 24 Am. & Eng. Enc. Law, 281. On the contrary, "it is only in those cases where the person advancing money to pay the debt of a third party stands in the situation of a surety, or is compelled to pay it to protect his own rights, that a court of equity, as a matter of course, and without any agreement to that effect, substitutes him in the place of the creditor." *Sandford v. McLean*, 3 Paige, 117, cited approvingly in *Shinn v. Budd*, 14 N. J. Eq. 234, 238, *Watson v. Wilcox*, 39 Wis. 643, 650, and *Ætna Life Ins. Co. v. Middleport*, 124 U. S. 534, 550, 8 Sup. Ct. 625, as laying down the correct rule. This rule, it will be observed, distinctly recognizes the right of one parting with his money to expressly stipulate that he shall be substituted for and occupy the position of another, whose rights in the premises he seeks to acquire; and all the authorities above cited agree that a special contract of this nature, whenever it contemplates what is commonly known as "conventional subrogation," is perfectly legitimate and enforceable. "This convention or agreement may be made with either the debtor or creditor." 24 Am. & Eng. Enc. Law, 291. Albeit a person thus advancing his money at the instance of the debtor or creditor may have had no prior connection with the transaction between them, or any

interest therein it may be necessary for him to protect, he "is in no true sense a mere stranger and volunteer." 3 Pom. Eq. Jur., supra. He acquires, by contract, an immediate concern in the matter, to an extent equal to that of the person to whose rights it is expressly agreed he shall succeed, and consequently is entitled to claim all the privileges necessarily incident to a realization of the fruits of his bargain. *Harris, Subr.* cited above. Thus, "one who advances money to pay off an incumbrance, upon an agreement with the debtor that the security shall be assigned to him, or a new one given to him, will be subrogated to the rights of the incumbrancer; and, if the new security turns out to be defective, he will be substituted to the benefit of the prior incumbrance, unless the superior or equal equities of others would be prejudiced thereby." 24 Am. & Eng. Enc. Law, 292-294. The theory upon which a court of equity proceeds, in an instance such as that just cited, would seem to be that, where one expressly contracts with a debtor for security which will secure, the fact that he does not actually get it is immaterial, unless equal or superior rights of third persons have intervened; for, as against the debtor himself and all parties whose rights will not be injuriously affected, the contract between him and the person in good faith advancing his money should be given effect, and consequently that will be considered done which ought to have been done. In other words, such person will be deemed to occupy the situation in which he would have been placed had the contract been executed in strict conformity to the express agreement between the parties, and his rights will be measured accordingly, whenever protection of him does not also involve a disregard of the rights, legal or equitable, of others concerned.

Considered in the light of the principles above enunciated, we see no merit in the contention insisted upon by the Merchants' & Mechanics' Bank in the present case, that Tillman, who claims to have advanced his money upon the distinct understanding that he was to acquire a first lien on the property in question, is to be regarded as a mere volunteer. Jefferson, the debtor of the bank, and the owner of land bought subject to a security deed in favor of Larned, procured Tillman to advance the money necessary to remove this incumbrance. At the time, the bank was the holder of a junior mortgage lien upon the same premises, Jefferson having previously executed a mortgage in its favor to secure his debt to it. Of the existence of this mortgage lien, Tillman had no actual knowledge. Therefore, when he accepted the papers executed with a view to giving him the first and highest lien on the property, it cannot be said that he made a mistake of law as to the legal effect of these documents, and consequently cannot complain, for the reason that he got exactly what he bargained for. Had it not been for

the bank's mortgage, of which Tillman was ignorant, the security accepted by him would have fully come up to that contracted for, and he would have succeeded to the rights of Larned, which seems clearly to have been in contemplation of all the parties to the arrangement by which his security deed was canceled. Tillman agreed that this security deed should be canceled of record, but he did so upon the understanding that papers should be immediately executed, the effect of which would be to continue in him a lien of the rank of the one thus sacrificed. The present case is therefore similar to that of *Trust Co. v. Peters*, 72 Miss. 1058, 18 South. 497, relied on by defendants in error, wherein it was held that "where money is loaned under an agreement that it is to be used in paying off a first lien on the borrower's property, and that the lender is to have a mortgage thereon as primary security, the borrower representing that the holder of a second mortgage had agreed that the new mortgage should have priority, and it turns out that this is untrue, if the money advanced is applied in the payment of the first incumbrances, and mortgage is taken by the lender as agreed, he will, as against the borrower and the holder of the second mortgage, be subrogated to the lien of the prior incumbrance, which will be kept alive for his protection, although it was not expected or intended that he would be subrogated thereto, and although the first mortgage was canceled as agreed." The decision was put upon the ground that "the holder of the second mortgage, being placed in no worse position by the transaction, cannot complain of the subrogation." This reasoning applies with equal force to the junior incumbrancer in the present case, i. e. the bank. Unquestionably, Jefferson had a right, as against the bank, to agree with Tillman that, if the latter should pay off the Larned incumbrance, he should be secured, to the extent of the money advanced, by a lien superior to that held by the bank. Accordingly, the bank cannot complain if Tillman is accorded the benefit of his agreement with Jefferson for a first lien on the property, notwithstanding such agreement was not actually carried out in such manner as to effectuate the result in contemplation. No contract right of the bank will be disturbed or affected by giving this direction to the case, nor will the bank be deprived of any advantage save that resulting from the mistake of Tillman, which, under the circumstances, it would be unconscionable to assert. The bank cannot, as matter of right, insist that the present status of the parties remain unchanged. True, the senior incumbrance appears of record canceled. Yet a court of equity has power to annul the cancellation of this instrument. *Cobb v. Dyer*, 69 Me. 494. Or, in determining the merits of Tillman's claim that he is entitled to be subrogated to the rights incident to this prior incumbrance, it may, with-

out formal order annulling its cancellation, be considered as still in existence, to the end that his right to the remedy invoked may not be defeated by a circumstance which has no real bearing on this issue.

It is urged by the plaintiff in error that this remedy—the writ of injunction—is a harsh one, and should be granted only where absolutely demanded. But what other recourse is open to Tillman? The bank refuses to recognize that he is entitled to a lien superior to its mortgage, which it is proceeding to foreclose. If a sale of the property takes place thereunder, he will not be in a position to file a claim in a court of law to the proceeds realized from the sale, and the bank will thus be enabled to gain an undue advantage over him. The reply is made to this that he does not affirmatively show that he will suffer irreparable loss, as he holds other security for his claim, of a character apparently as good or better than the land itself. This argument, however, fails to fully meet the issue. Tillman undertakes to show that, as between himself and the bank, he is entitled to first be paid out of the land in question; and, if so, the mere fact that he holds other security will not defeat this right, or furnish any excuse for the bank to disregard the same. On the contrary, the bank may, and should, be restrained from seeking to gain an inequitable advantage over Tillman by an attempt to enforce its lien as the apparently senior, though in point of fact the junior, incumbrance upon the property. The present action has for its object merely the adjudication of the question whether or not the claim of Tillman should, in equity and good conscience, take precedence over the lien being asserted by the bank. Whether Jefferson is or is not insolvent can have no bearing upon this issue, which involves only the determination of the relative dignity of the two liens relied on, respectively, by Tillman and the bank. He is entitled, under the evidence submitted in support of his petition, to have his declared the superior of the two. If, after his rights have thus been established, it should appear that Jefferson is insolvent, and the proceeds realized from a sale of the land will be insufficient to discharge both claims against him, the bank might, in an appropriate equitable proceeding, compel Tillman to first exhaust the other security held by him before going upon the land to the bank's prejudice; but in no other event can the bank defeat the right of Tillman to assert the superiority of his demand against Jefferson, and subject the land to the extinguishment of the same.

Again, it is insisted that Tillman is not entitled to any relief, because, by the exercise of ordinary prudence, he could have discovered all the facts, and taken the necessary steps to protect himself. As above pointed out, however, the mistake made by him was one of fact, not of law, in suppos-

ing the papers taken by him as security constituted a first lien on the property. He had no actual knowledge of the bank's mortgage, though it is true he had constructive notice thereof, the same having been duly recorded. "To be sure, he might have learned the fact of the existence of [this lien], had he exercised the prudence of a man of business dealing with a stranger in relation to land," title to which was claimed by the latter. "But a searching of the record [was] not indispensable." *Cobb v. Dyer*, supra, citing *Grimes v. Kimball*, 3 Allen, 518, 522. The doctrine of constructive notice is resorted to from necessity, its object being to protect the rights of innocent third persons, and should never be applied in favor of parties not entitled to the protection it affords. See cases cited in note 1, pp. 791, 792, 16 Am. & Eng. Enc. Law, under the subhead, "When the Doctrine is Applied." Obviously, culpable neglect on the part of one seeking the aid of a court of equity never constitutes a valid defense to the action which his adversary can set up as matter of right. The attention of the court may very properly be called to the fact that the plaintiff is chargeable with an improvident omission to take care of himself; but the refusal of the court to lend him aid always proceeds upon the idea that it is under no duty to afford him relief against his own unpardonable blunders, and is never predicated upon the theory that the defendant has a right to excuse his own alleged wrongdoing upon any such ground. It follows that it must plainly appear that the person seeking the aid of the court has by his own culpable neglect forfeited all claim to its protection; and, if any doubt upon this score exists, it should be decided in his favor, rather than in that of the opposite party. So far as the present case is concerned, we cannot say, as matter of law, that Tillman's omission to avail himself of the opportunity afforded him by the public records to become informed of the bank's mortgage constituted such culpable neglect as to cut him off from the relief he seeks, to which, upon the substantial merits of the case, he apparently is entitled. Accordingly, we hold that, under the pleadings and the evidence upon which the trial judge based the judgment complained of, there was no error in granting an interlocutory injunction, the effect of which is merely to preserve the status until the final hearing of the case before a jury. Judgment affirmed. All the justices concurring, except LUMPKIN, P. J., and LITTLE, J., absent on account of sickness.

(105 Ga. 836)

AYERS v. CENTRAL OF GEORGIA RY. CO.

(Supreme Court of Georgia. Nov. 25, 1898.)

DIRECTING VERDICT.

The evidence introduced upon the trial of this case demanded a verdict for the defend-

ant. Consequently the court committed no error in directing a verdict in its favor.

(Syllabus by the Court.)

Error from superior court, Baldwin county; F. C. Foster, Judge pro hac.

Action by Holt Ayers against the Central of Georgia Railway Company. Judgment for defendant, and plaintiff brings error. Affirmed.

Roberts & Pottle, for plaintiff in error. Lawton & Cunningham and John T. Allen, for defendant in error.

PER CURIAM. Judgment affirmed.

LUMPKIN, P. J., absent on account of sickness.

(105 Ga. 867)

THORNTON v. PERRY.

(Supreme Court of Georgia. Nov. 25, 1898.)

DIRECTING VERDICT.

The court has no authority to direct a verdict, except where there is no conflict in the evidence, and where, with all reasonable deductions or inferences therefrom, a particular verdict is demanded. Civ. Code, § 5331. The evidence in this case does not bring it within the exception.

(Syllabus by the Court.)

Error from superior court, Terrell county; H. C. Sheffield, Judge.

Action between J. A. Thornton and J. B. Perry. From the judgment, Thornton brings error. Reversed.

O. B. Wooten, for plaintiff in error. J. H. Guerry and J. A. Laing, for defendant in error.

PER CURIAM. Judgment reversed.

LUMPKIN, P. J., and LITTLE, J., absent on account of sickness.

(106 Ga. 61)

ZORN v. HANNAH et al.

(Supreme Court of Georgia. Nov. 26, 1898.)

WAREHOUSEMAN—CONTRACT TO INSURE—NEW TRIAL—NEWLY-DISCOVERED EVIDENCE.

1. A mere statement in a warehouse receipt, "All cotton stored with us fully insured," will not alone constitute a contract between the parties, requiring the warehouseman to insure the cotton of his customer, and rendering him liable for the value of the same when destroyed by fire.

2. The evidence authorized the verdict. The alleged newly-discovered evidence was not of a character which ought to produce a different result, and there was no error in overruling the motion for a new trial.

(Syllabus by the Court.)

Error from superior court, Upson county; M. W. Beck, Judge.

Action by A. M. Zorn, for the use of H. D. Adams & Co., against G. W. Hannah & Co. Judgment for defendants, and plaintiff brings error. Affirmed.

S. N. Woodward, J. A. Cotten, and Worrill & Lester, for plaintiff in error. M. H. Sandwich and J. Y. Allen, for defendants in error.

OOBB, J. Zorn, suing for the use of Adams & Co., alleged that Hannah & Co. were indebted to him for the value of four bales of cotton stored with defendants as warehousemen, which were destroyed by fire by reason of the negligence of the defendants in placing certain cotton on the outside of their warehouse, near a railroad track. Attached to the declaration were copies of receipts given for such cotton, the first of which was dated November 22, 1893, and was as follows: "Iron Warehouse. G. W. T. Hannah & Co., Proprietors. Mark [4] No. [161]. Weight [450]. P. Marks [175]. Rec. from A. M. Zorn one bale of cotton, marks, numbers, brands, etc., as margin, subject to the presentation of this receipt only on paying customary expenses and all advances. All cotton stored with us fully insured, acts of Providence excepted. [Signed] W. D. McKenzie, for the Proprietors." An amendment to the declaration, in effect, alleged that the receipt stated a contract between the parties, under which the defendants were bound to insure the cotton so stored, and that by reason of the failure so to insure the plaintiff had been damaged to the amount of the value of the cotton. The case came to this court upon exceptions to the sustaining of a general demurrer to the declaration, and the judgment of the court below was reversed; it being then held that "the declaration, with or without the amendment, set forth a cause of action, and it was therefore error to dismiss the action on general demurrer." *Zorn v. Hannah*, 90 Ga. 634, 25 S. E. 820. Subsequently, when the case was called for trial, the defendants made a motion to strike so much of the amendment to the declaration as related to the insurance clause in the cotton receipts. This motion the court temporarily overruled, and, at the conclusion of plaintiff's evidence, sustained; and to this ruling the plaintiff excepted. There was a verdict for the defendants, and plaintiff moved for a new trial on the grounds that the verdict was contrary to law and the evidence; that the court erred in sustaining the motion to strike above referred to, and because of certain newly-discovered evidence, which was, in substance, as follows: On the day of the fire there was cotton stored on the platform on the east end of the warehouse of the defendants. There was cotton stored on the platform from the door on the south side of the warehouse, around to within a few feet of the door in the east end of the warehouse, which east door was about the center of the building. At the time of the burning of the warehouse there was stored inside of the warehouse about 200 pounds of loose lint cotton. The court overruled the motion for a new trial, and the movant excepted.

1. The effect of the ruling made in this

case when the same was here before was that, under the allegations in the original petition, there was a cause of action arising out of the failure on the part of the defendants to deliver to the plaintiff, upon demand, the property which had been stored with the defendants as warehousemen, and that, under the allegations in the amendment, there was a cause of action set forth, growing out of the negligent manner in which the warehousemen had lost the property of their customer. Whether the clause in the receipt, "All cotton stored with us fully insured," stated a contract between the plaintiff and the defendants, by which the latter undertook to insure the cotton, was not passed upon by this court. This question, however, is now before us for decision. The petition, as amended, alleged that, "under the contract set out in the receipts set out in the original declaration, the defendants agreed to fully insure the cotton so stored, which they failed to do." This part of the petition was stricken by the court, and the ruling striking the same is made the basis of one of the assignments of error. It is necessary, therefore, to determine whether the sentence quoted, standing alone, was sufficient to constitute a contract between the parties, requiring the defendants to insure the cotton of the plaintiff. A warehouseman has an insurable interest in the goods of his customer which are stored with him, and he may insure the same in his own name, and collect the full amount of the insurance; the balance, after paying all charges which he is entitled to collect, being held by him in trust for his customer. 28 Am. & Eng. Enc. Law, 670. As a general rule, however, a warehouseman is not, solely on account of the relation existing between him and his customer, bound to insure the goods stored with him; and the obligation to insure arises only when there is an express contract to that effect, or when there is an existing custom, which would become, under the principles of law, a part of every contract entered into between the warehouseman and his customers. *Hamilton v. Moore*, 94 Ga. 707, 19 S. E. 993. There is no allegation in the petition in the present case of the existence of a custom which would make the warehousemen liable for a failure to insure, the contention being that the warehouse receipt makes an express contract so to do. A warehouse receipt is ordinarily only evidence of a contract between the warehouseman and his customer that the former will, upon demand and payment of storage fees, return to the latter the property which has been stored with him. The paper containing the warehouse receipt may also contain additional stipulations, but such additional stipulations will not, in themselves, amount to a contract, unless it appear that the terms stated were agreed upon by the parties, and that there was sufficient consideration moving them to the same. The mere statement, "All cotton stored with us

fully insured," is not sufficient to constitute a contract to insure. These words may be misleading and productive of damage, but they are not sufficient to constitute a contract. If it had been alleged that there was in fact a contract to insure entered into between the plaintiff and the defendant in the case, and that the clause in the receipt was a mere memorandum, the case would be different. The allegation in the present case is that the words above quoted constitute a contract, not that the plaintiff was misled by them, and did not insure on account of such statement, and in consequence loss resulted to him from them as a false representation. We do not think that the words, in themselves, amount to a contract to insure; and hence there was no error in striking that part of the petition which alleged that the warehouse receipts alone contained a contract on the part of the defendants to insure the plaintiff's cotton.

2. After striking from the declaration all allegations setting up a special contract to insure, the declaration then stood as setting forth a cause of action growing out of a failure on the part of the warehousemen to exercise due care in preserving the property of the customer in their charge. There was evidence authorizing the jury to find that such care as the law required had been exercised. The alleged newly-discovered evidence seems to be cumulative, in its character, of evidence introduced on the trial; but even if this is not true, it is not of such a character as to authorize this court to control the discretion of the trial judge in overruling the motion for a new trial. Judgment affirmed. All the justices concurring, except LUMPKIN, P. J., absent on account of sickness.

(106 Ga. 65)

WILLINGHAM v. RICHARDSON.

(Supreme Court of Georgia. Nov. 26, 1898.)

HOMESTEAD—SALE—RIGHT TO PURCHASE—EXECUTION.

1. It was not essential to the validity of an order of court, regularly granted in 1886, authorizing the sale of land set apart as a homestead, that the judge should make provision for a confirmation of the sale.

2. Where such an order provided in express terms that the head of the family and his wife were thereby authorized and empowered to themselves effect a sale of the land, the mere fact that the order further directed that another person designated therein should receive the proceeds, and be charged with the reinvestment of the same in other property, to be held as a homestead in lieu of the land authorized to be so sold, would not raise any legal obstacle to the latter becoming the purchaser under a sale made in pursuance of the order of court.

3. The plaintiff in *fi. fa.* having successfully carried the burden of proof resting upon him, the trial judge properly refused to dismiss the levy at the close of the plaintiff's evidence; and, the claimant having signally failed to establish her claim to the property levied on, a

finding against her was the only logical result which could have been reached.

(Syllabus by the Court.)

Error from superior court, Henry county; M. W. Beck, Judge.

An execution in favor of A. L. Richardson was levied on property to which a claim was interposed by S. C. Willingham. There was a judgment for plaintiff in execution, and claimant brings error. Affirmed.

R. O. Lovett and J. B. Hutcheson, for plaintiff in error. R. T. Daniel, for defendant in error.

LEWIS, J. 1. In 1886 D. S. Willingham and wife (the latter and a minor child being then the sole surviving beneficiaries of the homestead) applied to the superior court for leave to sell the land and reinvest proceeds in other property. The court thereupon passed an order granting said application, the effect of which was to provide (1) "that the said Darius and S. C., his wife, have leave to sell said land at private sale, and they are empowered and authorized to convey to the purchaser a fee-simple title to said land"; (2) "that the proceeds of said sale be paid over to W. B. Willingham, the guardian ad litem of the minor beneficiary, who shall reinvest the same in other lands in said county for the like use and purpose as the land authorized to be sold is now held (that is, for a homestead for said Darius S. Willingham, for use of his wife and minor children), and that he make report of the sale and reinvestment to the clerk of Henry superior court, that the same may go on the Homestead Book of Record." The deed of December 20, 1889, above referred to, recited that it was made by virtue of the above order of court, and purported to have been executed in pursuance of a sale of the homestead property to W. B. Willingham for a consideration of \$3,000. When this deed was offered in evidence by the plaintiff in *fi. fa.*, it was objected to by claimant on the grounds (1) "that the same showed it was made under an order of the judge directing the sale of homestead property, and no order of court was shown confirming said sale;" (2) "that the same was made to the person appointed by the court to carry out the sale, and reinvestment of the proceeds."

As to the first point, viz. "confirmation of sale," the order does not provide for same. Nor is this order to be treated as void because of the omission to do so. Section 2847 of the Civil Code, under which it was granted, does not make "confirmation" a requisite to a valid sale of homestead property. On the contrary, it provides that the "judge shall have all the power of a chancellor to provide the means and mode of sale and reinvestment." While, therefore, it might in every case be highly expedient for the judge to provide for confirmation by the court, the statute leaves all such particulars to his discretion; and an order not requiring confirma-

tion would not be for that reason illegal and void. Indeed, the plaintiff in error appears to recognize that section 2847 does not require confirmation of sale. It is insisted by counsel in his brief, however, that the above-cited section is to be read in connection with section 3175, which provides that the judge, whenever granting any order to sell trust property, "shall require the trustee, within sixty days from the date of said order, to file and have recorded in the office of the clerk * * * a written report on oath of his actings and doings under such order," etc., to the end that the judge may then, in the event a sale has been consummated, pass an order confirming the same, if deemed advisable. This contention cannot, however, be considered, for the simple though abundant reason that the act from which section 3175 was codified was passed in 1887, long after the order now under consideration was granted. The judge granting same could not have anticipated the passage of this act, and framed his order accordingly, conceding this act has any bearing upon the sale of homestead property.

2. Dealing with the second exception raised: The plaintiff in error erroneously assumes that W. B. Willingham was "the person appointed by the court to carry out the sale," although it is true he was charged with "reinvestment of the proceeds." A casual reading of the order of court will disclose that D. S. Willingham and wife, the applicants for leave to sell, were themselves authorized and empowered to dispose of the homestead land at private sale, and that W. B. Willingham was not himself charged with the duty of conducting the sale, or authorized to exercise any supervision thereover. He was named as the person to receive the proceeds and reinvest the same in other land, and was bound to faithfully discharge this trust alone. The case is not similar to a trustee becoming the purchaser at his own sale, and it can scarcely be said that, under the order of court, W. B. Willingham was precluded from becoming the purchaser from D. S. Willingham and wife, who were empowered to conduct the sale.

3. In his second assignment of error, plaintiff in error excepts to the judgment of the court refusing to dismiss the levy on the ground that the land could not be sold as the property of W. B. Willingham, unless it was shown that he had title to it or was in possession of it "at the date of the making of the deed by said Willingham to secure the debt which the plaintiff was seeking to enforce"; claimant contending that the court should have taken notice that the plaintiff was seeking to avail himself of the remedy under sections 1969 and 1970 of the Code of 1882, and that the plaintiff in execution, under the law, was bound to show either title in the defendant, or possession in him, at the date of said security deed. So far as the evidence discloses, W. B. Willingham had no title to the

land when, on December 13, 1889, he executed the deed to secure the loan; for the deed to him from D. S. Willingham and wife was not made until December 20th of the same year. However, it is evident the plaintiff in *fi. fa.* was not relying on the security deed, or attempting to assert its lien on the land, but relied rather on the deed of December 20th made to defendant in *fi. fa.* by claimants, as showing title in W. B. Willingham on date of levy. Indeed, it was the claimant, not the plaintiff, who introduced the security deed. No attempt seems to have been made by the plaintiff in *fi. fa.* to get the benefit of the security deed by filing with the clerk of court a deed back to W. B. Willingham, and selling the land as his property thereunder, even if, under the form of the security deed, which was not drawn in conformity to the statute, this remedy could be pursued. It follows, therefore, that the court could not take "notice that the plaintiff was seeking to avail himself of the remedy under sections 1969 and 1970 of the Code of 1882," and therefore properly declined to dismiss the levy on the ground that it was not shown that W. B. Willingham had title to the land, or was in possession of it, "at the date of the making of the deed by said Willingham to secure the debt which the plaintiff was seeking to enforce."

The only remaining ground to be considered is that embodied in the third assignment in the bill of exceptions, alleging the court committed error in its final judgment finding the land subject, upon the ground that the sale to W. B. Willingham was void, "for the further reason that no part of the purchase money of the sale had been paid, and plaintiff did not stand in the place of innocent purchasers without notice." The only evidence upon this point was the testimony of W. B. Willingham, who swore, generally, "that he paid no part of the purchase money mentioned in the deed to him by D. S. Willingham on December 20, 1889," and "the fact that he had not paid anything for the deed made by D. S. Willingham was known to W. A. Brown at the time said Brown took the application for the loan, and when the money was applied to the debts of D. S. Willingham." It appears that Brown was the agent of Rowan, the lender, from whom the plaintiff in *fi. fa.* purchased the loan notes without recourse, and in like manner obtained an assignment of the security deed. Conceding, then, that the original lender did not part with his money on the faith of the recital in the deed to W. B. Willingham that the homestead property was sold to him for a consideration of \$3,000, are both D. S. Willingham and his wife estopped from setting up, as against the lender's assignee, that the deed was really without consideration? Plaintiff in error contends they are not. We are inclined to think the doctrine of estoppel would apply in such a case. It is true, the law does not make conclusive upon the grantor the recital

of a consideration in a deed, but, notwithstanding such recital, will allow parol proof to show that in point of fact the consideration has never been paid. Yet it cannot be doubted, as a general rule, the grantee cannot set up such a plea, and claim on that account that no title passed to him, as against one who occupies the position of an innocent purchaser, as does the lender's assignee, so far as the record discloses in this case. The only reason that can be urged why this rule would not apply here is the fact that this was homestead property. While the sale of homestead property, without authority of the court, is absolutely void, and no recitals in a deed by the beneficiaries would amount to an estoppel against them in an action to rescind such an unlawful conveyance, or to recover back the property, yet in this case this disability of the husband and wife was removed by the order of court. While that order required the sale to be for cash, yet these parties being *sui juris*, acting under the power delegated to them by the court, and the recitals of their deed showing upon its face that the order of the court had been fully complied with, we see no reason why the doctrine of estoppel should not apply to them, as against the rights of an innocent purchaser, who had the right to rely upon the truth of the recitals contained in the deed under which he holds. But conceding, in this case, that the contention of plaintiff in error on this point is correct, the question then arises whether there was proof demanding a finding that the deed was a voluntary conveyance, without consideration, and therefore of no legal effect. The deed itself was introduced in evidence, and recited a sale to W. B. Willingham, for a valuable consideration, under and by virtue of an order of court. If he actually agreed to become the purchaser at \$3,000, and procured the deed to be executed on this understanding, its validity would not be affected by the fact that he actually paid no part of the purchase money over to D. S. Willingham and wife. They were not authorized by the order of court to receive from the purchaser the proceeds of sale; so if he, in his individual capacity, purchased the property, undertaking to pay himself, as trustee, the price, he would be bound to comply with his purchase, and the deed would not be a purely voluntary conveyance, without consideration, notwithstanding the purchase money was not actually treated by him as being in his hands as trustee, and in the latter capacity he did not discharge his duty to reinvest the same. There is not a word in the evidence going to show that he did not, as the deed recites, become the purchaser from D. S. Willingham and wife, or that no sale to him actually took place, and the deed was a sham. His denial of the recitals in the deed goes no further than to assert, in effect, that he paid over to D. S. Willingham and wife no part of the \$3,000 which he was to pay, and for which he would be liable to account to them as trustee,

if the intent of the parties was that the sale was to be for cash under the order of court, and he, as trustee, acknowledged receipt of the \$3,000 which he, in his individual capacity, had agreed to pay. If D. S. Willingham and wife were authorized by the court's order to sell to W. B. Willingham, but not to collect the proceeds, and in good faith accepted his offer to purchase, it would not be necessary to the validity of the sale that he should go through the formality of taking the \$3,000 out of his pocket, and, in his individual capacity, paying it over to himself as trustee. If a sale actually took place,—and this is not denied,—the deed would not be void because without consideration, notwithstanding the fact that, as trustee, W. B. Willingham did not reinvest the proceeds as it was his legal duty to do; but it would follow that D. S. Willingham and wife could hold him to his trade as an individual, treat the purchase money as coming into his hands as trustee, and call him to account in that capacity. Under the very loose and equivocal statements of W. B. Willingham in regard to the transaction, it would be going a great length to say that the trial judge, who stood in the place of a jury, was bound to find that the deed of December 20, 1889, was a voluntary conveyance, notwithstanding its recitals of a valid sale, and therefore did not pass title into W. B. Willingham in his character as an individual. It was shown by the plaintiff that W. B. Willingham was in possession of the land, presumably under this very deed, when the levy was made; and while W. B. testifies explicitly that he was not in possession in 1889, when the loan was made, he nowhere undertakes to deny that when the levy was made, or ever since 1890, he has not been in possession claiming as owner under the deed in question, which has been duly recorded, and thus published to the world. We, therefore, conclude that the plaintiff in *fi. fa.* successfully carried the burden of proof resting upon him, and that the claimant failed to establish her claim to the property levied on, and that the judgment of the court, finding the property subject, was the only logical result that could have been reached. Judgment affirmed. All the justices concurring, except LUMPKIN, P. J., absent on account of sickness.

(106 Ga. 97)

CASTELLAW v. BLANCHARD et al.

(Supreme Court of Georgia. Nov. 26, 1898.)

BILL OF EXCEPTIONS—CERTIFICATION—ASSIGNMENT OF ERRORS—NEW TRIAL—BRIEF OF EVIDENCE—AFFIDAVIT—AUTHENTICATION.

1. When rulings made during a term of court which continues longer than 30 days are complained of, and no exceptions *pendente lite* are filed during the term, the final bill of exceptions must be certified within 60 days from the date of the decision complained of, and not later than 30 days from the adjournment of the court.

2. Where error is assigned upon a ruling of the judge requiring the movant in a motion for a new trial to eliminate certain portions of the evidence contained in the brief of evidence, it must, in order to render such assignment good, be made clearly to appear that the evidence required to be eliminated was material to a proper determination of some ground of the motion for a new trial.

3. The word "trial," as used in Civ. Code, § 5484, which prescribes the time in which motions for new trials shall be filed, is used in its restricted sense, meaning an examination of the matter of fact in issue, and hence such trial ends with the verdict in the case.

4. Where the affidavit filed for the purpose of relieving the plaintiff in error and his counsel from the payment of costs in this court appears to have been executed before an official of another state, and there is no authentication of the official character of such officer, the affidavit will be disregarded, and the plaintiff in error will be required to pay the costs in this court as a condition precedent to a decision of the case.

(Syllabus by the Court.)

Error from superior court, Muscogee county; W. B. Butt, Judge.

Action by W. R. Blanchard, administrator of F. M. Castellaw, and others, against C. B. Rouse. From the decree in the case, B. T. Castellaw brings error. Affirmed.

G. E. Thomas, Jr., and Blandford & Grimes, for plaintiff in error. J. H. Worrill, L. F. Garrard, Reese, Crawford, McNeill & Levy, and C. J. Thornton, for defendants in error.

COBB, J. At the May term, 1898, of the superior court of Muscogee county, the case of Blanchard, administrator of F. M. Castellaw, against C. B. Rouse and others, was heard and determined. On May 11th, counsel for C. B. Rouse demurred orally to certain parts of the answer and cross petition of B. T. Castellaw. The court sustained the demurrer. Certain issues of fact were then submitted to a jury, and on May 12th a verdict was returned finding the issues submitted against the contention of B. T. Castellaw. Counsel for the administrator of F. M. Castellaw having filed an amended petition setting forth his account with the estate, and asking therein for extra compensation for himself as administrator, it was agreed that this application should be heard and determined by the court without a jury at such time during the term as the court should appoint. On May 19th B. T. Castellaw filed exceptions to the final decree which was proposed to be taken upon the verdict above referred to, and also objections to the claim for extra compensation. The hearing of these exceptions and objections was postponed until June 16th, when the court, after hearing the evidence on the application for extra compensation, refused to allow the same, but did allow the administrator \$100 as attorney's fees. A final decree in the case was entered on the same day. On that day the defendant B. T. Castellaw made a motion for a new trial, and the hearing of this motion was continued from time to time until the 19th day of August. The brief of evidence presented at the hearing of the motion for a new trial contained not

only the evidence introduced upon the trial before the jury, but also that introduced before the judge upon the application for extra compensation. Counsel for Rouse objected to the court's approving the brief of evidence thus presented, and the objection was sustained; the court requiring that the two briefs should be separated, and the one containing the evidence adduced on the trial before the jury should be filed as the brief of evidence with the motion for a new trial. After the motion for a new trial had been amended, and the grounds verified by the judge, and the brief of evidence filed and approved, counsel for C. B. Rouse moved to dismiss the motion upon the ground that the same was not "filed within thirty days from the trial." It appears that the term at which the case was disposed of continued longer than 30 days, and finally adjourned on June 27, 1898. The court sustained the motion. No exceptions *pendente lite* were filed to any of the rulings above referred to. On August 20th a final bill of exceptions was certified by the presiding judge, in which are the following assignments of error: (1) The court erred in the ruling made on May 11th, in sustaining the demurrer of C. B. Rouse; (2) the court erred in not ruling specifically on the exceptions filed by B. T. Castellaw to the proposed final decree when the matter of extra compensation was decided, on June 16th; (3) the court erred in sustaining the objections to the brief of evidence, and requiring counsel for B. T. Castellaw to separate that portion of the brief of testimony submitted to the court on May 19th and June 16th from the brief of testimony submitted to the jury on May 12th; (4) the court erred in sustaining the motion to dismiss the motion for a new trial on August 19th.

1. The assignment of error on the decision sustaining the demurrer of C. B. Rouse cannot be considered, as the bill of exceptions complaining of this ruling was not tendered or certified either within 60 days from the decision complained of, or within 30 days of the adjournment of the term at which the decision was rendered. This is also true of the two assignments of error relating to the exceptions filed to the proposed final decree. Civ. Code, § 5539.

2. It not being made to appear that that part of the brief of evidence which contained the testimony introduced before the judge on the question of allowing the administrator extra compensation was in any way material to a proper determination of the motion for a new trial, there was no error in requiring counsel for movant to eliminate such testimony from the brief before the same was approved by the court.

3. Was the court right in dismissing the motion for a new trial because not filed in due time? An answer to this question requires us to determine what is meant by the word "trial," as used in Civ. Code, § 5484, which declares that: "All applications for a new trial, except in extraordinary cases, must be

made during the term at which the trial was had; and when the term continues longer than thirty days, the application shall be filed within thirty days from the trial, together with a brief of evidence, subject to the approval of the judge, and subject to the right of amendment allowed in applications for a new trial; but all applications herein provided for may be heard, determined, and returned in vacation." Is the word "trial" there used in its broad and comprehensive sense ("the investigation and decision of a matter in issue between parties before a competent tribunal, including all the steps taken in the case from submission to the jury to the rendition of judgment"), or is the word there used in its restricted sense ("the investigation of the matter of fact in issue")? And. Law Dict. tit. "Trial." In our opinion, the word as used in that section is to be given only its restricted meaning; that is, the sense in which it is used by Sir William Blackstone when he says: "Trial, then, is the examination of the matter of fact in issue, of which there are many different species, according to the difference of the subject, or thing to be tried." 3 Bl. Comm. 33. This was evidently understood by this court to be the meaning of the word when the case of *King v. Sears*, 91 Ga. 577, 18 S. E. 830, was decided. While there is no direct ruling on the point in that case, in determining whether the motion for a new trial had been filed in due time the number of days was computed from the date of the verdict, and it does not appear in the statement of facts that any judgment had ever been rendered. When it is kept in mind that the section under consideration is dealing solely with the subject of motions for new trials, and that that is the peculiar and appropriate remedy to be resorted to when the losing party desires to have the facts of the case re-examined, it seems to be clear that the word "trial" is used in the restricted sense above referred to. A new trial has been defined to be a "re-examination of an issue of fact in the same court, after a trial and decision by a jury, court, or referee." And. Law Dict. tit. "Trial," subhead, "New Trial." See, also, 3 Bl. Comm. 387; Steph. Pl. 94-96. The motion for a new trial not having been filed within 30 days from the date of the verdict, the court did not err in dismissing the same on motion.

4. When the case was called in this court, the clerk, as was his duty under the rules, called the attention of the court to the fact that the pauper affidavit filed for the purpose of relieving the plaintiff in error from the payment of costs was signed in the state of South Carolina before a person describing himself as the clerk of the common pleas court of Edgefield county, S. C., and that there was no authentication of his official character. That such an affidavit could not be received seems

to be well settled by the decisions of this court. In *Behn v. Young*, 21 Ga. 207, it was held that "an affidavit administered in Florida to a bill for an injunction will not be noticed here without authentication." McDonald, J., in the opinion, says: "The official character of the person administering the oath is not authenticated. It cannot be recognized here without." In *Charles v. Foster*, 56 Ga. 612, it was held that a "claim affidavit and bond, purporting to be executed in another state before a notary public thereof, cannot be received by a levying officer in this state without due authentication." Judge Bleckley, in the opinion, says: "Under the act of congress, even the judicial proceedings of the court itself could not be authenticated thereby, without a further certificate from the judge, chief justice, or presiding magistrate that the clerk's attestation was in due form. If the letter of the act of congress does not apply to the case before us, its spirit does, as there is certainly no reason for holding the clerk competent, by his mere certificate and seal, to impart authenticity to the act of the notary, when by like means he could not impart authenticity to the proceedings of the very court which he serves as clerk." See, also, *McAllister v. Manufacturing Co.*, 64 Ga. 622. The official character of the person attesting the affidavit in the present case not having been properly authenticated, the affidavit cannot be received. It was contended, however, that after the record reached this court a proper affidavit had been filed in the office of the clerk of this court, and that accompanying the same was a good and sufficient reason why the original affidavit was not properly verified. The reason given was that the plaintiff in error was called from his home in this state to South Carolina by the illness of his wife, and that he executed the second affidavit, which is now on file here, as soon as he returned home from South Carolina. While the illness of his wife is such providential cause as to have justified him in leaving the state to attend her, we do not see how this prevented him, while in South Carolina, from having the affidavit administered in that state duly authenticated. Even if in any case an affidavit which is filed in the office of the clerk below after the record reaches this court could be considered, we do not think there is anything in the present case which requires that it should be done. Counsel for plaintiff in error was, by express permission of the court, allowed to argue the case subject to its decision on the sufficiency of the pauper affidavit to relieve him from the payment of costs. He was notified that the affidavit would be held to be insufficient, and the costs have been paid. Judgment affirmed. All the justices concurring, except LUMPKIN, P. J., and LITTLE, J., absent on account of sickness.

(106 Ga. 77)

PAGE et al. v. DODSON PRINTERS' SUPPLY CO. et al.

(Supreme Court of Georgia. Nov. 26, 1898.)

DEPOSITION—INFORMALITIES IN COMMISSION—EVIDENCE—SALE—INSPECTION OF GOODS.

1. The failure of the commissioners to insert their names in a blank commission to examine a witness does not render the execution of the commission invalid, if it appears in the return who the commissioners were.

2. There was no error in the ruling complained of as to the admissibility of evidence. The charges complained of, when taken in connection with the entire charge, were not erroneous. The evidence, though conflicting, was amply sufficient to authorize the verdict, and there was no error in overruling the motion for a new trial.

(Syllabus by the Court.)

Error from superior court, Muscogee county; W. B. Butt, Judge.

Action by Dodson Printers' Supply Company against R. W. Page & Co. To a cross petition Henry Barth was made defendant. Judgment for plaintiff on original petition and for Barth on cross petition. Defendants bring error. Affirmed.

C. J. Thornton, E. A. Thornton, and J. H. Worrill, for plaintiffs in error. W. A. Wimblish and E. D. Burts, for defendants in error.

COBB, J. On September 25, 1897, the Dodson Printers' Supply Company brought its petition to the superior court of Muscogee county against R. W. Page & Co., alleging, in substance, that on December 10, 1896, it leased to the defendants, for a term of 2½ years, two Thorn Type-Setting Machines, for \$300 per annum each, for which defendants, besides making a cash payment of \$200, gave promissory notes to the plaintiff for \$200 each, payable, respectively, April 10, August 10, and December 10, 1897; April 10, August 10, and December 10, 1898; and April 10, 1899, —all of which notes, except the first, had been transferred to the American Type-Founders' Company, Branch D, and by it to Henry Barth, who had brought suit in the city court of Columbus upon the note due August 10, 1897, which the defendants had refused to pay; that the defendants had violated certain stipulations of the contract of lease, requiring them to operate the machines and maintain them in good operative condition and repair, and have them cared for by a competent person; and that they were about to remove the machines from their place of business. The plaintiff prayed for an injunction to restrain the defendants from removing the machines, and for damages on account of the alleged breach of contract. The defendants filed an answer in the nature of a cross petition, in which they set up that they were induced to enter into the contract by reason of representations on the part of the plaintiff, upon which they relied, to the effect that the machines were in perfect condition, easily managed, and would consume but a

small amount of type, which representations were false and fraudulent, and that they were thereby damaged to the extent of \$1,000, which they asked to recoup. They averred that the transfers of the notes were fictitious, and made with the intention on the part of the plaintiff and the transferees of barring the defendants from setting up a legal defense to the notes. They prayed that the suit in the city court be enjoined, that the notes be declared void, and for general relief. Barth, who was made a party defendant to the cross petition, answered that he obtained the notes in good faith and for value, before maturity, and he prayed judgment in his favor against the defendants for the amount due thereon. Upon the trial the evidence was conflicting upon nearly all of the material issues in the case. There was evidence which tended to establish that the negotiations which finally resulted in the contract sued on began in August or September, 1896, and continued for several months; that R. W. Page, of the firm of R. W. Page & Co., about November 20, 1896, saw the machines in operation once or twice in Atlanta, and was given ample opportunity, both as to time and otherwise, to satisfy himself as to the character of the machines and as to the representations made, if any had been made; that the machines arrived in Columbus about November 26th, and were placed in position in the office of Page & Co., and not until the lapse of 10 or 12 days, during which time the machines were in operation in the office of Page & Co., under their immediate supervision and subject to inspection by them, was the contract sued on finally executed. The contract bears date December 10, 1897. The evidence as to when Page first expressed dissatisfaction with the machines is conflicting. Page & Co. contended that they expressed their dissatisfaction about January, 1897, and plaintiffs contended that the dissatisfaction was not expressed to them until about June 7, 1897. The evidence showed that the note due April 10th was paid. R. W. Page testified: "I have ceased to use the machines, because I could not get the results out of them at all. I notified Mr. Johnson, if I remember correctly, on the 10th day of June, 1897. I had paid for the time I used them, to June 10th. I offered to Mr. Johnson the machines, asked him where they wanted them, and went to Atlanta. Johnson was out of the city. A Mr. Hill, one of their office men, said Mr. Johnson was the machine man, and would make everything all right. I told him I was willing to do what was right, but that I could not use the machines. * * * I made a cash payment that carried us to April 10th, and made another in April, and another in May, and another in June, and stopped, when I had paid up to the time I used one [machine], up to the 10th July, and the other one had gotten so bad I quit using it two or three weeks before." There was evidence authorizing the jury to find that the ma-

chines had been unnecessarily damaged by the way in which Page & Co. had used them, and that to put them in proper repair would involve an expense of several hundred dollars. The jury returned a verdict in favor of Barth for \$600, with interest, the amount of three of the notes held by him, and in favor of the Dodson Printers' Supply Company for \$75, "damages on machines." Page & Co. moved for a new trial, which was overruled, and they excepted.

1. Several witnesses were examined in behalf of the plaintiffs by interrogatories executed under a commission. Objection was made to the reading of the answers of these witnesses, on the ground that "no commissioners were named in the commission to take the interrogatories, or as having taken them." In the case of *Jordan v. Rivers*, 20 Ga. 108, a similar question was involved, and Judge Benning in his opinion uses this language: "We think, then, that the insertion of the commissioners' names in the blank in the commission annexed to interrogatories is not indispensable to the validity of an execution of the commission. The only object there can be for such insertion is that of informing the court who it is that have executed its commission. And this is an object which may be accomplished in other ways; as by a statement or indication in the caption of the return, or in the conclusion and signatures of the return." In the absence of a statement to the contrary in the motion for a new trial, it will be presumed that the return indicates the names of the commissioners who actually executed the commission, either by having them set out in the caption or by their signatures to the return. There was no error in allowing the answers to the interrogatories to be read.

2. The motion for a new trial contains numerous exceptions, some referring to the admission of evidence and others to the charge of the judge. None of the alleged errors are, in our opinion, sufficient to require the granting of a new trial. When those parts of the charge which are the subject of exception are read in connection with the entire charge, there does not seem to be any material error. In fact, taking the charge as a whole, the case was fairly submitted to the jury on all of the material issues involved. There was ample evidence to sustain the verdict. The jury were warranted in finding that Page & Co. had, before the making of the contract, ample opportunity to inspect, and did in fact inspect, the machines, and knew of, or could by the exercise of ordinary diligence have discovered, the defects of which they afterwards complained; and that notwithstanding this they executed the contract, and made payments thereunder; and that even if it was true that they did not discover until after the execution of the contract that a fraud had been perpetrated upon them, if any had in fact been perpetrated, they did not upon such discovery make prompt offer to rescind, but,

on the other hand, made payments under the contract. If these things were true, a verdict against Page & Co. was a necessary result, under the issues made in the case. See *American Car Co. v. Atlanta Street Ry. Co.*, 100 Ga. 254, 28 S. E. 40, and cases cited; *Lunsford v. Malsby*, 101 Ga. 39, 28 S. E. 496. Judgment affirmed. All the justices concurring, except LUMPKIN, P. J., and LITTLE, J., absent on account of sickness.

(106 Ga. 81)

STANDBACK v. THORNTON.

(Supreme Court of Georgia. Nov. 26, 1898.)

MORTGAGES—FORECLOSURE—PURCHASE BY MORTGAGEE—BOND FOR TITLE—PROOF OF EXECUTION.

1. While a mortgagee cannot himself become the purchaser at a sale of the mortgaged property had under the execution of a power contained in the instrument, unless the mortgage expressly authorizes him to do so, a purchase by him at a sale, made fairly and without fraud, is not void, but only voidable, at the election of the mortgagor to redeem at any time before final judgment of eviction.

2. When the subscribing witnesses to an instrument in writing are dead, or inaccessible, proof of the actual signing by the alleged maker is primary evidence of the fact of execution. In such cases, it is not necessary that the proof shall be made by the maker himself, nor that the maker be accounted for, before testimony of other witnesses who know the facts shall be admitted.

(Syllabus by the Court.)

Error from superior court, Talbot county; W. B. Butt, Judge.

Action by S. W. Thornton against Madison Standback. Judgment for plaintiff, and defendant brings error. Reversed.

Persons, McGehee & Persons, for plaintiff in error. J. J. Bull and A. J. Perryman, for defendant in error.

COBB, J. S. W. Thornton brought an action against Tom Standback for the recovery of 80 acres of land. Madison Standback was, upon his own motion, made a party defendant, and claimed title to an undivided one-half interest in the land in dispute. At the trial the plaintiff introduced in evidence a mortgage from Tom Standback to S. W. Thornton & Son, covering the land in dispute, dated February 15, 1896. The mortgage gave authority to the mortgagees, upon default in payment, to sell the land at public outcry, after advertising the same for four weeks in a newspaper, the proceeds to be applied, first, to the payment of the mortgage debt and costs, and the remainder, if any, to be paid to Tom Standback. Plaintiff then introduced a deed from S. W. Thornton & Son, dated February 13, 1897, conveying the land to Mahone, in consideration of \$25, and also a deed from Mahone to plaintiff, dated February 13, 1897, conveying the land upon a consideration of \$30. He also introduced newspapers showing advertisement in pursuance of the power of sale contained in the mortgage. The plaintiff testified that he was

a member of the firm of S. W. Thornton & Son, and that Mahone clerked in their store, and attended the sale, and purchased the land as the agent of witness. Defendant moved a nonsuit, on the ground that Thornton having purchased the land at a sale had by the firm of which he was a member, and there being no authority in the mortgage for him to become a bidder and purchaser, the sale was void. This motion was overruled, and the defendant excepted. Madison Standback testified that he and Tom Standback had been in possession of the land in dispute since the execution of a certain bond for title to the land. This bond was from one McCord to Madison and Tom Standback, and was dated February 18, 1869, and attested by Terrell Barksdale and William E. Harvey. The purchase money was paid half and half by the defendants. Tom Standback had been keeping witness' part of the land as his tenant for 16 years, witness living in another county. Tom Standback is his brother, and had agreed to pay rent, but had never done so. The amount of the rent was not agreed on, nor when it was to be paid. Barksdale, one of the witnesses to the bond for titles, was dead, and Harvey, the other witness, was somewhere in Texas. Witness did not know what had become of McCord, the obligor in the bond. Witness had not told any one that Tom Standback was his tenant, and witness had not returned the land for taxes. The defendant then offered in evidence the bond for titles referred to, and the plaintiff objected, on the ground that there had been no proof of execution. The defendant then introduced Tom Standback as a witness, and offered to prove by him that he saw McCord sign the bond for titles. The court ruled that the witness could not testify to the execution of the bond by McCord, and to this ruling the defendant excepted. A verdict was rendered for the plaintiff, and judgment was entered in accordance with the same.

1. There was no error in overruling the motion for a nonsuit. While the general rule is that no trustee can purchase trust property at his own sale, and therefore a mortgagee cannot purchase property at a sale which is held under an execution of the power authorizing such sale, unless the mortgagee expressly authorized him to become a bidder and purchaser at the sale, still an unauthorized purchase by the mortgagee will not render the sale void, but only voidable, at the instance of the mortgagor, who has a right to elect to set aside the sale, provided he offer to redeem at the time that he so elect. If the sale has been made fairly and without fraud, it will pass title to the mortgagee as purchaser, unless the mortgagor offer to redeem by paying the debt secured by the mortgage before judgment of eviction is rendered against him. *Palmer v. Young*, 96 Ga. 246, 22 S. E. 928; *Banking Co. v. Haas*, 100 Ga. 111, 27 S. E. 980. The defendant not having offered to redeem the property before suit was filed, and not offering to do so in his pleadings or in his

motion for a nonsuit, there was no error in refusing a nonsuit on the ground upon which the motion was predicated.

2. We think the court erred in not allowing the witness Tom Standback to testify that he saw McCord sign the bond for titles. The witnesses to the bond were accounted for. One was dead and the other inaccessible. In such cases, any competent evidence going to show that the paper was actually executed is sufficient. The rule applicable to such cases is stated in section 5245 of the Civil Code, which is as follows: "Whenever the subscribing witnesses to an instrument in writing are dead, insane, incompetent, or inaccessible, or, being produced, do not recollect the transaction, then proof of the actual signing by, or of the handwriting of, the alleged maker shall be received as primary evidence of the fact of execution; and if such evidence be not attainable, the court may admit evidence of the handwriting of the subscribing witnesses, or other secondary evidence, to establish such fact of execution." See, also, *McVicker v. Conkle*, 96 Ga. 584, 24 S. E. 23; *Kelly v. Saddlery Co.*, 99 Ga. 393, 27 S. E. 741. *Buchanan v. Grocery Co. (Ga.)* 31 S. E. 105. While it is true that since the act of 1895, now embraced in section 5244 of the Civil Code, proof by subscribing witnesses may be dispensed with if the party executing the written instrument testifies to its execution, still it is not necessary, where the witnesses are dead or inaccessible, that the party executing the instrument shall be called as a witness, or that his absence be accounted for, before other proof of actual execution by him or of his handwriting is admissible. Judgment reversed. All the justices concurring, except LUMPKIN, P. J., and LITTLE, J., absent on account of sickness.

(106 Ga. 73)

BEACH v. AVERETT.

(Supreme Court of Georgia. Nov. 26, 1898.)

DISTRESS WARRANT—VALIDITY—AMENDMENT OF AFFIDAVIT.

1. The fact that a jurat is not attached to an affidavit in a distress warrant for rent is an amendable defect, and does not render the warrant issued thereon void, when it appears that the oath was actually taken before the magistrate issuing the warrant.

2. The warrant was not void because the same was made returnable to "the next term of the court," without designating what particular court, especially when the magistrate issuing the warrant has jurisdiction to try any issue that may be made thereon by the defendant.

(Syllabus by the Court.)

Error from superior court, Talbot county; George F. Gober, Judge.

Action by J. H. Averett against Burrill Beach. Judgment for plaintiff. Defendant brings error. Affirmed.

J. J. Bull, for plaintiff in error. Persons, McGehee & Persons, for defendant in error.

LEWIS, J. 1. It appears from the record in the present case that the oath upon which the justice's warrant for rent issued was in writing, and was in the usual form of an affidavit for rent due by a tenant to his landlord. The writing itself recites that the affiant appeared before the magistrate, the name of the magistrate and his official designation being given. This written oath was signed by the affiant, who was the plaintiff below, but there was an absence of the officer's signature to the certificate that it was sworn to and subscribed before him. Following the affidavit was the distress warrant for rent, which recited on its face that the affiant made affidavit before the officer whose signature is attached to the warrant and whose name appears in the body of the written oath. The question before us for decision is whether or not the absence of the jurat from such oath renders the entire proceeding absolutely void. To constitute a complete affidavit, three essential features are requisite: First, the written oath embodying the facts sworn to by the affiant; second, the signature of the affiant thereto; and, third, the jurat or attestation, by an officer authorized to administer the oath, that the affidavit was actually sworn to and subscribed before him by the affiant. We think it is a matter of some significance in this case that, under section 4818 of the Civil Code, the justice may issue "a distress warrant for the sum claimed to be due, on the oath of the principal, his agent or attorney, in writing." The word "affidavit" is not used in this section, nor is there any special requirement that this written oath should be attested by the officer before whom it was taken. In *Hyde v. Adams*, 80 Ala. 111, it was held that, "if an affidavit for an attachment is in fact made before the officer who issues the writ, it is not necessary that it shall be signed or certified by him; and a plea in abatement, 'because it was not signed by the clerk,' presents an immaterial issue." In the opinion delivered in that case by Clopton, J. (pages 112, 113), it will be seen that this decision of the court was based upon a statute of the state which required the oath to be reduced to writing, and subscribed by the party, but was silent as to certification by the officer. But it is not necessary to base our decision in this case upon a like omission in the Georgia statute. Even construing the term "oath * * * in writing" in the section of the Code above cited as meaning a formal affidavit, we do not think the absence of the officer's signature from the affidavit necessarily renders the proceeding absolutely void. The object of such a certificate is to furnish written evidence that the oath was actually taken by the affiant. It is not to be presumed, therefore, that the oath was actually administered without such proof appearing upon the face of the papers. It does not follow, however, that this is the only possible proof that is admissible upon the subject. In the case of *Borough of Pottsville v. Curry*, 82 Pa. St. 443, it was held: "An appeal from an award of ar-

bitrators is not vitiated by an omission of the prothonotary to attest the jurat, if the record show that the affidavit was in fact made." Strong, J., in his opinion in that case, on page 444, says: "It [the jurat] affords evidence that the oath was taken, but it is not the only possible evidence. When, therefore, the paper filed, being in form an affidavit, was found without an attestation, it was competent for the appellant to show by other evidence that the oath was made." In *Cook v. Jenkins*, 30 Iowa, 452, it was ruled: "Proceedings in attachment cannot be successfully attacked on the ground that the jurat to the affidavit is not signed by the officer administering the oath, if it be shown that the affidavit was, in fact, sworn to before him." It will thus be seen from authority that, even where an affidavit constitutes the basis of a proceeding in court, and is essential to the validity of its processes, it is not indispensable that the jurat should be signed by the officer who administered the oath, the material question being whether or not the oath was actually administered and taken; and, in the absence of the officer's certificate to this effect, allunde testimony may be received to establish this material fact. In accord with this principle is the decision of this court in *Veal v. Perkerson*, 47 Ga. 92, where there was a failure of the officer to sign the jurat to an affidavit, and it was ruled that the judge committed no error in permitting the magistrate to sign the jurat nunc pro tunc, as he had other evidence before him that the oath had been actually administered. In *Smith v. Walker*, 93 Ga. 252, 18 S. E. 830, it is decided that, the jurat being no part of the affidavit, a general demurrer to its sufficiency will not reach a defect in the jurat, such as failure to add to the name of the person who administered the oath his official designation. This was an affidavit of illegality to an execution. Especially will this rule not be relaxed in Georgia, on account of the liberality allowed by the statute to litigants amending their pleadings, extending not only to ordinary petitions, answers, and pleas in court, but also to affidavits which constitute the foundation of summary process. Civ. Code, § 5122. The better practice would be to require the magistrate, after proof of due administration of the oath, to attach his certificate to the jurat nunc pro tunc. We do not believe, however, that this is absolutely indispensable to the legality of the proceeding, and will not reverse the judgment below because no such motion was made by plaintiff in the distress warrant, no point being made thereon in the argument of the case here.

2. We find nothing in the statute which requires the officer issuing the distress warrant to make it returnable in the body of the warrant to any particular court. The law imposes upon the officer executing the warrant the duty of returning it to the proper court, but imposes no obligation upon the justice issuing it to embody this mandate in the warrant itself. But, even if it did, we think the

following words in the warrant before us sufficient to meet such requirement: "And have you the said sums of money, together with this warrant, before the next justice's court to be held on the second Saturday in January, 1896, to render to the said Averett." The justice who issued the warrant having jurisdiction of the sum involved, a fair interpretation of these words is that his intention was to make the paper returnable to his court. Judgment affirmed. All the justices concurring, except LUMPKIN, P. J., and LITTLE, J., absent on account of sickness.

(106 Ga. 102)

PINKSTON v. HARRELL et al.

(Supreme Court of Georgia. Nov. 26, 1898.)

EXECUTION SALE—ENTRY OF BID—AFFIDAVIT OF ILLEGALITY.

1. A purchaser at a judicial sale must comply with his bid, whether the property offered for sale is the property of the defendant in execution or not. It follows, therefore, that, where such purchaser is the plaintiff in execution, the sheriff will, upon a proper proceeding by the defendant in execution, be compelled to enter the amount of the bid as a credit upon the execution.

2. It is settled law of this state that an affidavit of illegality is not a remedy for an excessive levy.

(Syllabus by the Court.)

Error from superior court, Quitman county; H. C. Sheffield, Judge.

Action by J. G. Pinkston against J. M. Harrell and others. Judgment for defendants, and plaintiff brings error. Reversed.

Hickey & Fort, for plaintiff in error. W. C. Worrill, for defendants in error.

COBB, J. Pinkston brought his petition against Guilford, sheriff, Harrell, former sheriff, and C. G. Mercer, alleging that J. W. Mercer had obtained a judgment against him for \$400 principal, with interest from February 21, 1890, at 7 per cent. per annum, and that the execution issued on such judgment was controlled by C. G. Mercer; that Harrell, as sheriff, had levied such execution upon an undivided one-half interest in lot of land 128, in the Eighth district of Quitman county, and that the same was sold to C. G. Mercer for the sum of \$372, which amount should have been entered as a credit upon the execution, but was not; the sheriff refusing to make the entry; that petitioner had paid upon the execution after the levy, and before the sale, \$263, which, together with the amount bid at the sale, was more than sufficient to satisfy the execution, and the sheriff refuses to turn over to him the excess in his hands; that Guilford, as sheriff, had levied the same execution upon the whole of lot 128, in the Twenty-First district of Quitman county, and as soon as petitioner was apprised of this he placed an affidavit of illegality in the hands of the sheriff, in which it was alleged that the *fi. fa.* was pro-

ceeding illegally for the following reasons:

(1) That the amounts paid before the sale, added to the amount bid at the sale, were sufficient to pay off the *fi. fa.* before the second levy was made; (2) because the levy is excessive. The sheriff disregarded the affidavit of illegality, and sold the land to C. G. Mercer for \$50, which was a grossly inadequate price, the land being well improved, and worth at least \$1,000. The lots described in the two levies are the same. After the first sale petitioner paid to C. G. Mercer sums aggregating \$78.79; which should be paid back, as at the time of their payment the execution was fully paid off. Petitioner has been compelled, by the wrongful conduct of defendants, to employ counsel at an expense of \$150. Waiving discovery, he prays that the sheriff be enjoined from giving Mercer a deed, or from putting him in possession under and by virtue of the second sale, and that Mercer be enjoined from entering into possession, or exercising any right of possession, thereunder; that the second sale be declared void, and any deed made thereunder be canceled and set aside; and that Harrell, former sheriff, be required to turn over to petitioner the amounts realized from the first sale in excess of the amount due on the execution; and for general relief. By amendment, the petitioner struck from the petition the name of Harrell as a party, and all allegations as to damage by him, and the prayer for relief as against him; and further amended the petition by substituting \$276 for \$372 as the amount for which the property was sold at the first sale, and by striking all allegations of indebtedness on the part of C. G. Mercer to the plaintiff. The execution under which the levies were had is attached to the petition as an exhibit and upon it is an entry of the sheriff that the undivided half interest in lot No. 128 in the Eighth district was levied on as the property of the defendant in *fi. fa.* The petition as amended was dismissed on a general demurrer filed by the defendants, and to this the petitioner excepted.

1. The petition alleges that a sale was had pursuant to the first levy, and the demurrer admits that this is true. The execution attached to the petition as an exhibit contains an entry of the sheriff showing that the property was levied on as the property of the petitioner, who was the defendant in execution. The petition further alleges that the plaintiff in execution bid in the property at that sale at an amount which, together with certain credits on the execution, was sufficient to satisfy it. It further appears that the plaintiff in execution repudiated his bid, and that the sheriff acquiesced in such repudiation, and refused to enter, as a credit on the execution, the amount bid by the plaintiff. That a purchaser at a judicial sale is bound to comply with his bid, even though he gets no title to the property offered for sale, is the well settled law of this state. In the case of *Mc*

Whorter v. Beavers, 8 Ga. 300, it was held that, "where property of a defendant in execution is seized and sold by the sheriff, and there is no warranty of title on the part of the defendants in execution or the sheriff, the maxim of caveat emptor applies, and the purchaser of property at sheriff's sale cannot maintain an action against the defendant in execution for so much money paid to his use, on failure of such title to the property so purchased." See, also, Worthy v. Johnson, 1d. 236 (5); Methvin v. Bexly, 18 Ga. 551. In the case of Crafton v. Toombs, 58 Ga. 343, it was held that, in the distribution of a fund realized from the sale of property which was levied on as the property of the defendant in *fi. fa.*, the fund would be awarded to the oldest judgment against him, notwithstanding he had no title to the property sold. In Colbert v. Moore, 64 Ga. 502, it was ruled that "a purchaser of property at administrator's sale cannot repudiate his bid because of a defective title, or no title at all, in the intestate, when there is no fraud or misrepresentation by the administrator." In the case of Jinks v. Mortgage Co. (Ga.) 28 S. E. 600, it was held that "where an execution is levied upon the property of the defendant, and at a sale had in pursuance of the levy the property brings a sum equal to, or greater than, the amount due upon the execution, such sale satisfies the judgment; and the process is thenceforth functus officio, whether marked 'Satisfied' or not." It was further ruled that "an entry by the sheriff upon such execution, stating the facts above indicated, so long as it stands unchallenged upon the record, is presumptively correct; and in the trial of an issue formed upon an affidavit of illegality alleging payment, which was filed to arrest a subsequent levy of the same execution, such entry concludes the plaintiff." Three things are settled by the decisions cited above: (1) That a purchaser at a judicial sale must comply with his bid, whether the property offered for sale is the property of the defendant in execution or not; (2) that a sale regularly had pursuant to law, if the amount bid equals or exceeds the amounts due on the execution, satisfies the judgment against the defendant in execution; and (3) that the plaintiff in execution is precluded by an entry of sale by the sheriff on the execution from showing that there had been in fact no sale. In the present case the execution shows that there was a levy, and the petition alleges that there was a sale pursuant to that levy. A petition showing these facts is good against a general demurrer. The plaintiff in execution, who was alleged to be the purchaser at the sale, can defend by showing either that there was no sale, or a state of facts which would, either legally or equitably, preclude the defendant in *fi. fa.* from claiming any benefit under the alleged sale. Should he fail to make any proper defense, the court should decree that he comply with his bid, and that the sheriff enter the amount of the

same as a credit upon the execution. If it appears that the bid was of a sufficient amount to pay off the execution, then it would be satisfied. If the amount of the bid was greater than the sum due on the execution, the purchaser should be required to pay over to the sheriff, for the use of the defendant in execution, the balance remaining after the execution is satisfied. The petition in the present case set forth a cause of action, and should not have been dismissed on demurrer.

2. It is settled law of this state that an affidavit of illegality is not a remedy for an excessive levy. Manry v. Shepperd, 57 Ga. 68; Rogers v. Felker, 77 Ga. 46. Judgment reversed. All the justices concurring, except LUMPKIN, P. J., and LITTLE, J., absent on account of sickness.

(106 Ga. 84)

CHICAGO BLDG. & MFG. CO. v. TALBOTTON CREAMERY & MFG. CO.

(Supreme Court of Georgia. Nov. 26, 1898.)

PLEADING — DEMURRER — PROPERT OF CONTRACT
SUED ON — CORPORATION — ORGANIZATION —
MECHANICS' LIENS — ENFORCEMENT.

1. If, upon the hearing of a demurrer to a petition, the plaintiff make proof of a written contract which is the foundation of the suit, and produce and read the same, it thereby becomes a part of the petition, and may be considered on the demurrer, notwithstanding it is not set forth in the petition or exhibited thereto. The better practice, however, is to set forth the instrument in the petition or attach it thereto as an exhibit.

2. Where a contract for the erection and equipment of a factory is made with a number of natural persons, who agree therein to obtain a charter for a corporation, in which each of such persons shall be interested to the extent of his individual liability on the contract, and such charter is subsequently obtained and the corporation organized, a right of action upon such contract arises, after the completion of the work undertaken, against the corporation, and the right of action against the individuals ceases. In such a case the contractor would have a lien upon the factory and its equipment, and a claim of lien, setting forth that such a contract had been made with the individuals (naming them) and with the corporation, would be sufficient to authorize a foreclosure suit against the corporation alone.

3. Contractors, material men, machinists, and manufacturers of machinery do not, by the taking of personal security, waive the lien given them under section 2801 of the Civil Code.

(Syllabus by the Court.)

Error from superior court, Talbot county; W. B. Butt, Judge.

Action by the Chicago Building & Manufacturing Company against the Talbotton Creamery & Manufacturing Company. Judgment for defendant, and plaintiff brings error. Reversed.

J. J. Bull, A. J. Perryman, and Glenn & Rountree, for plaintiff in error. Brannon, Hatcher & Martin, for defendant in error.

COBB, J. The petition of the Chicago Building & Manufacturing Company, in sub-

stance, alleged: It is a corporation, incorporated under the laws of the state of Illinois, and is a manufacturer, machinist, and contractor and furnisher of materials. In 1895 it contracted with certain persons named and the Talbotton Creamery & Manufacturing Company, all of said county. After the contract was made, the parties named were incorporated under the laws of Georgia as the Talbotton Creamery & Manufacturing Company. The contract was made with the persons named and the company, for the purpose of building a creamery on a described lot in the town of Talbotton. The building was erected and fully equipped for a creamery at and for the sum of \$3,950, all of which has been paid except \$1,359.35, and for this sum the petitioner has taken no personal security. In June, 1895, petitioner completed the building and creamery equipment and machinery, in compliance with its contract, and thereupon the defendant became indebted to it in the sum last above mentioned, besides interest. On September 25, 1895, and within three months of the completion of the work required under the contract, petitioner filed its claim of lien against the individual subscribers and the corporation on the building and machinery furnished by it, and upon the lot upon which the building was situated, and the same was recorded in the office of the clerk of the superior court as required by law. The action is commenced within 12 months from the time the debt which is the foundation of the lien became due. The prayers were that a lien on the building, machinery, and lot be set up and established, and that process issue against the Talbotton Creamery & Manufacturing Company. The defendant demurred to the petition, on the ground that the allegations were insufficient in law to authorize the foreclosure of the lien as claimed or to authorize a recovery in the suit. The court sustained the demurrer and dismissed the petition. The bill of exceptions sets out a copy of the contract between the parties, and states that in the argument upon the demurrer the defendant's counsel used the contract "as a profert." The order of the judge sustaining the demurrer contains this clause, "Plaintiff's counsel made profert of the written contract which was the foundation of the suit," and it appears from the order that the judge treated the contract as a part of the petition. The contract referred to was, in substance, as follows: The plaintiff is referred to in the contract as the party of the first part, and the persons named in the petition as defendants are referred to as the party of the second part. The purpose of the contract is to provide for the building, erecting, completing, and equipping for the party of the second part a butter and cheese factory at or near Talbotton, Ga. The character of the building and equipment of the factory is fully set forth. The party of the second part "agrees to select, describe, and furnish, at its own expense, within ten days

from the date of this contract, suitable and reasonably level land, with good title, and water ready to connect pump to, for the use of said factory, and agrees within the same time to appoint an executive committee with full authority to represent second party's interest while first is discharging said contract." The party of the first part agrees to erect a butter and cheese factory, as set forth in the specifications, for \$3,950, payable in cash when the factory is completed. The party of the second part agrees to pay that amount when the factory is erected, and the building is to be completed within 90 days after the amount above mentioned is subscribed. As soon as that amount is subscribed, and within a reasonable time thereafter, the party of the second part agrees "to incorporate under the laws of the state, as therein provided, fixing the aggregate amount of stock at not less than the amount subscribed, to be divided into shares of \$100 each. Said share or shares, as above stated, to be issued to the subscribers hereto in proportion to their paid-up interest herein, and it is herein agreed that each stockholder shall be liable to the corporation only for the amount subscribed by him and no more." Subscriptions to any amount in excess of the amount above named are authorized by the contract, but all such subscriptions "shall belong to the first party until the full contract price has been fully collected therefor. The remainder of the subscriptions, after the first party has been fully paid, is the property of the second party, and may then be by the second party also collected and used as working capital." The contract is signed by the plaintiff company, and also by the persons named in the petition in the following way:

Names of Subscribers.	No. of Shares.	Amount of Stocks After Incorporation.
E. H. Spivey	1	\$100 00
W. T. Cosby	2	200 00
W. C. Turner	$\frac{1}{2}$	50 00
Etc., etc.		

Attached to the contract is a communication addressed to the plaintiff, signed by four persons, styling themselves the "regularly appointed executive committee" of the party of the second part, in which it is stated that a described tract of land has been selected by them upon which to erect the butter and cheese factory, and that they have accepted the same as suitable for the purpose, and agree to indemnify plaintiff against all adverse claimants, and authorizes the plaintiff to proceed to erect the factory thereon according to the contract.

1. The first question to be determined is: Did the court have a right to consider this contract in passing upon the demurrer filed to the petition? The contract is the foundation of the action. It is neither embodied in the petition nor exhibited thereto, nor is a technical profert of the same made in the pleadings. It appears, however, distinctly from the record, that on the hearing an oral

profert of the contract was made; that it was produced; that it was read; that counsel for both parties argued the case upon the theory that the contract was a part of the pleadings; and that the ruling by the court was also based upon this assumption. While the contract did not come before the court and become a part of the record, in compliance with the technical rules of profert and oyer as they have existed at common law since the day of written pleading, still we are of the opinion that under the liberal, and we might say loose, practice which is allowable in this state, the contract was properly before the court, became a part of the petition, and was therefore properly considered by the court in passing upon the demurrer. While at common law profert was required only in cases where the party claimed or justified under a deed, and was not necessary where the suit or defense was founded upon an instrument not under seal, still the rule in this state requires that profert should be made of any note or other instrument which is the foundation of the action, whether the same be under seal or not. *Steph. Pl.* pp. 67, 437; *Smith v. Simms*, 9 Ga. 418. It seems, therefore, that in the present case the plaintiff should have set out in his petition the substance of the contract which is the foundation of the action, or he should have exhibited to his petition the material parts of the same, or made profert of it in the pleading,—that is, after referring to the contract, used the formula, “which is here to the court shown”; and in the latter case the defendant would have had a right to demand oyer of the instrument,—that is, that the same be filed for inspection, and subject to be treated in the after-progress of the case as embodied in the petition itself. At common law, in all cases where profert of an instrument was required to be made and was made, and oyer was demanded, and the instrument read in the days of oral pleading, or filed for inspection since the day of written pleading, the instrument which was the subject of the profert became, after the granting of oyer, a part and parcel of the pleading which contained the profert. *Gould, Pl. (5th Ed.)* pp. 408, 409. That author also says: “He who is entitled to, and obtains, oyer of a deed, is not bound to take any notice of it in his pleading; the object of granting it being merely to enable him to do so, at his pleasure. He may, however, after reciting the instrument verbatim on the record, avail himself of any advantage which any part of it, not set out by his adversary, may afford him. The mode in which such advantage may be taken may be either by pleading or demurring, as the case may require. If the instrument sued upon, or upon which the defense is founded, is, upon the face of it, void, either from illegality or otherwise; or is, from any other cause, insufficient, upon the face of it, to maintain the demand or defense founded upon it; or if there is any material variance between the instrument, as recited on oyer, and the de-

scription of it in the pleading of him who has made profert of it,—the adverse party may demur to the pleading in which the profert is made. * * * The deed, as recited, is considered as parcel of the pleading of him who pleads it, and consequently has the same effect as if it had been set out verbatim in his own pleading.” *Id.* pp. 418, 419. See, also, *Chit. Pl.* pp. 450, 451; *Jeffery v. White*, 2 Doug. 476; *Snell v. Snell*, 7 Dowl. & R. 257; *Tucker v. State*, 11 Md. 322. There is nothing in this ruling to conflict with the decisions made in the cases of *Publishing Co. v. Stegall*, 97 Ga. 405, 24 S. E. 33, and *Railroad Co. v. Lark*, 97 Ga. 800, 25 S. E. 175. In those cases the court attempted to consider upon demurrer written statements of facts which had not been made, in any way, a part of the pleadings, and which could not become a part thereof except by an allegation in the petition. It was in those cases held that, upon demurrer to a petition, the court could not look outside of the petition. And we so hold here; the effect of the ruling now made being simply that a contract which is the foundation of the action, but which is not actually set out in the petition, becomes, nevertheless, in contemplation of law, a part of the same, when a proceeding equivalent to a demand of oyer on the one side, and the granting of oyer on the other, has been practically accomplished in the progress of the case. While it is the better practice to set out the contract in the petition, in substance, or to exhibit it thereto in *hæc verba*, we think, nevertheless, that what was done in the present case made the contract so much a part of the petition that the court could look to it in the determination of the demurrer.

2. Treating the contract as a part of the pleading, it is necessary to determine whether the petition sets forth a cause of action, as against a general demurrer. The petition alleges, in substance, that the plaintiff had made a contract with certain named persons for the erection of a building at a specified cost; that the liability of each of the persons was determined by the amount set opposite their names; that these persons agreed to have themselves incorporated with a capital stock of not less than the amount set forth in the petition as the price of the building to be erected; that the capital stock was to be divided into shares, of \$100 each, and each person should be a stockholder in the corporation to the extent of the amount subscribed by him in the contract; that the individuals who had made the contract had complied with the stipulations, and had become incorporated in the manner agreed upon; and that the plaintiff had fully complied with the terms of the contract. The petition also contains allegations showing a compliance with the requirements of law necessary to establish a lien in favor of the plaintiff upon the real estate which has been improved by its performance of the contract. It seems to us that, as against a general demurrer, the plaintiff has stated a cause

of action. It is true that the suit is against the corporation, and not against the individuals who subscribed to the contract, but the existence of the corporation sued was in contemplation of the parties when they made the contract; and, taking the contract as a whole, it was clearly the intention of both parties thereto that the plaintiff, when it complied with its contract, and the amount specified by the contract became due, should have a right to proceed against the corporation which was to be formed to carry out the enterprise contemplated by the contract; and, if the party of the second part failed, neglected, or refused to have themselves incorporated, their liability to the plaintiff was to be as individuals, each one being responsible for the amount set opposite his name. It being alleged that the corporation has been formed in conformity to the contract, it would seem that the right of action of the plaintiff against the individuals does not now exist, and that the only right which it has is to sue that artificial person which the contract provided for, and which, when brought into being, was to take the place of the natural persons who had agreed to form it. The liability of the individual to the plaintiff is the same in each case,—direct in one contingency and indirect in another. If no corporation was formed, the individuals were directly responsible to the plaintiff for the amount set opposite their names in the contract. If the corporation was formed, it would be liable to the plaintiff, and the individuals who formed it would be responsible to the corporation as for a subscription to capital stock represented by the amounts set opposite their names in the contract. The allegation being that the corporation had been formed pursuant to the contract and in conformity to law, the suit was properly brought against the corporation, and the claim of lien which was filed and recorded, notwithstanding it was against both the individual subscribers and the corporation, was in substantial compliance with the contract and the law in relation to such matters. The suit being against the corporation, that part of the claim of lien which refers to and enumerates the individual subscribers may be properly treated as surplusage. The petition set forth a cause of action, which, if established by evidence, would authorize a judgment setting up a lien upon the property described in the pleading.

3. It is contended, however, that the demurrer was properly sustained because it appeared from the face of the petition that the plaintiff had taken personal security for its debt, and was therefore not entitled to a lien under the law. In support of this contention, it is urged that that part of the contract which provides that additional subscriptions may be secured by the party of the second part, and that they shall belong to the party of the first until the amount due is fully paid, is a taking of personal security. Even if this amounts to a taking of personal security, we do not think it

affects the right of the plaintiff to claim a lien. The contract contains no express waiver of the lien and nothing therein could be properly construed as an implied waiver. It has been held that while it may be that mechanics who have taken personal security thereby waive their right to a lien material men have a lien as well when they take personal security as when they do not. *Ford v. Wilson*, 85 Ga. 109, 115, 11 S. E. 559. The plaintiff sues as a manufacturer, machinist, builder, contractor, and furnisher of material, and the lien given by the statute to such persons is placed upon the same footing as the lien given to material men, and is therefore not affected by the taking of personal security. Civ. Code, § 2801. Judgment reversed. All the justices concurring, except LUMPKIN, P. J., and LITTLE, J., absent on account of sickness.

(96 Va. 357)

COMMERCIAL BANK OF LYNCHBURG v. MILLER et al.

(Supreme Court of Appeals of Virginia. Sept. 22, 1898.)

PARTNERSHIP—CREATION—MEMBER'S LIABILITY.

1. Where two firms of tobacco dealers, one in Virginia and the other in England, agreed that the American firm should buy tobacco in this country, and ship it to the English firm to be sold on their joint account, and agreed to bear the expenses, and divide the profits and losses of the business equally, the members of each firm are partners, so far as this business is concerned.

2. Where one was in partnership with a trading firm in a particular business, he was not bound by notes executed by the firm in its own name to a bank after his partnership was dissolved by mutual consent, in settlement of prior obligations of the firm to the bank, where it was not proved that it was represented to the bank, at or before the notes originated, that he was a partner in the transaction out of which the indebtedness arose.

Appeal from circuit court of city of Lynchburg.

Bill by the Commercial Bank of Lynchburg against R. L. Miller and others. The bill was dismissed, and the plaintiff appeals. Affirmed.

J. E. Edmunds, Caskie & Coleman, and J. W. Daniel, for appellant. Thos. N. Carter, R. G. H. Kean, Harrison & Long, and A. W. Nowlin, for appellees.

CARDWELL, J. This is an appeal from a decree of the circuit court of the city of Lynchburg dismissing the bill of appellant, the Commercial Bank of Lynchburg, filed to enforce, by way of foreign attachment, the collection of a debt amounting to \$7,000 and interest, alleged to be due and owing to the bank by R. L. Miller, T. B. Watkins, William Wilberforce Jose, John Edmund Jose, and Thomas P. H. Jose, as partners in the leaf tobacco business, and trading under the firm style of Miller & Hawkins, the attachment having been levied upon a debt amounting to about \$12,000, due to the Joses under

the style and firm of T. P. Jose & Sons, by Miller & Hawkins, which debt is secured by deed of trust to Thomas N. Carter, trustee, upon certain real estate in the city of Lynchburg; the Joses being nonresidents of the state of Virginia and residing in Great Britain.

It appears that on the 24th of December, 1887, an agreement was entered into between the Joses, doing business under the style and firm name of T. P. Jose & Sons, of the one part, and R. L. Miller and T. B. Hawkins, doing business as Miller & Hawkins, of the other part, for the purpose of doing what the parties to the agreement denominated "a joint-account business together in the purchase, preparation, and sale of tobacco, and all usual trade operations connected therewith, for a term of five years from the 1st of January, 1888, determinable as mentioned in article 10" of the agreement. The other features of the agreement are as follows:

(2) The costs and expenses of the business were to be borne in equal shares, and the profits or losses equally divided.

(3) Miller & Hawkins (at Lynchburg) were to buy, free of commission, prepare, and ship to T. P. Jose & Sons at their Bristol house, in England, bright Virginia leaf, or such other classes of tobacco as T. P. Jose & Sons should prescribe, quantities, prices, grades, and styles to be as T. P. Jose & Sons should direct; paying all charges and insurance until f. o. b. the cars at Lynchburg, and consign the same by through bill of lading to T. P. Jose & Sons at Bristol.

(4) The tobacco so shipped to Bristol, T. P. Jose & Sons were to sell free of commissions and brokerage, pay insurance, inland and marine, and freight, landing, warehouse, and selling charges, and render accounts of such payments, to be charged to their "joint account and the sales credited to the same."

(5) When through bills of lading were sent to T. P. Jose & Sons, Miller & Hawkins were at liberty to draw against the shipment at 60 days, for not exceeding 80 per cent. of the cost of the tobacco, and expenses and charges accrued and paid by Miller & Hawkins, up to the time the tobaccos were put f. o. b. the cars at Lynchburg.

(6) T. P. Jose & Sons were to have interest, at 5 per cent., on the amount of such drafts from their payment.

(7) Miller & Hawkins were not to ship (with an exception in favor of other firms with which Miller & Hawkins were interested) any tobacco to any merchant in Great Britain or England, except at Edinburgh, Glasgow, or London, and all shipments to T. P. Jose & Sons at Liverpool were to be for sale by the latter on commission, and not on joint account.

(8) Miller & Hawkins were to forward to T. P. Jose & Sons, as early as possible in every season, samples of all such grades and styles of tobacco as T. P. Jose & Sons might require or direct, and keep them as well

posted as possible as to crops, prospects, prices, and other things relating to the business, and in all respects conduct this joint-account business with due regard to the advice, suggestions, and interests of T. P. Jose & Sons.

(9) The joint-account brands were to be joint property, and Miller & Hawkins were to take care to brand all tobacco consigned to persons in Glasgow or London in manner absolutely different from the joint-account brands.

(10) Miller & Hawkins were to pay or allow T. P. Jose & Sons £250 sterling if they from any cause, except death or mental incapacity, failed to continue the agreement during the term of five years from January 1, 1888, unless previously terminated by T. P. Jose & Sons, who should be at liberty to do so at any time, by three calendar months' previous notice in writing.

T. P. Jose & Sons were extensively engaged in business as tobacco merchants and tobacco brokers with one of their business houses located at Liverpool and the other at Bristol, England, handling tobaccos for all shippers to them; and Miller & Hawkins were located at Lynchburg, Va., and engaged in buying, preparing, and shipping to the tobacco markets in America, Great Britain, Germany, Australia, and other countries, and had been for a number of years prior to this agreement with T. P. Jose & Sons, and went on with their general business after January 1, 1888, as before, without any change in their firm name or in their method of dealing with the appellant, the Commercial Bank of Lynchburg,—Miller attending to the finances of the firm, while Hawkins superintended the factory or warehouse. They began to make shipments to Bristol under this joint-account agreement, drawing drafts against their shipments to T. P. Jose & Sons through the Commercial Bank. The first draft drawn against the first shipment on joint account was on March 28, 1888, and numerous drafts were thereafter drawn, until May, 1891. In the meanwhile, Miller & Hawkins were also shipping to foreign markets, and drawing against other parties than T. P. Jose & Sons at other points to a large amount, besides their dealings with other markets in the United States, and all of this business was done through the Commercial Bank of Lynchburg. In the spring of 1891, this joint-account business at Bristol having become unsatisfactory to T. P. Jose & Sons, T. P. H. Jose, a member of this firm, who was in Lynchburg, Va., in April, and again in May, of that year, put an end to it, Miller acquiescing in its termination at that time, though no notice in writing of its termination had been given as stipulated in the tenth article of the agreement of December 24, 1887. An effort was afterwards made by Miller to renew the arrangement with T. P. Jose & Sons, but it was never assented to by the latter.

It further appears that all invoices on this joint account were so expressed on their face,

and the last one sent was dated April 29, 1891; and all subsequent shipments to Bristol, as well as to Liverpool, to T. P. Jose & Sons, were "for and on account of the undersigned,"—that is, Miller & Hawkins,—until this firm was dissolved, and then on account of R. L. Miller or R. L. Miller & Co. on commission.

In August, 1892, the firm of Miller & Hawkins was dissolved, and notice of its dissolution given in a newspaper published in Lynchburg; Miller buying out all interest of Hawkins in the business, assuming the debts of the firm, and thereafter conducted the tobacco business alone for awhile as R. L. Miller, and afterwards as R. L. Miller & Co., until he failed, in 1894, and left the state.

When the joint-account business was finally closed out, there was a small balance of profit resulting from it to Miller & Hawkins, which was transferred to Miller's account with T. P. Jose & Sons at the Liverpool house; and the general account between Miller & Hawkins and R. L. Miller & Co. with the Liverpool house, involving shipments for sale on commission only, after 1891, resulted in large losses.

Miller & Hawkins had, in 1889, in order to get a line of credit with T. P. Jose & Sons for advances, conveyed to T. N. Carter, trustee, their lot and factory in Lynchburg to secure such advances up to \$12,000, and as of October 1, 1895, they owed T. P. Jose & Sons over \$13,000, secured in part by this deed of trust; and it is this debt due to T. P. Jose & Sons that the appellant seeks to subject in this suit to the payment of its notes, alleged to have been contracted by T. P. Jose & Sons and Miller & Hawkins, as partners in the leaf tobacco business in Lynchburg, Va., under the firm name of Miller & Hawkins.

Appellant's original bill, filed November 27, 1894, alleged that it was a creditor of R. L. Miller and the Jose's, partners in business under the style and firm name of R. L. Miller & Co., to the amount of \$7,002.16, with interest, evidenced by four notes, drawn by R. L. Miller, by the style of R. L. Miller & Co., and indorsed by H. J. Hatcher, by the style of H. J. Hatcher & Co.,—one dated July 24, 1894, for \$1,500; one August 4, 1894, for \$3,000; one August 18, 1894, for \$1,000; and the other August 22, 1894, for \$1,500; and charged that the Jose's were partners of R. L. Miller, under the style and firm name of R. L. Miller & Co.; and attached the debt due by R. L. Miller & Co. to the Jose's, secured by the deed of trust to T. N. Carter,—the agreement between Miller & Hawkins and the Jose's of December 24, 1887, being exhibited with the bill.

T. P. Jose & Sons promptly answered this bill, denying any sort of indebtedness to appellant, or that they had any sort of connection with its transactions with Miller & Hawkins, or R. L. Miller, under that or other style. They admitted the joint account transactions with Miller & Hawkins at their Bris-

tol house, from January 1, 1888, to May, 1891, when those shipments ceased, and deny the general partnership charged, or that they ever had even a joint account with R. L. Miller or R. L. Miller & Co. Appellant then amended its bill, alleging that the notes issued and made by R. L. Miller & Co. in July and August, 1894, represented indebtedness which arose before Hawkins retired from the firm of Miller & Hawkins, and while the joint-account arrangement and the alleged partnership with the Jose's subsisted, and denying that the joint-account shipments ceased in 1891. To the amended bill T. P. Jose & Sons made answer, relying on their answer to the original bill, and putting the whole of appellant's case in issue. R. L. Miller made answer to the original and amended bill, setting forth that the nature of his contract relations with T. P. Jose & Sons was fully set out in the agreement of December, 1887; that the history of these relations was correctly set forth in the answer of T. P. Jose & Sons; that the statement of the original or amended bill that the notes therein referred to of R. L. Miller & Co., given in renewal of the notes of Miller & Hawkins, were discounted and renewed from time to time upon the credit of T. P. Jose & Sons, and because it was represented to the directors and officers of the plaintiff bank that T. P. Jose & Sons were members of the co-partnership of Miller & Hawkins, was not true; denying that respondent ever at any time, either as a member of the firm of Miller & Hawkins, or when conducting business as R. L. Miller & Co., used his connection with T. P. Jose & Sons as a basis of credit, except that the existence of a joint-account business was known to the bank; and alleging that, when the notes in suit were originally made and discounted by respondent at the appellant bank, he was possessed of ample means, and his own credit was a sufficient guaranty of all paper discounted by him at the bank, and that, when his financial condition changed, the bank looked to his property, and relied for security upon the incumbrance thereon which he gave, at the bank's request, embracing nearly his entire estate.

Upon the hearing of the cause, upon the original and amended bills, the answers thereto, and the exhibits, with the bills and answers, and depositions of witnesses for complainant and respondents, the circuit court dismissed the bills.

Whatever may have been the intentions of the parties thereto, the agreement of December 24, 1887, made and constituted the persons composing the firm of Miller & Hawkins and those composing the firm of T. P. Jose & Sons partners in the business of buying, preparing, and shipping bright Virginia leaf tobacco, and such other classes of tobacco as were contemplated by the agreement, to the Bristol house of T. P. Jose & Sons, for sale on the joint account of Miller & Hawkins and T. P. Jose & Sons, and to conduct all usual

trade operations connected therewith, the partnership to continue for five years from January 1, 1888, till terminated by limitation, or as provided for in the agreement or by mutual consent of the partners. *Winship v. Bank*, 5 Pet. 560; *Weaver v. Tapscott*, 9 Leigh, 424; *Brooke v. Washington*, 8 Grat. 248; *Jones v. Murphy*, 93 Va. 218, 24 S. E. 825.

It does not follow, however, that the debts sued on here are debts properly chargeable to this partnership, whether contracted by R. L. Miller, or by R. L. Miller as R. L. Miller & Co., or by Miller & Hawkins. The question remains whether or not these debts were contracted on the faith and credit of the *Joses* as partners with Miller & Hawkins, or whether the money was loaned for the benefit of the partnership, or the partnership received the benefits of the loans. If they were ever the partnership debts, they remain so, of course, till paid, whether evidenced by the original notes given for the loans, or notes given in renewal of notes formerly evidencing such loans.

It is settled law that "the borrowing of money and negotiation of bills and notes being incident to, and usual in, the business of co-partnership formed for the purpose of trade, it follows that when a co-partner borrows money professedly for the firm, and executes therefor a negotiable instrument in the co-partnership name, it will bind all the partners, whether the borrowing were really for the firm or not, or whether he diverts and misapplies the funds or not, provided the lender is not himself cognizant of the intended fraud, and the burden will not be thrown on him to show that he was not cognizant of such fraud, or to prove value given for the paper." *Daniel, Neg. Inst.* § 357. But the question in this case still is, did Miller & Hawkins, or R. L. Miller, or the latter trading as R. L. Miller & Co., after Hawkins' retirement from the firm of Miller & Hawkins, borrow of the appellant bank the money evidenced by the notes in suit, professedly for the firm in which the *Joses* were partners?

The learned author of *Lindl. Partn.* (vol. ume 1, bk. 2, p. 177, § 5), in discussing the liability of partners in respect of contracts not entered into on behalf of the firm or not so in proper form, says: "The general proposition that a partnership is bound by those acts of its agents which are within the scope of their authority, in the sense explained in the foregoing pages, must be taken with the qualification that the agent whose acts are sought to be imputed to the firm was acting in his character as agent, and not as principal. If he did not act in his character of agent, if he acted as a private individual on his own account, his acts cannot be imputed to the firm, and he alone is liable for them, even though the firm may have been benefited by them. Whether a contract is entered into by an agent as such, or by him as a principal, is

often, but not always, apparent from the form of the contract."

In the case of *Beckham v. Drake*, 9 Mees. & W. 79, where the question was discussed whether a dormant partner was bound, though his name did not appear, by a contract made on behalf of the firm of which he was a member, in the firm name, the court, although holding the dormant partner in that case liable, fully recognized the established doctrine that if one partner only is dealt with, and the circumstances are such as to show that he was acting and was dealt with on his own account, i. e. as a principal, and not as the agent of the firm, he alone is responsible.

Leaving out of consideration the answer of R. L. Miller in this case, we come to the consideration of the circumstances under which the debts asserted herein were contracted, and the facts shown by appellant upon which it relies to charge T. P. Jose & Sons with their payment.

In addition to the circumstances already stated as surrounding the transactions of R. L. Miller, the acting member of the firm of Miller & Hawkins, and attending exclusively to the finances of the firm with the appellant bank from January 1, 1888, to the spring of 1891, when the agreement of December 24, 1887, was set aside and annulled by the acquiescence of Miller, it is shown that, from 1882 or 1883, Miller & Hawkins had enjoyed with this bank a line of accommodation credit or discounts of \$9,000 to \$10,000 per annum, and this continued to the dissolution of the firm of Miller & Hawkins in August, 1892, and to R. L. Miller thereafter. On January 1, 1888, the firm owed the bank \$9,500 of such accommodation loans; on December 1, 1891, \$11,513.75; and on June 1, 1892 (shortly before Hawkins went out of the firm), \$10,400. There was no publication of the agreement with the *Joses* of December 24, 1887, it being understood, as it appears, among the parties thereto, that it was not to be made known; and there is no sufficient proof that the *Joses* were held out by either Miller or Hawkins, or any one else in Lynchburg, Va., or elsewhere, as partners in the business of Miller & Hawkins, whereby the appellant could have been induced to contract with Miller & Hawkins or R. L. Miller on the faith and credit of the *Joses*, as their or his partners, at the time of, or prior to, the contracting of the debts evidenced by the notes in suit. The principal evidence relating to the period from January 1, 1888, to the inception of these debts, is given by Hawkins, who, in speaking, as a witness for the bank, of the interest of the *Joses* in the business done with the bank under the name of Miller & Hawkins, says: "We kept it [agreement of December 24, 1887] no secret. I suppose the bank knew it, and reckon it was known all over town." This is entirely too vague and indefinite, especially in view of the fact that other witnesses who were connected

with the bank not only fail to corroborate Hawkins, but show that at the time of which he speaks the bank had no knowledge of any connection of the Joses with the business of Miller & Hawkins. The notes in suit, as shown by witness Withers, teller of the bank at the time of the transactions, examined as a witness on its behalf, arose as follows: Two of them, for \$1,500 each, December 1, 1891, made by Miller & Hawkins, and indorsed by H. J. Hatcher & Co., months after the agreement of December 24, 1887, had been annulled with the assent of Miller, the active member of the firm of Miller & Hawkins, and eight months after, as we have seen, the last shipment under the agreement had been made to Bristol on joint account, and drawn on by Miller, through the bank. The remaining two notes originated, one in January and the other in September, 1892, the first made by Miller & Hawkins, indorsed by H. J. Hatcher & Co., and the last by R. L. Miller, indorsed by H. J. Hatcher & Co. after Hawkins had retired. The notes made in the name of Miller & Hawkins were renewed one or more times in that name, and then one or more times in the name of R. L. Miller, and finally in the name of R. L. Miller & Co.

Kinler, who was cashier of the Commercial Bank (appellant) from 1882, when organized, to January 1, 1895, first said, when examined as a witness in this case, that he never saw a contract between Miller & Hawkins and Jose & Sons, but that he did see one between R. L. Miller & Co. and Jose & Sons, but could not remember when, while in fact the only contract that ever existed was that of December 24, 1887. When shown the contract, he said it was with Miller & Hawkins, and that, before producing the contract, Miller on several occasions had told him "he was buying tobacco on joint account, or, in other words, he was shipping tobacco to the Joses and dividing profits"; but witness said he was unable to give the dates, though it was before a meeting of the finance committee of the bank called in September, 1893, to inquire into the affairs of Miller, at which meeting the contract was produced. In addition to the vagueness of this witness' testimony, and his total inability to fix even approximately the date when these conversations were had with Miller, he is plainly shown by Edmunds, the attorney for the bank and its witness, to be in error by more than a year as to when the contract was produced by Miller. Edmunds, who was present at the meeting in September, 1893, when a year's extension was given Miller on this indebtedness, says that the contract was not produced by Miller on that occasion, and was not produced till in November, 1894, not long before this suit was brought. He further says that he was requested to meet the finance committee in September, 1893, to learn what arrangement Miller could make for the payment of his indebtedness to the bank; that Miller, at this meeting, desired an extension of his indebtedness for a period of one year, and said

if given him that he would give the bank security on some real estate he had, and that the bank should fear no harm about the indebtedness, for, if the security he offered should be of no value and he himself had nothing, his partners, the Joses, of England, were very wealthy men, and could meet the indebtedness without feeling it; that the Joses were his partners, and equally bound with him for the debt. Witness then says that "upon that statement of Miller's, and also the additional security given, we gave him the extension requested of one year, dating it from September 23, 1893."

This is the only positive statement we have from any of the witnesses, the other witnesses being even less definite than Kinler, as to when Miller represented to the bank, or any one connected with it, that the Joses were partners with Miller & Hawkins, and bound for this indebtedness; and it would seem incredible that the bank would have permitted the renewal of these notes from their origin, in December, 1891, and in January and September, 1892, first in the name of Miller & Hawkins, then R. L. Miller, and afterwards R. L. Miller & Co., till September, 1893, when they were extended one year, at a meeting called expressly to learn what Miller could do about his indebtedness to the bank, without a single demand ever being made on the Joses for their payment, or a single intimation to them that they were looked to, for the payment of the notes or any part of them, if in point of fact they were contracted on the faith and credit of the Joses, or the bank had any good reason for supposing that the Joses were interested in the transactions of Miller with it. A statement by a person that another, his partner in business, which induces the person to whom the statement is made to give credit upon the faith and credit of the person represented to be a partner and bound for the debt, will bind such person if the statement be true, but not if untrue; and in the absence of all, certainly of sufficient, proof, as is the case here, that it was represented to the appellant, at or before the notes in question originated, that the Joses were partners with Miller & Hawkins or R. L. Miller in the transactions out of which the indebtedness arose, the contention that the loans were made by appellant on the faith and credit of the Joses wholly fails.

Upon the question whether or not the proceeds of these notes, or any of them, went into the business conducted by Miller & Hawkins and the Joses under the agreement of December 24, 1887, the only proof is the testimony of Hawkins, who in answer to the question (objected to as leading) whether or not, "during the continuance of this business, and while you were a member of the partnership, the negotiable notes signed in the name of Miller & Hawkins were discounted for the partnership, of which the Joses were members, as you have said, at the Commercial Bank of Lynchburg, and, if so, state whether or not the pro-

ceeds of those notes were used for the purpose of buying tobacco or paying for tobacco which was bought under the articles of partnership and shipped to the Joses at Bristol," Says: "Yes, sir; notes were discounted there at the Commercial Bank. I suppose the proceeds were used in part for that; I cannot say they were used altogether for that purpose." And, when pressed by a following question, he says: "I could not say that all of them were used for buying tobacco for T. P. Jose & Sons, as we were buying tobacco for other purposes. I have no doubt that some of the proceeds of these notes were used to pay for tobacco shipped to the Joses." When he had stated that Miller & Hawkins had some notes at the Commercial Bank when he retired from the firm, but how many he could not say, and that he thought some of them had been renewed, this witness was asked to state, "as nearly as he could, what was the amount of the notes of Miller & Hawkins held by the bank at the time of his retirement; was the amount of those notes greater or less than \$7,000?" (the amount of the notes in suit), to which he replied: "I really do not know how to answer that question, for the simple reason that Mr. Miller attended to everything of that kind, and I attended to everything in the factory, and I do not know how to answer that question. I should not like to say whether it was \$3,000, \$7,000, or \$10,000."

In addition to the fact shown that this witness' memory was so treacherous that he could not tell just when he retired from the firm of Miller & Hawkins, it is also shown by appellant's witnesses that these notes in suit all originated after the joint account had been ended, and one of them after Hawkins' retirement in August, 1892. He was also familiar with the agreement of December, 1887, and therefore knew that, according to its provisions, Miller & Hawkins were to pay all charges, etc., in buying, preparing, and shipping the tobacco to the Joses "until the delivery free on rail from the factory at Lynchburg, and to consign the same by through bill of lading to the Joses at Bristol," etc.

It is furthermore shown from the books of the appellant that the drafts of Miller & Hawkins on the shipments of tobacco to the Joses at Bristol, during the continuance of this partnership or joint-account business, from January 1, 1888, to April 29, 1891, amounted to only about \$60,000; while the drafts drawn by Miller & Hawkins during this period on shipments to other points out of the United States (to say nothing of their business in the United States) amounted to more than \$290,000, or nearly five times as much as the whole joint-account business during the same period; and though all of these drafts were collected through or discounted at the appellant bank, by Miller, for account of Miller & Hawkins, neither during this time nor afterwards, till this suit is brought, does the bank make demand upon or suggest to the Joses that they

were looked to for the payment of any indebtedness to it of Miller or of Miller & Hawkins.

We are of opinion that appellant has failed to show that T. P. Jose & Sons are liable for the debts asserted in its bill. On the contrary, the proof is that the debts were contracted by Miller, acting for himself or Miller & Hawkins, but not as a member of, or agent for, a firm in which T. P. Jose & Sons were partners. Therefore the decree of the circuit court is affirmed.

HARRISON, J., absent.

(96 Va. 411)

RORER et al. v. FERGUSON et al.

(Supreme Court of Appeals of Virginia. Nov. 17, 1898.)

JUDGMENTS — ENFORCEMENT — SUBROGATION OF SURETIES — LIENS — MERGER.

1. A party recovered a judgment and issued execution. A forthcoming bond was given, and subsequently forfeited. Afterwards the judgment debtor conveyed certain of his real estate. A decree was entered subjecting his remaining land to the payment of the judgment, and, if insufficient, then the land conveyed to the grantee was to be sold to satisfy the balance. *Held*, that the decree was not prejudicial to grantee, since, if the sureties on the forthcoming bond had paid the judgment, they would have been subrogated to the rights of the judgment creditor, and to his lien on the real estate conveyed.

2. A grantor conveyed real estate to a trustee to secure notes, and afterwards conveyed it by general warranty to a grantee, who assumed payment of the indebtedness. The trustee then conveyed to the same grantee, who became the owner of the debts secured by the deed of trust. *Held*, that the lien created by the deed in trust was not, by such conveyances, merged or impaired, since equity would keep it in force for the protection of grantee's title.

Appeal from hustings court, city of Roanoke.

Action by J. P. Underwood against Payne, Shelor & Co., Edmund Didler, and F. Rorer, Jr. From the decree Rorer and Didler appeal. S. D. Ferguson filed a bill of review, which was dismissed. Affirmed.

R. R. Hicks, for appellants. Watts, Robertson & Robertson and Smith & King, for appellees.

KEITH, P. The suit of Underwood against Payne, Shelor & Co. was brought in the corporation court of the city of Roanoke to enforce liens upon the real estate of the defendants. There was a decree referring the cause to a commissioner to report upon the liens and their priorities. Exceptions to this report were passed upon by the hustings court, and a decree of sale entered, from which an appeal was taken to this court.

Underwood recovered a judgment against Payne, Shelor & Co. at the March term, 1893 of the hustings court, which was docketed on April 7th of that year, and the lien of which relates back to the beginning of the term, the first Monday in the month. Upon this

judgment execution was issued, and a forthcoming bond given the 6th of May, 1893, with Rorer and Didier as sureties, which was forfeited on the 22d of that month. On April 5, 1893, a part of the real estate of those composing the firm of Payne, Shelor & Co. was conveyed to Hart, trustee, to secure certain notes aggregating \$4,200, and on June 3, 1893, the same real estate, subject, of course, to the deed of trust just mentioned, was conveyed to Ferguson with general warranty for the consideration of \$1, and the assumption upon his part of the liens created by the deed to Hart, trustee.

At the term of the circuit court of the city of Roanoke beginning April 11, 1893, Dunbar & Cape recovered judgment against Payne, Shelor & Co., docketed May 2, 1893, upon which execution issued the 6th of May, 1893, and a forthcoming bond was given, with Rorer and Didier as sureties, which was also forfeited on the 22d of May, 1893.

On the 16th of November of the same year, Hart, trustee, conveyed, with special warranty, to S. D. Ferguson, the property described in the deed of April 5th.

Upon this state of facts the court was of opinion that the real estate should be sold to pay the liens in the following order: The real estate of Payne, Shelor & Co. to be first sold, or so much thereof as would be sufficient to pay the judgment of Underwood and costs of suit, including the prior lien upon it. If the proceeds of this sale proved insufficient to satisfy Underwood's judgment in addition to the liens which were prior thereto, then the land conveyed to S. D. Ferguson should be sold to satisfy the balance due J. P. Underwood.

As to the judgment of Dunbar & Cape, it also was to be paid out of the property remaining in the hands of the judgment debtor, if sufficient for that purpose, but, if it proved insufficient, the balance due them was to be paid by Didier and Rorer, and not by Ferguson.

This decree is attacked by Didier and Rorer, who claim that upon the payment by them of the Dunbar & Cape judgment they would be subrogated to the rights of the judgment creditors; that Ferguson was in fact the owner of the debts secured in the deed of trust to Hart of April 5th; and that, having purchased the equity of redemption, and assumed the payment of the Hart lien, he became both debtor and creditor, and thereby the Hart deed of trust and the debts secured in it were extinguished.

Ferguson complains because by the decree his property is subjected to sale in the event that the real estate remaining in the hands of Payne, Shelor & Co. proves insufficient to satisfy the judgment in favor of Underwood and the liens prior to it.

Passing upon the last contention first, it is sufficient to say that if Rorer and Didier, the sureties in the forthcoming bond, had paid the judgment obtained against them, they would be subrogated to the rights of Under-

wood, and to the lien of his judgment against Payne, Shelor & Co. This was decided in the case of *Robinson v. Sherman*, 2 Grat. 179, where it is held that: "The surety of a joint debtor in a forthcoming bond becomes, upon the forfeiture thereof, surety for the debt; and when he has discharged it is entitled to be substituted to all the rights of the creditor against the original debtors, subsisting at the time he became so bound for the debt, and is entitled to recover from the original debtors the principal, interest, and costs of the original debt."

This case has been frequently cited, and always with approval. In *Hill v. Manser*, 11 Grat. 525, it is held that the surety in a forfeited forthcoming bond became thereby surety for the debt, and when he "paid the same as such surety he became entitled, upon the principles of a court of equity, to all the rights of the creditor against the original debtor subsisting at the time he became so bound for the debt, and that the judgment for the benefit of the surety so paying is not regarded as extinguished, but transferred with all its obligatory force against the principal." To the same effect, see *Cooper v. Daugherty*, 85 Va. 350, 7 S. E. 391.

There is no error in the decree to the prejudice of Ferguson; nor do we think there is any to the prejudice of Rorer and Didier. It matters not whether Ferguson was the real owner of the debts secured in the deed to Hart, trustee, at the time of the execution thereof, or whether he acquired them subsequently. There is no question as to the bona fides of the transaction. He bought the property with the Hart lien resting upon it, and he is entitled to hold that lien for his protection, and this upon the plainest principles of equity.

In *Sheldon on Subrogation* (section 54) it is said: "The merger of a charge in the inheritance will not be presumed if this would be contrary to the interest of both the charge and the inheritance."

Pomeroy, speaking upon the same subject (*Pom. § 791*), says, if there is no reason for keeping the charge alive, then "equity will, in the absence of any declaration of intention, destroy it; but if there is any reason for keeping it alive,—such as the existence of another incumbrance,—equity will not destroy it. In short, where the legal ownership of the land and the absolute ownership of the incumbrance become vested in the same person, the intention governs the merger in equity. If this intention has been expressed, it controls. In the absence of such an expression, the intention will be presumed from what appear to be the best interests of the party as shown by all the circumstances. If his interests require the incumbrance to be kept alive, his intention to do so will be inferred and followed. If, on the contrary, his best interests are not opposed to a merger, then a merger will take place according to his supposed intention."

But it is argued that, Ferguson having assumed the charge made, it is his debt, and he therefore cannot claim the benefit of the foregoing principles. His object in assuming the debt, however, it is manifest, was only for the purpose of protecting his title, which would be wholly defeated if the charge thus assumed is to be considered as having been extinguished; and this result would inure to the benefit, not of Ferguson, by whom it was discharged, but of the junior incumbrancer. The decree complained of properly decides that the purchase by Ferguson on the 3d of June, and the conveyance to him by Hart, trustee, of the trust property in November following, did not merge, extinguish, or impair the lien created by the deed of trust to Hart of April 5th, but that in equity it will be kept alive and in force for the protection of his title.

Upon the whole case we are of opinion that there is no error in the decree complained of, and it is affirmed.

CARDWELL, J., absent.

(123 N. C. 538)

FIRST NAT. BANK OF ELIZABETH CITY v. SCOTT.

(Supreme Court of North Carolina. Dec. 13, 1898.)

BILLS AND NOTES—PLEDGE—APPLICATION OF PAYMENT.

1. A bank held notes executed by a principal and three sureties. Principal and two of the sureties gave the bank another note, and assigned as collateral a note executed by the principal to such sureties, and indorsed by the latter. It was agreed that, if the parties should come under any other liability to the bank, the proceeds of the collateral note might be applied by the bank as it deemed best. Subsequently the bank became the owner of a note against the principal alone. The proceeds of the collateral note were applied by the bank partly to the payment of such latter note, instead of those on which the sureties were jointly liable. Held that, as the collateral note was payable to the sureties, it presumptively belonged to them, and the bank had no authority to apply its proceeds on notes on which they were not liable.

2. A creditor holding several obligations against the same debtors has a right to apply a payment made without direction by one of them; but he must apply it to the debt on which the owner of the money paid was liable.

Appeal from superior court, Pasquotank county; Brown, Judge.

Action by the First National Bank of Elizabeth City against G. M. Scott. There was a judgment for defendant, and plaintiff appeals. Affirmed.

H. F. Aydlett, for appellant. Shepherd & Busbee, for appellee.

DOUGLAS, J. This is an action to recover from the defendant the balance due on two notes, for \$1,000 each, executed on the 14th day of March, 1895, to the plaintiff, by the Jones Manufacturing Company, and indorsed

by the defendant, together with G. B. and T. W. Jones, who are not parties to this action. The Jones Manufacturing Company executed to G. B. and T. W. Jones, on December 20, 1894, its note for \$8,000, secured by mortgage. On the 23d day of April, 1895, the said company executed and delivered to the plaintiff the following paper:

"\$5,000. Elizabeth City, N. C., April 23, 1895.

"Four months after date, we promise to pay to the First National Bank, Elizabeth City, N. C., or order, negotiable and payable without offset at said bank, five thousand dollars in gold coin, for value received, having deposited with said bank, as collateral security for the payment of this note, a note of the Jones Manufacturing Co., for \$8,000, dated Dec. 20th, 8 months from date, indorsed by G. B. and T. W. Jones; insurance policies for \$5,000, loss, if any, payable to this bank,—with such additional collaterals we hereby promise to give at any time on demand. If these additional collaterals be not so given when so demanded, then this note to be due; and rebate of interest taken shall be allowed on payment prior to maturity. And we hereby give to said bank, its president or cashier, full power and authority to sell and assign and deliver the whole or any part of said collaterals, or any substitutes therefor, or any additions hereto, at public or private sale, at the option of said bank, or its president or cashier, or of either of them, on the nonperformance of the above promises, or any of them, or at any time thereafter, and without advertising or giving to us any notice or making any demand of payment. It is also agreed that said collaterals may from time to time, by mutual consent, be exchanged for others which shall also be held by said bank on the terms above set forth; and that if we shall come under any other liability, or enter into any other engagement with said bank while it is the holder of this obligation, the net proceeds of the sale of the above securities may be applied either on this note or any other note of our liabilities or engagements held by said bank, as its president or cashier may elect; and we, the maker or makers, hereby waive the benefit of our homestead exemptions as to this debt and contract.

"The Jones M'fg Co.

"G. B. Jones, Secy. & Treas.

"T. W. Jones, President."

And the following indorsements on the back:

"T. W. Jones.

"G. B. Jones."

"March 27th, 1897. Rec'd on within note \$4,704.50, being bal. of \$7,000.00 rec'd from G. M. Scott, receiver of the Jones Mfg. Co., which was credited upon the \$8,000.00 note.

"Sept. 18th, 1897. Rec'd on within note \$792.30, bal. of principal & interest due to date, being part of amt. rec'd from G. M. Scott, Rec'r, from the \$8,000.00 note."

The said G. B. and T. W. Jones indorsed this note, and also indorsed and deposited with the plaintiff, as security therefor, their note upon the company for \$8,000.

The issues and judgment, which recite nearly all the material facts, are as follows:

Issues.

"(1) Was it agreed between G. B. Jones, acting for himself and the Jones Manufacturing Company, at the time of the defendant's indorsement of the notes of said company sued on in this action, that said defendant should be secured and indemnified as to his said indorsement to the plaintiff bank by the security of the said \$8,000 note and trust deposited as collateral with plaintiff, subject to the prior lien of the \$5,000, loaned thereon by the bank? Answer: Yes. (2) Did the plaintiff bank, while holding said \$8,000 note and trust, have notice of said agreement prior to April 23, 1895, after which date the \$2,295 notes were purchased? Answer: No."

Judgment.

"This cause came on to be heard before the court and jury. The issues hereto annexed were submitted to the jury without objection, no other issues being tendered. The jury having answered first issue, 'Yes,' and second issue, 'No,' both the plaintiff and defendant move for judgment. It is admitted that the sum unpaid on the notes sued is \$1,248.71, and, if the plaintiff is entitled to judgment at all, the defendant admits that the plaintiff is entitled to judgment for only two-thirds of said sum. The plaintiff moves for judgment for the entire sum. The defendant moves for judgment that he go without day, and that defendant recover costs. It is admitted that the plaintiff received and collected the whole of the \$8,000 note and interest, referred to in the evidence and pleadings, to wit, \$8,818, and that plaintiff applied \$5,496.80 of the said sum to the \$5,600 note and interest referred to in the evidence, and that plaintiff then applied \$2,295 to certain notes dated on and after April 23, 1895, issued by Jones Manufacturing Company for logs, etc., to certain other individuals, and purchased and discounted by the plaintiff after April 23, 1895, and that neither T. W. Jones, G. B. Jones, nor George M. Scott were sureties, or indorsers, or in any way liable for said \$2,395 notes. It is admitted that the plaintiff applied what was left, to wit, \$1,026.27, to notes sued on in this action, leaving the balance of \$1,248.71, and that if the bank shall apply said excess after paying the \$5,000 note to notes sued on, in preference to the \$2,295 notes, it is more than sufficient to pay the notes sued on in full. It is admitted that the notes sued on are renewals, and that the originals were dated and executed November 9, 1894, and January 26, 1895, and the originals and renewals were executed to plaintiff by Jones Manufacturing Company, a corporation, and indorsed as sureties by T. W. Jones, G. B. Jones, and George M. Scott. It is not denied that the agreement found by jury on first issue was made prior to the purchase by the bank of the \$2,295 notes. That is ad-

mitted. It is admitted that on April 20, 1895, the plaintiff brought an action against Gordon B. Jones, one of the indorsers upon the notes sued on in this action, to recover on his said indorsement, in the circuit court of Accomack county, Va., which court had jurisdiction of the parties and of the cause of action, the defendant, Jones, being duly before said court, and that the jury therein found for said defendant, G. B. Jones, and that the court adjudged that the plaintiff take nothing against said Jones. The record in said action is evidence on this trial, and is made a part of this finding.

"The court is of opinion that according to the terms, in writing, upon which T. W. and G. B. Jones assigned the \$8,000 note to plaintiff, it had no authority to apply the excess after paying the \$5,000 note to the \$2,295 notes. In preference to the notes sued on for which the said T. W. and G. B. Jones and this defendant were liable. Said written contract is hereto attached. It is a renewal of the original, and in same words. Original was dated December 20, 1894. Both the original and this renewal are signed alike and indorsed on back by T. W. and G. B. Jones. The court is further of opinion that the evidence does not tend to prove and is insufficient to show that the \$8,000 note and deed in trust were not the property of T. W. and G. B. Jones. On their face they purport to be, and, if this is erroneous, no issue was tendered by plaintiff embodying such contention. Upon the issues as found, and the admitted facts, and the evidence as a whole, the court is of opinion, and so adjudges, that the excess of the proceeds of the \$8,000 note after paying the \$5,000 note should be applied to payment of notes sued on, which cancels and discharges them in full, and that it matters not whether the plaintiff had notice or not of the agreement embodied in first issue. It is adjudged that plaintiff take nothing by its writ, and that defendant go without day and recover costs, to be taxed by clerk."

Upon the foregoing facts, we are of the opinion that every principle of law as well as of good conscience requires us to affirm the judgment. As held by the court below, the \$8,000 note presumably belonged to the Joneses, as it was payable to them, and the manufacturing company could not hold its own paper. As this presumption appears from the face of the note, it is binding upon the plaintiff. The plaintiff is therefore placed in the position of taking the money belonging to the Joneses, and, instead of applying it to the notes now in suit, upon which they are jointly liable, using it without authority to pay notes with which they had no connection. The pretended authority claimed by it under the collateral note has no existence in law or equity. The plaintiff then sues the defendant upon the notes which it should have paid with the surplus of the \$8,000 note. It is true the two Joneses are not sued in this

action, and that one of them appears to have successfully defended a suit in the state of Virginia, which might perhaps be pleaded in estoppel; but the plaintiff argues expressly that the defendant would have his redress against his co-sureties, the Joneses, at least one of whom would apparently have no defense.

The plaintiff also argues that, as neither the principal nor sureties applied the \$8,000, it had a right to do so. Undoubtedly, but only to the debts upon which the owners of the money were liable. The plaintiff lays stress upon the fact that the collateral note commences with "we" and speaks of "our," and contends that these words refer exclusively to the company and its liabilities. If this is true, it does not help the plaintiff, as it excludes the idea that the indorsers are parties to the agreement. If they are not parties to the agreement, then they are liable only as indorsers, and their money is liable only for their obligations under that particular indorsement. If, on the contrary, the indorsers are parties to this complicated agreement, then the word "our" refers only to their joint obligations. Again, admitting the contention of the plaintiff that the words "we" and "our," in the collateral note, refer exclusively to the company, we find the said company specifically waiving the benefit of its homestead exemptions. We are not advised as to the nature and extent of a corporate homestead, the existence of which we did not even suspect. In *Boyd v. Redd*, 120 N. C. 335, 27 S. E. 35, this court held that a statute which gives to a bank a lien on the stock of a stockholder indebted to it is in derogation of common right, and must be strictly construed, and that "the statutory lien on stock is intended only to secure the direct indebtedness which the stockholder creates with the corporation, either as principal or surety, and not any involuntary indebtedness to it caused by the purchase of his liabilities incurred to third parties." This rule is equally applicable to the case at bar. Under this view of the law, we are not required to pass upon the validity of the many-faced, but essentially one-sided, contract relied upon by the plaintiff; but we cannot be expected to give a latitudinarian construction to an instrument so inequitable upon its face, and which, we are compelled to say, has been used as the cover for an unlawful and oppressive diversion of the funds belonging to an indorser. The judgment is affirmed.

(123 N. C. 586)

WILLIAMS et al. v. MAXWELL.

(Supreme Court of North Carolina. Dec. 20, 1898.)

BUILDING AND LOAN ASSOCIATIONS—INSOLVENCY—LIABILITY OF BORROWING MEMBER.

1. A borrowing stockholder, who is an incorporator in an insolvent building and loan association, cannot be allowed the amounts

paid into the association in discharge of his indebtedness, until the amount of defalcation and expenses of winding up the concern are paid.

2. On the insolvency of a building and loan association, a borrowing incorporator should be charged with the amount borrowed, plus 6 per cent. interest, less the whole amount paid to the association, whether as fines, penalties, or weekly dues, plus his pro rata part of the defalcation of the association, to be determined by the pro rata per cent. on the amount of capital (the amount owing the association, in the case of borrowing members) which the incorporators had in the association on the day it went into the hands of the receiver.

Appeal from superior court, Burke county; Starbuck, Judge.

Action by Richard Williams and others against W. C. Maxwell to enjoin a foreclosure sale. From a judgment for defendant, plaintiffs appeal. Affirmed.

I. T. Avery and A. C. Avery, for appellants. Burwell, Walker & Cansler and Osborne, Maxwell & Keerans, for appellee.

FURCHES, J. The North Carolina Building & Loan Association is a corporation, and its place of business is Charlotte, N. C. The plaintiff Richard Williams became the owner of 10 shares of capital stock in said association, of the par value of \$100 each, aggregating the sum of \$1,000. This made him a stockholder in the association (*Strauss v. Association*, 117 N. C. 814, 23 S. E. 450), and enabled him to borrow \$1,000 from the association, which he did; and he and his wife executed one of the mortgages mentioned in the complaint as security therefor. The plaintiff, having reduced the amount of this indebtedness to the association, was allowed to borrow \$250 more, for which he and his wife executed a second mortgage on the same property. Plaintiff from time to time made payments to the association, until this indebtedness was reduced to \$676.70, on the 27th of March, 1897, if these amounts should all be applied to said indebtedness, calculating the indebtedness at 6 per cent. interest, and allowing plaintiff credit for all amounts paid by them, and interest thereon at the same rate of per cent., whether the same was called fines, assessments, or what not. The defendant corporation became insolvent; suit was commenced in the superior court of Mecklenburg county to wind up the concern; and on the 27th day of March, 1897, J. W. Keerans and E. T. Cansler were appointed receivers. The mortgages mentioned above were made to W. C. Maxwell, with power to sell upon default. Maxwell was also a stockholder and member of said corporation, and a party to the action to wind up and settle the concern; and, upon the plaintiff's failing to pay said indebtedness, the court made an order directing said Maxwell, trustee, to sell and to foreclose said mortgages. To prevent Maxwell's selling under said mortgages, the plaintiff, on the 17th day of February, 1898, commenced this action in the superior court of Burke county, and obtained a temporary restraining order against

said sale. The plaintiff's motion for injunction was afterwards heard, when the following facts were found and agreed to by the parties: That plaintiff, on the 26th of March, 1890, borrowed \$1,000, and on the 2d of October, 1894, borrowed \$250; that after allowing plaintiff credit for every dollar paid the defendant association, whether by way of fines or otherwise, and interest thereon at the rate of 6 per cent. (the same rate defendant had charged plaintiff), the balance remaining due from plaintiff, if the whole amount of these payments should be credited on the indebtedness, was \$676.70. But the court allowed the receivers to apply \$12.50 per share of stock to the loss account, amounting to \$125; and, if this be deducted from the amount paid into the concern, the amount still due will be \$801.70. The injunction being refused, plaintiff appealed.

These are the facts found by the court, and not disputed on the argument here. Upon this state of facts, there are nothing but questions of law presented, and they have been so frequently and so recently decided by this court that we do not feel disposed to discuss them in this opinion. It was decided in *Strauss' Case*, 117 N. C. 314, 23 S. E. 450, and 118 N. C. 556, 24 S. E. 116, that each holder of stock on the 27th day of March, 1897 (the day the receivers were appointed), is an incorporator, and liable for his pro rata part of the defalcation and expenses of closing out the concern. It is held in *Meares v. Davis*, 121 N. C. 192, 28 S. E. 188, that a corporator is not entitled to have the excess paid to him until his part of the deficiency is ascertained and accounted for. And it is held in *Meares v. Duncan*, 31 S. E. 476, and in *Meares v. Butler*, 31 S. E. 477, at this term, that, as the incorporators are bound for the defalcation and expenses of winding up the concern, the amounts paid into the association cannot be allowed as a discharge of their indebtedness until this deficiency is paid. This is held in these cases to be so, even where the rights of married women are involved. It is held in *Strauss' Case*, supra, that the incorporators were liable for their pro rata part of this deficiency, according to their pro rata per cent. upon the amount of capital they had in the association on the day it went into the hands of the receivers. And the capital of the borrowing members was the amount they owed the association at that time. In this case it seems that the shares held by each incorporator were assessed \$12.50. We do not think this was a compliance with the rule in *Strauss' Case*, and may make some difference in the amount due by the plaintiff. But this is a matter that may be corrected by a mathematical calculation, by taking what the assessments amount to, at \$12.50 a share, and get the per cent. this would make upon the whole collectible assets of the concern, and apply this per cent. to the plaintiff's indebtedness. We are of the opinion that the remaining amount of plaintiff's indebtedness is the

amount he borrowed, with 6 per cent. interest, deducting the whole amount the plaintiff has paid the association, after first deducting the proper per cent. therefrom for defalcations and expenses of closing out the concern. In the consideration of this case, in order to put it upon its merits, we have left out of consideration the question of venue. We see no good reason why an injunction should issue, and therefore affirm the judgment of the court below. Affirmed.

(123 N. C. 547)

COZART v. FLEMING et al.

(Supreme Court of North Carolina. Dec. 13, 1898.)

ELECTIONS—INJUNCTIONS—QUO WARRANTO.

1. An action to enjoin newly-elected county commissioners, who had not yet qualified, from declaring a public office vacant, and electing a successor, is properly dismissed as premature.

2. Injunction does not lie to restrain county commissioners from declaring a public office vacant because of an apparent tie vote, where it is an attempt, in effect, to try the title to the office by injunction, which is not permissible.

3. The erroneous action of the county commissioners in declaring an office vacant because of an apparent tie vote, and ordering a new election, does not warrant the granting of an injunction to one of the candidates, since the title to the office can be inquired into by quo warranto even after such a new election.

4. Laws 1895, c. 159, § 7, as amended by Laws 1897, c. 185, provides that any judge of the superior or supreme court may issue a rule on any election officer to show cause why he has not performed or shall not perform any specified act or duty required by the election law, or why he shall not perform or execute this act in any specified way, so as to best give effect to the intent and purposes of the election law. *Held*, that the result of an election as declared by the clerk of the superior court, where made in the manner pointed out by statute, is prima facie correct, and can be questioned only by quo warranto; and hence the clerk, who is functus officio after the declaration of the result, cannot be ordered by a "mandamus" to recount the vote, where it was a tie between two candidates.

5. Code, § 1872, provides that all officers shall continue in their respective offices until their successors have been duly elected and qualified. An election for sheriff resulted in a tie vote between defendant and relator, who was a candidate for re-election. The relator sued to restrain the clerk of the superior court from ordering a new election, and asked for a recount. Both candidates claim the incorrectness of the count, illegal votes, intimidation, etc., but defendant asked for a new election. *Held*, that the ordering of a new election was properly enjoined until the correct result of the election already had could be determined according to the issue raised by the pleadings, notwithstanding neither of the candidates is in possession of the office by virtue of the election, which was a necessary averment in quo warranto, which has been abolished (Code, § 603), but is not expressly required in the substituted action to try title to an office.

Montgomery, J., dissenting.

Appeal from superior court, Granville county; Timberlake, Judge.

Action by W. S. Cozart against S. A. Flem-

ing and others to enjoin the ordering of a new election. From a decree for plaintiff, defendants appeal. Reversed.

A. W. Graham and J. W. Graham, for appellants. T. T. Hicks, for appellee.

CLARK, J. The clerk of the superior court of Granville county, upon tabulating the returns of the recent election for sheriff of that county, ascertained that there was an equal number of ballots cast for the relator and for his competitor, the defendant Fleming, and was about to proceed to order a new election to be held for that office, as required by the statute, whereupon the relator, who was the sheriff of the county and a candidate for reelection, began this action, on November 15, 1898, against said Fleming, the clerk of the superior court, and the three newly-elected commissioners (who had not then qualified, and could not do so till the first Monday in December), alleging in substance: (1) That the count was incorrect, and that upon a recount of the ballots he would be found to have received a majority, and asking the judge to issue a rule on the clerk to show cause why he should not make such recount and declare the correct result; (2) an itemized statement of illegal votes counted for his competitor, and legal votes for himself rejected, intimidation, and like matters proper to be inquired into upon a quo warranto; (3) that the clerk had declared his intention to order a new election, averring the needless expense thereof to himself and the county, and asking a restraining order against such proceeding, until the proper result of the election already had was ascertained; (4) that the newly-elected county commissioners would, on their qualification, proceed to declare the office vacant, and elect a successor; and asking a restraining order to prevent such action. The defendant Fleming answered that he himself had, in truth, received a majority of the votes cast, and on a recount should be declared sheriff, denying all the allegations of the complaint as to the items affecting the result, and also on his part setting out an itemized statement of illegal votes cast for his competitor, and legal votes for himself rejected, intimidation, fraud, and other particulars proper in a quo warranto, but at the same time averring his willingness to submit the issue again to the arbitrament of the ballot box, and objecting to the order for a recount. The clerk answered, expressing his willingness to submit to the orders of the court. The newly-elected commissioners, in their answer, aver that they had not qualified, had not determined upon any action as to declaring the office vacant, and asking that the action be dismissed as to them as both premature and without warrant in law. It is well to dismiss this branch of the case here, by saying that their contention was well founded in both particulars. The proceeding as to them was not only premature, but, if it had not been, it would have been, in effect, an at-

tempt to try the title to an office by an injunction, which is not permissible. *Patterson v. Hubbs*, 65 N. C. 119. Besides, if the commissioners had assumed to declare the office vacant, and elect another, there would have been no resultant damage justifying an injunction. The title would still be inquired into by quo warranto. The county commissioners should be dismissed, with their costs. It is proper, however, to add that the failure of a new sheriff to qualify, when it is undetermined who is elected, and no certificate has been issued to him, does not authorize a declaration that the office is vacant. The old sheriff holds over until his successor is declared elected and qualified. Code, § 1872.

The court, in view of the provision in section 7, c. 159, of the election law of 1895 (amended by chapter 185, Laws 1897), that any judge of the superior or supreme court may issue a rule upon any election officer "to show cause why he has not performed or shall not perform any specified act or duty required by the election law, or why he or they shall not perform or execute this act in any specified way, so as to best give effect to the intent and purposes of the election law," issued the rule as prayed, and on its return ordered the clerk to make the recount in the presence of the parties and others. On such recount of the ballots, the clerk reported that the relator had received a majority of eight votes. On a review of the disputed items of this report, the judge found that the relator had received a majority of two votes, and was entitled to the certificate of election, which he ordered the clerk to issue; and he issued his mandamus to the county commissioners to induct the relator into office upon giving the bonds and taking the oaths required by law, reserving, however, to the defendant Fleming the right to contest, either in this proceeding, or, at his election, in an action of quo warranto, the correctness of the result as affected by the legality or illegality of ballots rejected and received, and the intimidation and fraud alleged in the pleadings, as to which matters he refused to hear evidence at the hearing in chambers. His honor conceived rightly that the title to the office, so far as dependent upon the reception or rejection of ballots, intimidation, fraud, etc., could only be determined before a judge and jury in a quo warranto; but he erred in thinking that a contest could be maintained over the certificate which conveys only a prima facie title to the office, subject to the declaration of the right in a quo warranto proceeding. If the clerk had refused or failed to tabulate the result in the manner required by law, he could have been compelled by a rule to perform that duty. *Moore v. Jones*, 78 N. C. 188. But here the clerk had acted, and in the mode pointed out by the statute. His declaration of the result is prima facie correct, and can only be questioned in an action of quo warranto. In *Swain v. McRae*, 80 N. C. 111, decided at a time when the tabulation was made by a board of canvassers, instead of by

the clerk, as is now the law, it was held that, upon their declaration of the result, the board was *functus officio*, and could not be ordered by a mandamus to reassemble and recount the vote, the remedy being by a quo warranto. In like manner, in *Gatling v. Boone*, 98 N. C. 573, 3 S. E. 392, it is held that the declaration of the result of an election by the board of canvassers "conclusively settles *prima facie* the right of the person so ascertained to be elected to be inducted into and exercise the office," leaving the correctness of the result so declared to be investigated upon a quo warranto. This seems to be generally well settled. *Cooley*, Const. Lim. (6th Ed.) 784, and cases cited in note 6, among which the following cases hold that, not only a recount cannot be ordered by a court, but if the canvassing board voluntarily recount, and give a second certificate to another, such action is a mere nullity: *Bowen v. Hixon*, 45 Mo. 340; *People v. Robertson*, 27 Mich. 116; *Opinion of Justices*, 117 Mass. 599; *State v. Donnewirth*, 21 Ohio St. 216. *Moore v. Jones*, supra, does not differ from these. In that case the board of canvassers, having, without authority of law, gone behind the returns, were ordered to assemble and perform the duty allotted to them of adding up the returns and declaring the result. In law, the board had not acted at all.

The clerk, having declared the result, no longer has any duties in regard thereto which he could exercise either voluntarily or upon the order of a judge. Besides, the clerk did not have the power in the first instance to count the ballots and declare the result, but merely to add up the various precinct returns legally made, and ascertain the result. Section 22 of the act; *Moore v. Jones*, supra. In *Broughton v. Young*, 119 N. C. 915, 27 S. E. 277, it was held that the preservation of the ballots is required that "they may be kept as evidence to verify or correct the election returns when impeached, and that on a quo warranto the ballot boxes might be brought into court, and the recount made in the presence of court and jury." But in that case, being in regard to a contested seat in the general assembly, inasmuch as the trial was not *viva voce* before that body, but the evidence must be taken before a commission, a recount of the ballots was ordered to be made in the presence of the legislative commission appointed to take evidence, since it could not be contemplated that "the clerks of Cherokee, of Dare, or other counties should attend with their ballot boxes before the general assembly in Raleigh, or before the congressional committee on elections at Washington." This was merely to procure evidence to support or impeach the *prima facie* title of the sitting member, and not for the purpose of authorizing or directing a certificate of election to be issued to the contestant, should a recount show that he had received a majority of votes. The object was solely to procure evidence for the body that was to determine the title, not to compel nor to per-

mit the clerk to reverse the declaration of the result already made, or recall the certificate founded thereon. So much of this proceeding as sought to have a recount made by the clerk was without authority of law, and a nullity. If made for the purpose of furnishing evidence, it is not justified by the circumstances, as was the case in *Broughton v. Young*, supra, since here the boxes could be opened and the recount readily made in the presence of the jury, and, if for the purpose of changing the result already declared by the clerk, he, already having performed that duty in the mode prescribed by law, was *functus officio*. The law does not contemplate a legal contest over the *prima facie* certificate. The officer charged with the duty of issuing the certificate settles that matter at his peril if he act corruptly, but conclusively so far as its issuance is concerned.

The only remaining question is whether so much of this action can be sustained as seeks to restrain the holding of a new election till the issue raised by the pleadings is determined,—whether in truth there was a tie vote. If, as formerly (Code, § 2699), upon a tie vote, the county commissioners, promptly and without expense, determined the result, there could be no foundation for such proceeding as we have here. Their declaration of the result must be in favor of one party, and the other, if so minded, could, by a quo warranto, have the correctness of the original election determined. But under the present statute we have this anomaly: that, unless this proceeding lies, neither Cozart nor Fleming can bring his quo warranto until a new election, since Fleming is not in office, and Cozart is not in by virtue of this election, but merely holding over till his successor is elected and qualified, and no more liable to a quo warranto than if some other person had been the former sheriff, and was holding over under no claim to the office, but merely until the title should be determined between two parties, each of whom claimed the election. Besides, in such election a third person might be elected; and, if the result of the November election can only be contested when one of the two highest candidates at such election is actually inducted into office, there might be no chance to contest at all.

From the averments in the pleadings of both competitors, it is almost impossible to believe (especially in view of the recount, though illegally made) that on a vote of so many thousands there will not be discovered an error of one single ballot in favor of one party or the other, either by inadvertence of the election officers, or the erroneous acceptance or rejection of some ballot, or in some other particular. On the face of the numerous averments to that effect specifically made by both the parties, and the truth of which must be determined notwithstanding a new election shall be held, it seems a clear right both to the parties them-

selves and to the public as well that the expense of an election shall not be incurred when the chances are almost infinitesimal that its result will not become a nullity upon the trial of the averments made in these pleadings,—averments which would be renewed in a quo warranto against the party successful in such new election, since it can have no validity if either party be shown to have been truly elected in the election already held. It is true that this proceeding is an anomalous one, but it arises upon a condition of things which can very rarely occur. If there is no precedent or statute authorizing it, there is neither precedent nor statute forbidding it. It is one of the occasions when the "reason of the thing" calls upon a court to make a precedent. It is not reasonable that an election should be ordered when both parties make numerous specific averments, the correctness of any one of which on either side (unless exactly balanced by sustaining a similar averment of the other party) will render the new election nugatory. This proceeding is in its essence a quo warranto, brought by one contestant against the other, when neither is in actual possession of the office (under the election), by reason of the fact that upon the declaration of a tie vote, which both seek to impeach, neither can be in possession. They have a right to contest the correctness of the result and have it determined, and the clerk is a proper party. The injunction against his ordering a new election will be continued to the hearing, when the trial of the issues will determine which of the two parties claiming the office was elected; or if, by a marvel, it should happen that no majority is ascertained on either side, then the restraining order will be dissolved, to the end that an election be held; but the re-reference to the ballot box should not be ordered till the plea in bar, set up on each side,—that the people at the ballot box have already declared their will,—is disposed of. This action, notwithstanding its unusual feature of not being against one in possession of office, is in its every essence an "action to try the title or right to an office," since each party asserts his right to the office to which he claims to have been elected; and the action will therefore stand for trial at the first term of Granville superior court. Code, § 616.

The gist of the action is that the relator was elected, and is kept out of office, not by the induction of his competitor, but by an erroneous declaration of a tie vote, which declaration he has a right to contest. Though, for convenience, we still speak of an action of quo warranto, it must be remembered that action has been specifically abolished (Code, § 603), and we have in fact only a civil action, in which the subject-matter is a trial of the title to an office (Id. § 616). Usually, in such actions there is an allegation that the defendant has usurped and is illegally exercising the duties of the office; but

section 616 does not require such averment, and the facts of this case satisfactorily show why it is not alleged here. A new election, if there is any truth whatever in the allegations in the pleadings on either side, would damage the parties, not only by the expense thereof (since the expense of the quo warranto will still have to be undergone), but the candidate defeated in the new election would be put at a serious disadvantage in satisfying a jury that, at the late election in November, he in truth received a majority, however strong the evidence might be. For these reasons, to give the parties an unprejudiced trial to determine the result of the November election, and to save the public and the parties a serious expense, which will probably prove to have been unnecessary, the injunction against ordering a new election should be continued to the hearing. The injunction in no wise determines the title, but merely preserves the status quo till the title can be determined. *Gullette v. Polney* (La.) 6 South. 507. In granting such injunction there was no error, but in other particulars, as above pointed out, there was error.

MONTGOMERY, J. (dissenting). Before the adoption of the Code of Civil Procedure, the writ of quo warranto was the only proper remedy provided by our laws to try the title to a public office. Section 362, Code Civ. Proc. (now section 603, Code), abolished the writ of quo warranto. But the "form" of the action, only, has been abolished. The remedies obtainable under the old writ may be obtained by civil actions, under the former provisions of title 15, c. 2, Code Civ. Proc. (now chapter 1, tit. 15, Code). *Saunders v. Gatling*, 81 N. C. 298. It is only under the provisions of that chapter of the Code that the title to a public office can be tried in this state. Section 607 of that chapter of the Code declares that "an action may be brought by the attorney general in the name of the state upon his own information, or upon the complaint of any private party, against the parties offending, in the following cases: (1) When any person shall usurp, intrude into, or unlawfully hold or exercise any public office, civil or military, or any franchise within this state, or any office in a corporation created by the authority of this state; or (2) when any public officer, civil or military, shall have done or suffered an act which by law shall make a forfeiture of his office; or (3) when any association or number of persons shall act within this state as a corporation, without being duly incorporated." There is not, in my opinion, a line written in the Laws of North Carolina which authorizes any suit to be brought to try the title to a public office except the above-quoted section. Section 616, as I construe it, only declares that actions brought under section 607, subd. 1, shall be tried with unusual dispatch, at the next term after summons issued. It is too clear for argument that, upon the face of section 607, before an action can be brought

for an office, the defendant claimant must be in possession of the office.

Fleming, the defendant in this action, not only has not usurped, intruded into, or unlawfully held or exercised, the office of sheriff of Granville county before this action was commenced, but he never has been declared by any authority, competent or incompetent, to be entitled to that office. The clerk had proclaimed, as it was his duty to do, under section 26 of chapter 159 of the Laws of 1895, after having tabulated the vote, the result of the vote, to wit, that there was a tie between the plaintiff and the defendant Fleming for the office of sheriff. So, we have before us an action brought to test the title to an office by a person who had been held not entitled to it by that officer—the clerk—whose duty it was to tabulate the vote and announce the result, against that person whom the clerk had announced as having received a tie vote with the plaintiff, and therefore not entitled to the office. Under the announcement of the vote of the clerk, neither one was entitled to the office of sheriff; and yet we have before us a contest for the office, commenced by regular action, before the day fixed by law for the commencement of the term of the office. It is perfectly clear that the proceeding was commenced under the powers which the plaintiff thought that the election laws of 1896 and 1897 conferred upon the judges of the supreme and the superior courts over election officers. I concur with the court in the opinion that the proceeding in the court below by which a recount of the vote was made by the clerk, through the order of the judge, was without authority of law, for the reason, as I believe, that, when the clerk tabulated the vote and announced the result, his duties as one of the election officers for that election ceased. But I go further, and, with due deference to the opinion of the court, I think this action ought to be dismissed, for it has no foundation to rest upon, except the supervisory powers given to the judges under the election laws, and those powers do not support it. It is true that, if another election is ordered, some expense will have to be incurred therefor by the county; but that is a matter that cannot be prevented by judicial determination. Legislation must cure that. In the meantime the county would not be without the services of a person qualified to act as sheriff. The plaintiff was sheriff at the time of the last election, and, under the law, will serve until his successor is duly elected and qualified. If he was elected at the last election, he will succeed himself, whatever the result of the new election, if it is held, may be. If he was not elected, then Fleming, the defendant, may show it, if he can, and succeed him in the office. The new election will settle nothing, unless it should turn out in some proper action for the office, between the plaintiff and defendant, that there was a tie vote; and it is unfortunate that another election has to be held. But the election laws make no provi-

sion to meet a case like this one; and proceedings in the nature of quo warranto, if this action can be regarded in that light, cannot be maintained, because the defendant is not in possession of the office, and the action was brought before the term of the office was to begin.

In the opinion of the court, it is stated that, unless the present action lies, neither the plaintiff nor the defendant can bring quo warranto until the new election is held. I do not take that view of the matter. After the first Monday in December following the election (the date fixed by law for the installation of the person truly elected to the office of sheriff), there was nothing to prevent Fleming, under section 607 of the Code, from instituting proceedings against the plaintiff for the office. It is not necessary, as I see it, that the plaintiff be in possession of the office by the election returns and his installation by the proper authorities, though not truly elected, in order that the defendant may have the right to contest with him the title to the office. If the defendant was in fact elected, the plaintiff is unlawfully holding the office against the defendant, although the law, from motives of public policy, that there may be no vacancy in so important an office as that of sheriff, prescribes that the plaintiff shall hold the office until his successor is duly elected and qualified, from the mere fact that he was sheriff at the time of the last election. It is not necessary, to enable the defendant to commence his action, that he should have his certificate of election or the announcement of the tabulated vote in his favor. He can show, if the fact be so, that he received a majority of the votes for the office, and that he was entitled to be inducted therein, though another had received the certificate of election, and had been inducted into the office, or notwithstanding that the clerk had declared the result to be a tie between him and the incumbent.

(122 N. C. 379)

DAVIS et al. v. BLEVINS et al.

(Supreme Court of North Carolina. Dec. 12, 1898.)

WILLS—EVIDENCE OF PROBATE—COLLATERAL ATTACK.

A record of the county court that a will was produced in open court in 1861 for probate, and duly proved "according to law," raises a presumption that the will was so proved, which is conclusive in an action in ejectment, irrespective of what the law might be had the will been probated under the present statute and code practice.

Appeal from superior court, Ashe county; Coble, Judge.

Ejectment by A. C. Davis and others against George Blevins and others. From a judgment of nonsuit, plaintiffs appeal. Error.

Todd & Pell, for appellants. R. A. Dough-ton, for appellees.

FURCHES, J. This is an action of ejectment, in which the will of George Bower becomes a necessary link in the chain of plaintiffs' title. The plaintiffs offered this will in evidence, on the back of which was written: "State of North Carolina, Ashe County. I certify that the foregoing will has been duly proven and recorded as the law directs. James Wagg, Clerk County Court." The plaintiffs also offered in evidence the following record, on the minute docket of October term, 1861, of the court of pleas and quarter sessions of Ashe county: "The last will and testament of Col. George Bower was duly produced in open court for probate, and duly proved according to law. And, on motion, America C. Bower was appointed administratrix with the will annexed (it appearing that no executor had been appointed in said will); and she filed her bond in the sum of one hundred thousand dollars, with C. H. Doughton, Q. F. Neal, and Robert Gambill as sureties. Bond accepted, and the administratrix qualified as the law directs." But his honor, still being of the opinion that said will had not been sufficiently probated, sustained the defendants' objection, and ruled out the will. Plaintiffs excepted, and submitted to a judgment of nonsuit, and appealed.

The only question presented by this appeal is the sufficiency of the probate of the will of George Bower to be allowed as evidence in the trial of this case. The question presented here is a very different one from what would have been presented upon a caveat and appeal from the judgment of the county court of Ashe county in 1861. That would have put the sufficiency of the probate directly in issue, and the trial would have been de novo. This appeal only attacks the judgment of the county court, collaterally, which, in our opinion, could not be done. "The probate of wills is a judicial proceeding in rem, and the judgment is a judgment in rem, and is good against the world." 2 Freem. Judgm. § 608. It must be presumed that when the county court admitted this will to probate, and proceeded to judgment, in which it held that the will "was produced in open court for probate, and duly proved according to law," it was so proved. This view is sustained in *Re Young's Will* (at this term) 31 S. E. 626; *Hutson v. Sawyer*, 104 N. C. 1, 10 S. E. 85; *Jenkins v. Jenkins*, 96 N. C. 254, on pages 258 and 259, 2 S. E. 522; *Moody v. Johnson*, 112 N. C. 798, 800, 17 S. E. 578.

On the argument, objection was taken to the record of probate because it was on the minute docket. But this is no ground of objection, as the minute docket is the docket upon which such records were made, as the courts of probate were constituted at that time, and was therefore found just where it should have been found. The defendants cited *Raleigh & W. Ry. Co. v. Glendon & G. Min. & Mfg. Co.*, 113 N. C. 241, 18 S. E. 208, in support of the ruling of the court. But, in doing so, they failed to note the fact that that decision

was made under the present statute and the code practice, and is not in point in this case; and, not being in point, it is not necessary that we should make any ruling as to its correctness, and we do not; but as it became necessary to consider it, as it was cited as authority by defendants, we are not willing that it should pass without our calling attention to it, with the suggestion that it may have been put upon incorrect principles. The clerks now have jurisdiction of the probate of wills, and they should not admit one to probate without taking the proof as provided by statute. But as they have jurisdiction to admit wills to probate, when they do so, whether their judgments in rem are not "binding on the world," and whether they can be collaterally attacked, quere. In our opinion, the will of George Bower was competent evidence, and should have been admitted in evidence on this trial. Error. New trial.

(123 N. C. 508)

LYMAN v. HUNTER.

(Supreme Court of North Carolina. Dec. 20, 1898.)

TAX SALES—MORTGAGES—ACTIONS TO RECOVER PROPERTY—LIMITATION.

1. LAWS 1895, c. 119, § 69, prescribing as to actions to recover property sold for taxes a limitation of three years after the making of the sheriff's deed, except as to persons under legal disability, bars an action begun in September, 1898, by the purchaser at a sale under a deed of trust, to recover lands from a grantee under a tax deed made in June, 1895.

2. A tax deed conveys a good title as against a deed of trust made before the land was listed for taxes.

Douglas, J., dubitante.

Appeal from superior court, Buncombe county; Norwood, Judge.

Controversy without action between A. H. Lyman and E. T. Hunter. From a decree for the latter, the former appeals. Affirmed.

Moore & Moore, for appellant. Davidson & Jones, for appellee.

MONTGOMERY, J. This is a controversy submitted without action under section 567 of the Code, at the September term, 1898, of Buncombe superior court, and a lot or parcel of land in the city of Asheville is the subject of the controversy. The defendant is in possession of the property, claiming title thereto, but the plaintiff alleges that he is the owner of the same in fee, and entitled to the possession. The decision of the matter is to be made upon the following facts: The lot was listed and assessed for taxation in 1892 as the property of T. A. Cummings, was sold regularly by the tax collector upon the failure of the owner, Cummings, or any one for him, to pay the taxes, and a deed therefor was executed and delivered by the tax collector on June 11, 1895, and registered at once. By

virtue of that deed the defendant is now in possession of the land, and claims title thereto. Before the lot was listed for taxes, Cummings conveyed the same by deed of trust to D. O. Waddell, Jr., to secure a debt to Youmans. The deed of trust was duly registered. There was default made by Cummings in the payment of the debt. The trustee, after due notice, and in compliance with all of the provisions of the deed of trust, sold the lot of land on the 11th of May, 1897, when the plaintiff, Lyman, became the purchaser thereof, received a deed therefor from the trustee, and now claims title thereunder.

The first question of law arising upon the facts submitted is this: Is the plaintiff barred by the statute of limitations contained in section 69 of chapter 119 of the Laws of 1896 from maintaining an action for the recovery of the lot? That section reads as follows: "No action for the recovery of real property sold for the non-payment of taxes shall lie, unless the same be brought within three years after the sheriff's deed is made as above provided: provided that where the owner of such real property sold as aforesaid at the time of such sale be a minor or insane or convict in the penitentiary or under any other legal disability, three years after such disability shall be removed, shall be allowed such person, his heirs or legal representatives to bring action." His honor held that the plaintiff's claim was barred by that statute, and we think there was no error in this ruling. The question is not before us as to whether section 69 of chapter 119 of the Laws of 1896 would be a bar against the claims of *infant cestuis que trustent* where the lands, held in trust for the security of a debt in which they had an interest, had been sold for taxes on account of the failure of the owner, trustor, to pay the taxes; nor is the question before us as to whether that section would be a bar against the claims of *infant heirs at law* of a deceased mortgagee who had died before the time allowed by law to pay the taxes on the mortgaged land had expired, and the land had been sold for the taxes; and we express no opinion on these matters. The case before us is free from either of these complications.

The other question in the case—whether the tax sale had divested the title of Cummings and that of the trustee, and vested it in the purchaser, the defendant—it is not really necessary to decide, for upon our decision of the first question the right of the plaintiff to maintain an action for the land has been answered in the negative. But the case of *Powell v. Sikes*, 119 N. C. 231, 26 S. E. 88, leaves no doubt that the defendant in this case got a good title under the tax collector's deed. Affirmed.

DOUGLAS, J., dubitante. FURCHES, J., concurs in the judgment upon the last ground stated in the opinion.

(123 N. C. 566)

HOFFMAN et al. v. KRAMER et al.
(Supreme Court of North Carolina. Dec. 20, 1898.)

FACTORS—TRANSFERS OF CONSIGNOR'S PROPERTY
—CONSIDERATION.

1. An instruction that a principal cannot recover for an alleged conversion of merchandise by his factor's transferee, if the transfer was for a "valuable consideration," and without notice that the transferor held them as agent, is misleading, in view of a preceding instruction that an antecedent debt was a "valuable consideration" for an indorsement of the principal's notes by the factor to such transferee.

2. A factor cannot pass title to his consignor's merchandise by a transfer in payment of, or as security for, his own antecedent debt.

Appeal from superior court, Durham county; Adams, Judge.

Action by E. Hoffman & Son against S. Kramer & Son. There was a judgment for plaintiffs, and defendants appeal. New trial.

Winston & Fuller, for appellants. Manning & Foushee, for appellees.

MONTGOMERY, J. The defendants executed and delivered to M. Lindheim, a dealer in tobacco in New York City, three promissory notes, of \$242 each, payable at Durham, N. C.,—the purchase money for five packages of Havana tobacco, to be delivered to the defendants upon their call. In the complaint it is alleged that Lindheim sold to the plaintiffs the notes before maturity, and for value. This action is for the recovery of the amount due on the notes. The defendants set up, among other defenses, two counterclaims,—one for the value of a broken package of tobacco belonging to the defendants, and averred to have been wrongfully converted by the plaintiffs, and the other for the value of the tobacco constituting the consideration of the notes sued upon, and averred to have been wrongfully converted by the plaintiffs.

We will consider the exceptions to the rulings of his honor in connection with the first counterclaim. It appeared from the testimony of both Lindheim and the defendants that, after the execution of the notes, the defendants consigned to Lindheim, at New York, a package, and also a broken package, of domestic tobacco, to be sold by him; the proceeds of which sales were to be accounted for to them. Lindheim sold the whole package, and accounted therefor to the defendants. Lindheim and the plaintiffs testified that Lindheim, before either of the notes fell due, conveyed to the plaintiffs all of his stock and accounts, as collateral security for what he might owe them. Under that conveyance or assignment, Lindheim testified that the plaintiffs took possession of the broken package of tobacco. The plaintiffs denied that statement of Lindheim. Upon that evidence his honor instructed the jury as follows: "The burden is upon defendants to prove by a preponderance of evidence that the broken package of tobacco came into the possession of the plaintiffs, and without considera-

tion; and, if the jury believe that the plaintiffs took the broken package without consideration, then the defendants would be entitled to recover its value; but, if the jury believe that the defendants put the broken package in the possession of Lindheim for sale, and to account to them for its proceeds, and Lindheim transferred the said tobacco to plaintiffs for a valuable consideration, and plaintiffs had no knowledge or notice that said tobacco was held by Lindheim as agent of defendants, then the defendants cannot recover of plaintiffs its value, or set off the same as a counterclaim against the notes, but must look to Lindheim for its value." There was error in that instruction. His honor had already told the jury, in defining what is meant by a "valuable consideration," that upon the sale by Lindheim of the notes, and their purchase by the plaintiffs, an existing indebtedness of Lindheim to the plaintiffs was a valuable consideration, and that the title to the notes passed for that consideration; and the jury, of course, understood his honor to mean, from his former definition of what a "valuable consideration," in law, was, that the transfer of the broken package of tobacco to the plaintiffs by Lindheim, for a debt which he owed the plaintiffs, was a valuable consideration, and supported the transfer of the tobacco for that purpose against the rights of the defendants as consignors. But a principal who consigns goods to an agent or factor, to be sold, has a right to expect the proceeds of the sale to be returned to him. Where a factor sells the goods of his principal, he must keep that sale, so far as his principal is concerned, unconnected with his private affairs, and not mix it up with his own interests, to the injury of his principal. *Guerreiro v. Pelle*, 5 R. C. L. 616. The same principle is announced in *Warner v. Martin*, 11 How. 209, where it is said: "It has been supposed that the right of a factor to sell the merchandise of his principal to his own creditor in payment of an antecedent debt finds its sanction in the fact of the creditor's belief that his debtor is the owner of the merchandise, and his ignorance that it belongs to another, and if in the last he has been deceived, that the person by whom the delinquent factor has been trusted shall be the loser. The principle does not cover the case. Where a contract is proposed between factors, or between a factor and any other creditor, to pass property for an antecedent debt, it is not a sale, in the legal sense of that word, or in any sense in which it is used in reference to the commission which a factor has to sell. * * * When such a transfer of property is made by a factor for his debt, it is a departure from the usage of trade known as well by the creditor as it is by the factor. It is more; it is the violation of all that a factor contracts to do with the property of his principal. * * * It does not matter that the creditor may not know,

when he takes the property, that the factor's principal owns it; that he believes it to be the factor's in good faith." To the same effect are numerous authorities cited in 1 Am. & Eng. Enc. Law, p. 1174. The same principle of law will apply with equal force where the factor conveys the property of his principal to his own creditor by way of mortgage or pledge to secure a debt of his own. *Warner v. Martin*, supra.

From what has been said by the court, it is unnecessary to consider the other exceptions of the defendants. There must be a new trial, and the court is not disposed in this case to make that new trial a partial one. New trial.

(123 N. C. 571)

SLOCOMB v. RAY et ux.

(Supreme Court of North Carolina. Dec. 20, 1898.)

MARRIED WOMEN—EXECUTION OF MORTGAGES—DOWER.

Under Const. art. 10, § 6, providing that the property of a married woman may be conveyed by her "with the written assent of her husband" as if she were a feme sole, and Code, § 1256, providing that every conveyance affecting the real estate of any married woman must be executed by such married woman and her husband, the execution by a married woman of a mortgage on her dower interest to secure the same debt for which the husband had previously executed a mortgage on the same property is insufficient where executed by her alone.

Clark, J., dissenting.

Appeal from superior court, Cumberland county; Allen, Judge.

Action by A. H. Slocumb against John C. Ray and his wife. From that part of the judgment sustaining the demurrer of defendant wife, plaintiff appeals. Affirmed.

H. L. Cook, for appellant. N. W. Ray, for appellees.

DOUGLAS, J. This is an action for the foreclosure of a mortgage executed on the 18th day of January, 1892, to the plaintiff by the defendant J. C. Ray, in which his wife and co-defendant, Mary A. Ray, did not join. Subsequently to its execution, on the 3d day of November, 1892, the said Mary A. Ray executed to the plaintiff a similar mortgage upon her dower interest in the same property, to secure the same debt of her husband. In this mortgage the husband did not join. Upon the trial of the action, the defendants demurred to the complaint, *ore tenus*, "upon the ground that the complaint showed upon its face that the defendant John C. Ray executed the note and mortgage on the 18th of January, 1892, and that the defendant Mary A. Ray, wife of John C. Ray, did not sign and execute the same mortgage at the same time with her husband, but on November 3, 1892, she executed a paper releasing her dower interest and all other interest she might have in said lands by virtue of her marital or other rights, in favor of the note

and mortgage executed by her said husband." The defendants filed no answer. The court sustained the demurrer as to Mary A. Ray, and gave judgment against the other defendants for the debt and foreclosure of the mortgage on the land, discharging the defendant Mary A. Ray. The plaintiff appealed from that part of the judgment sustaining the demurrer as to Mary A. Ray only.

This presents the sole question in the case, —whether the mortgage of the wife, executed by her alone, is sufficient to convey or release her right of dower. We think not. Section 6 of article 10 of the constitution is as follows: "The real and personal property of any female in this state acquired before marriage, and all property real and personal, to which she may, after marriage, become in any manner entitled, shall be and remain the sole and separate estate and property of such female, and shall not be liable for any debts, obligations or engagements of her husband, and may be devised and bequeathed, and with the written assent of her husband, conveyed by her as if she were unmarried." Section 1256 of the Code provides that "every conveyance, power of attorney or other instrument affecting the estate, right or title of any married woman in lands, tenements or hereditaments, must be executed by such married woman and her husband." This clearly contemplates that the same instrument of writing shall be executed by both. Chapter 136 of the Laws of 1895 in no way alters this requirement, as that act simply refers to the acknowledgment, and not to the execution, of the instrument. This court has well said in *Ferguson v. Kinsland*, 93 N. C. 337, 339, that "the requirement that the husband should execute the same deed with the wife was to afford her his protection against the wiles and insidious arts of others, while her separate and private examination was to secure her against coercion and undue influence from him,"—approved in *Green v. Bennett*, 120 N. C. 394, 27 S. E. 142. The wife is legally presumed to be always under the protection of the husband, whose stronger character renders him less liable to sinister influences, and whose wider range of experience gives him a better knowledge of business affairs. The particular act by which her property is affected must meet his concurrent assent expressly given in the instrument itself; otherwise, the instrument is a nullity, as coming within the express prohibition of the statute, and opposed to the letter and spirit of the constitution. The constitution includes "all property, real and personal"; while the statute relates to "every instrument affecting her estate, right or title." Both clearly include her right of dower, which, although inchoate, is none the less vested. The legal assent of the husband cannot be presumed from any other instrument. It must be expressed in the instrument itself to which it alone can give validity. Under the statute, it is the joinder of the husband

and wife that makes the instrument, which without such joinder would be the deed of neither as far as the wife's interest is concerned.

We think that these conclusions, based upon the letter of the law, are in harmony with the uniform current of our decisions. *Harris v. Jenkins*, 72 N. C. 183, 186; *Southerland v. Hunter*, 93 N. C. 310, 311; *Ferguson v. Kinsland*, Id. 337, 339; *Lineberger v. Tidwell*, 104 N. C. 506, 510, 10 S. E. 753; *Green v. Bennett*, 120 N. C. 397, 27 S. E. 142. The opinion in *Barrett v. Barrett*, 120 N. C. 127, 26 S. E. 691, does not conflict with these cases, as there the husband and wife executed the same deed; and the opinion says, on page 130, 120 N. C., and page 692, 26 S. E., that "the sole defect is that the privy examination was taken a few minutes or hours before the husband's acknowledgment, on the same day of the execution of the deed by him." It was therefore held that this defect was cured by chapter 293 of the Laws of 1893. For the reasons stated in this opinion, the judgment is affirmed. Affirmed.

CLARK, J. (dissenting). The husband executed his deed with full covenants of warranty. In a subsequent deed, the wife executed a release of her contingent right of dower. Her privy examination was duly and regularly taken. The only defect that can be urged is that "the written consent" of her husband was not taken; but the conveyance is not of her own land, and, even if it were, the previous deed of the husband with warranty was a written consent, given with all solemnity. There is no statute anywhere which requires that the husband's assent shall be in the same deed with the wife's release of her dower. When it is the husband's land, and he has conveyed it by deed with full warranty, and subsequently the wife releases her dower right by deed with privy examination, the warranty in the husband's deed is not only an assent to the wife's subsequent release of dower, but a solemn contract that she shall make the release, and is a liability of his estate should he die before his wife and without procuring her to execute such release. There was a line of decisions, all quoted in *Barrett v. Barrett*, 120 N. C. 127, 26 S. E. 691, to the effect that, where the privy examination of the wife was taken before the proof of the execution by the husband, the probate was insufficient; but that was not the case here, and even that was held so exceedingly technical that chapter 293, Laws 1893, was enacted: "That in all cases . . . when the acknowledgment of a husband has been taken before or subsequent to the acknowledgment and privy examination of his wife," it shall be "valid and binding"; and chapter 136, Acts 1895, recognizing the inconvenience that might arise from the previous technical construction, further provides that the acknowledgment of the husband and wife may be before

different officers, and even in different states.

As already stated, the release of dower, being by deed with privy examination duly taken, was not only with written assent of her husband, but in performance of his contract of warranty under seal. If it was a conveyance of her property, held by her independent of any control of her husband, the case is that of two joint owners of an interest in property, which can be conveyed by them in separate deeds; and, construing the two papers together, the court should hold there was a conveyance of the entire title, each assenting to what the other had done. There is no statute or good reason why both must necessarily join in the same deed, which at times may be inconvenient, as is recognized by chapter 136, Acts 1895; and, in the absence of any statute requiring joinder in the same deed, even if it were desirable, the courts cannot make one. *Green v. Bennett*, 120 N. C. 394, 27 S. E. 142, was decided on a transaction occurring before the above-cited Acts of 1893 and 1895, and therefore it was governed by the technical ruling in *Ferguson v. Kingsland*, 93 N. C. 337, and such cases,—a distinction which was pointed out in *Barrett v. Barrett*, 120 N. C. 127, 28 S. E. 691. In the present case, rights of third persons have not intervened, and the curative statutes apply.

(128 N. C. 502)

REDMON et al. v. RAY et al.

(Supreme Court of North Carolina. Dec. 20, 1898.)

REPLEVIN—INTERVENTION—TRIAL OF TITLE.

An interplea in replevin presented the issue only as to whether the interpleader was the owner of the property sued for. The interpleader claimed under a bill of sale absolute in form, but intended as a mere security, and void, therefore, as to creditors and subsequent purchasers. Plaintiffs were entitled, as against interpleader, only on the ground that they were subsequent purchasers from the grantor. *Held*, that plaintiffs' title was called in question, as their claim, if in fact a mere security, as alleged, would not prevail over the prior claim of the interpleader, which was equally good as against the common debtor of both.

Appeal from superior court, Madison county; Greene, Judge.

Action for the recovery of personal property by Redmon & Wilbar against Ray & Edwards, in which J. G. Williams, who claimed the property in controversy, was allowed to interplead. On trial of the issue presented by the interplea it was adjudged that interpleader was not the owner of such property, from which judgment interpleader appeals. Affirmed.

J. M. Gudger, Jr., for appellant. W. W. Zachary, for appellees.

FURCHES, J. This is an action commenced by Redmon & Wilbar against Ray & Edwards to recover a lot of sawed lumber.

Their claim is based on two contracts of Ray & Edwards with plaintiffs; one of September 3, 1896, and the other of February 10, 1897. By leave of court J. G. Williams was allowed to interplead in this action, and he claims that the lumber sued for belongs to him. He bases his claim on what he calls a bill of sale from Ray & Edwards, which is in the following terms: "Know all men by these presents that we, W. M. Edwards and W. C. Ray, of the county of Madison, and state of North Carolina, for and in consideration of the sum of \$500 in hand paid by J. G. Williams, of the county of Buncombe, said state, do by these presents sell, transfer, and deliver to the said J. G. Williams all lumber that is to be manufactured on said yards known as the 'Whitt & Shelton Yards,' which is now logged on Upper Laurel, in Madison county, thereby giving the said J. G. Williams all the rights we have to sell or remove said lumber, with all our rights of ingress and egress to the same at each and every place where said lumber is situated, and giving to said J. G. Williams all rights that we have in regard to said lumber. This, the 10th day of January, 1896. [Signed] William M. Edwards. W. C. Ray." This instrument is prior in date to either of the contracts under which plaintiffs claim, and was in form probated and registered in Madison county before the date of plaintiff's contracts. But it was admitted by the interpleader, Williams, on the trial, and is stated in the case on appeal, that Ray & Edwards were indebted to Williams at the date of said contract in the sum of \$400 or \$500, and that he was furnishing them supplies to enable them to operate their business, and that the same was given to secure said past indebtedness, and also to secure further advancements that he might make to them. The appellant, Williams, being an interpleader, the only issue presented, so far as he is concerned, is as to whether he is the owner of the lumber sued for or not; and the burden of this issue—to show that he is—was upon him. *Wallace v. Robeson*, 100 N. C. 206, 6 S. E. 650; *Bank v. Asheville Furniture & Lumber Co.*, 120 N. C. 475, 26 S. E. 927. The instrument under which the interpleader claims title has no clause of defeasance, or conditions that show that it was a mortgage or security to Williams, and did not need to be registered. But it was shown and admitted that it was in fact intended as a security, and, this fact not appearing in the instrument, it was incapable of being registered, and was "void as to creditors and subsequent purchasers." *Gulley v. Macy*, 84 N. C. 434; *Bernhardt v. Brown*, 122 N. C. 580, 29 S. E. 884. It is probable that Williams' claim would be good as against Ray & Edwards, as a verbal mortgage may be good against the mortgagor of personal property. Therefore, while no issue could be tried on this interplea, except as to Williams' title to the lumber, still, as he showed an apparent title as against Ray & Edwards, the original owners,

and as plaintiffs also claimed to have derived their title from Ray & Edwards at a subsequent date to that of Williams' claim, this called in question their title. The plaintiffs are only entitled, as against Williams, upon the ground that they are "subsequent purchasers" from Ray & Edwards; and if their claim (apparently an unconditional sale) was in fact a mortgage (a security for debt, as Williams' bill is) they would have no title as against Williams, who is a "prior creditor," and who has a bill of sale, good as against Ray & Edwards, the debtors. But, so far as we can see from the evidence and from the statement of the case on appeal, it was shown that the sale to the plaintiffs was absolute in terms, and that the plaintiffs had paid Ray & Edwards for the lumber; and no exception of the interpleader presents the question that it was not an absolute sale by Ray & Edwards to the plaintiffs, Redmon & Wilbar.

The interpleader has some exceptions to the admission of evidence, also an exception to the first issue submitted by the court, which is as follows: "Is the interpleader, J. G. Williams, the owner of the lumber described in this action?" which issue was answered in the negative. He also asked the court to instruct the jury that upon the evidence the first issue should be answered "Yea." The exceptions have all been considered, and none of them can be sustained. Affirmed.

(123 N. C. 426)

MOORE v. CARR et al.

(Supreme Court of North Carolina. Dec. 20, 1898.)

LIMITATIONS—ACCOMMODATION INDORSERS.

Indorsers in blank of a note before delivery to the payee being declared by Code, § 50, liable as sureties to any holder, a partial payment by the maker after maturity is a payment by them, as regards the statute of limitations.

Appeal from superior court, Mecklenburg county; Starbuck, Judge.

Action by Thomas O. Moore against J. P. Carr and others, maker and indorsers of a note. Judgment for plaintiff, and defendant indorsers appeal. Affirmed.

Burwell, Walker & Cansler, for appellants. Osborne, Maxwell & Keerans, for appellee.

FAIRCLOTH, C. J. By consent his honor found the facts: J. M. Little borrowed \$100 from the plaintiff, and gave his note; and the defendants indorsed their names in blank on the note before it was delivered to the payee, the plaintiff. Annual payments were made by the maker, and the last payment made by him was on April 13, 1898, and this action was brought on April 15, 1898. The statute of limitations was pleaded. The defendants claim that as they were indorsers, and as more than three years had elapsed since the maturity of

the note, they are discharged, notwithstanding the recent payment by the maker of the note. His honor held that they are liable, and the indorsers appealed.

Bearing in mind that the law should fit the facts in all cases, it would seem that this question ought to be understood by this time. The act of 1827 (Code, § 50) declared that indorsers shall be liable as sureties to any holder, and that they may be sued without demand on the principal debtor. Many decisions have been made construing this statute, and they all hold the indorsers liable as sureties, upon facts like those now before us, and that they are of the class of original promisors. A payment by either of them or by the principal is a payment by all, because the benefit of the payment inures to each one, and it follows that the statute of limitations operates only from the last payment. In *Le Duc v. Butler*, 112 N. C. 458, 17 S. E. 423, attention is called to quite a number of decisions pointing out the rights and liabilities of indorsers, among themselves, to the holder of the note, etc., and with the principal debtor, according to the conditions in each case, and several more cases since *Le Duc's Case* have followed the principles above referred to. *Baker v. Robinson*, 63 N. C. 191, is a case in which the facts are on all fours with those in the case at bar; citing *Rey v. Simpson*, 22 How. 341. In each of these cases the indorsers were held to be original promisors, and were as liable as if they had signed as sureties on the face of the note. *Good v. Martin*, 95 U. S. 90, is a case in point. Two persons signed a note as makers thereof, and Good wrote his name across the back of the note before it was delivered to the payee. It was held that the indorser is presumed to have indorsed as surety of the maker, for his accommodation, and to give him credit with the payee, and that, if the presumption is not rebutted by evidence, he is liable on the note as maker; in other words, he is surety for the principal debtor. There are conflicting decisions in the states, but all agree that a construction of the contract should be given which will carry into effect the intention of the parties. The statute declares such indorser's liability is that of a surety, and a blank indorsement before delivery is construed and presumed to be intended as a suretyship. No difficulty can arise if the indorsement is special, and proper words are used to show the intention of the party to be otherwise than that presumed from a blank indorsement. 1 *Para. Cont.* (6th Ed.) 243; *Story, Prom. Notes*, § 58. The same conclusion was adopted in *Johnson v. Hooker*, 47 N. C. 29. These principles must govern between the holder of the note and the maker, sureties, and such indorsers. The rights and liabilities of indorsers among themselves, and in their relations to the maker and his sureties, are not affected by these decisions. These questions are not presented here, and we say nothing about them. Affirmed.

(123 N. C. 871)

PARKER v. HASTINGS et al.

(Supreme Court of North Carolina. Dec. 23, 1898.)

NEGLIGENCE—ISSUE.

A complaint sought to recover damages alleged to have been sustained by defendants' having "unlawfully and willfully" put logs in the stream, and caused the same to be floated down against plaintiff's milldam, which destroyed it. There was no evidence of negligence on the part of defendants, who claimed the right to float the logs. *Held* error to submit an issue as to whether defendants "negligently" injured the dam.

Appeal from superior court, Jackson county; Norwood, Judge.

Action by J. H. Parker against Hastings & Co. From a judgment for plaintiff, defendants appeal. Reversed.

Moore & Moore and W. E. Moore, for appellants. W. T. Crawford, for appellee.

CLARK, J. This action was brought by the plaintiff against the defendants to recover damages which the plaintiff alleges that he had sustained by reason of the defendants' having unlawfully and willfully rolled and placed into Tuckasegee river large numbers of logs, lumber, and timber, and permitted and caused the same to be floated down against his milldam, by which the dam was broken down and destroyed. The defense was that the stream was a floatable one, and therefore a natural highway, and that the plaintiff's injury, if any he suffered, was without remedy, no negligence being alleged or proved. The court submitted an issue as to whether the dam was injured by the negligence of the defendants, and instructed the jury that, if they should find that the river was a floatable stream where the plaintiff's mill and dam were located, still the defendants would be liable, if they negligently injured the plaintiff's dam in the floating of the logs. The defendants objected to the issue, and excepted to the charge of his honor upon it. The issue should not have been submitted, for the complaint did not allege negligence on the part of the defendants, nor was there a scintilla of evidence that the defendants did anything except cut the logs, and put them in the stream for floatage down the river. The words "unlawfully and willfully" mean simply that the act of cutting and putting the logs in the stream was contrary to the plaintiff's rights, and intentionally done. There must be a new trial of this case for that error. New trial.

MONTGOMERY, J. I concur with the court in the conclusion that there ought to be a new trial in this case, and I desire to add, as my own views, on account of the serious public importance of the matter involved, that, if the question had been raised in the trial below in such a way as that the court could take notice of it, I would be of the opinion that there was no sufficient testimony

offered,—such as a jury ought to consider,—under the main issue submitted, to warrant the finding of the jury in the affirmative. The issue to which I refer was in these words: "At the time of the alleged injury, was the Canada Fork of the Tuckasegee river, at the point of the alleged injury, such a stream that business men may calculate that, with tolerable regularity as to seasons, the water will rise to and remain at such a height as will enable them to make it profitable to use it as a highway for transporting logs to market or mills lower down?"

Justice Furches, in his dissenting opinion in *Commissioners of Burke Co. v. Catawba Lumber Co.*, 116 N. C. 750, 21 S. E. 947, said that "floatable water courses" was a term not known to our law until within the last six or eight years; and I think an examination of our decisions will verify the statement. The right to float logs, at certain times of high water, in a stream not navigable for craft of any kind at ordinary water, has been recognized by this court; and the law in reference thereto has been formulated, or, rather, announced, under an oft-repeated definition of a "floatable stream." That definition, repeated in *Commissioners of Burke Co. v. Lumber Co.*, *supra*, is as follows: "It is not necessary, in order to establish an easement in a river, to show that it is susceptible of use continuously during the whole year for the purpose of floatage; but it is sufficient if it appear that business men may calculate that, with tolerable regularity as to seasons, the water will rise to and remain at such a height as will enable them to make it profitable to use it as a highway for transporting logs to mills or markets lower down." The learned judge (Avery) who wrote the opinion in that case, of course, made his definition from reading and digesting the works of text writers and decisions of the courts upon the subject. He quotes as authority from Gould on Waters (sections 108, 109), where the writer says: "It is not necessary that the stream, in order to be a highway, should be capable of floating logs at all seasons of the year, but its public character depends on its fitness to answer the wants of those whose business requires its use." "If the stream is not always navigable, it must be capable of floatage, as the result of natural causes, at periods recurring from year to year, and continuing for a sufficient length of time in each year to make it useful as a highway." Mr. Gould cites the case of *Morgan v. King*, 35 N. Y. 454, to sustain his petition, and in the New York case will be found this announcement: "If it [the stream] is ordinarily subject to periodical fluctuations in the volume and height of its water, attributable to natural causes, and occurring as regularly as the seasons, and if its period of high water or navigable capacity ordinarily continues a sufficient length of time to make it useful as a highway, it is subject to the public easement." The principle of law, then, which is

announced in *Commissioners of Burke Co. v. Catawba Lumber Co.*, supra, is the same as that stated in *Gould on Waters*, and the same as that announced in the case of *Morgan v. King*, supra. Therefore, to make a stream such as I have described a floatable one, the rises of water must be at recurring seasons during each year, with tolerable regularity. They must not be produced by artificial means. They must be habits of the stream, produced by natural causes, to be known and to be anticipated, and upon which prudent business men might make investments with a reasonable hope of returns. As was said in *Morgan v. King*, supra, "These periodical fluctuations must be attributable to natural causes, and occur as regularly as the seasons." Sudden and irregular freshets, however high the waters may become, will not make a stream a floatable one. If that were the rule, then every creek, if only a few yards wide, in moderately hilly sections, at times of sudden and unexpected heavy falls of rain would become a floatable stream, with the result of the destruction of a large proportion of the milling and ginning properties of the state.

Now, have the defendants, by their evidence, brought themselves within the principles of law mentioned above? The evidence of the plaintiff tended to prove that there was no regularity in the rises of the river at periodic or recurring seasons of the year, and some of the witnesses said that sometimes years would elapse between rises sufficient to float logs. The strongest evidence of the defendants on the subject is as follows: T. H. Hastings said: "There were from three to eight or ten rises in the river each year that would float logs. There was a continuous tide in 1890, for six weeks, that would have floated logs. There was a tide in November, 1891. We had some small tides in December, 1891. In 1892 we had tides in February and March,—three tides, four tides. We had one in September that brought in a lot of logs. We had tides in 1893,—one in July, and a very large one in August." John Wike said: "I was raised near Tuckasegee river, and have known it all my life. Some years we have 3 to 4 tides a year. On the average, we have 3 tides a year." M. F. Galloway testified that "some years there will be five or six freshets that will float logs. Other years there will not be more than one or two rises. The river will not carry the logs down without a freshet. It might be a year, sometimes, between the freshets. There was generally one or two freshets a year. You could not count with any certainty on the time of these freshets. The freshets were generally in the fall and spring." L. J. Smith testified: "I know the Tuckasegee river. It will not float logs without a considerable rise. There are usually from four to five tides or rises a year sufficient to float logs. There might be a year that there would not be a freshet that

would float logs. I think that the rises or tides can be counted upon with reasonable certainty." E. D. Davis said: "In common years there would be water enough to float logs three or four times a year; some years more, and some years less. I could not count on regularity, but I could count on its coming along some time during each year." Mrs. Annie L. Buffum testified as follows: "I kept a weather report and diary in 1891, 1892, 1893, 1894, and 1895. (Witness read diary:) Tide on January 22, 1891; 150 logs came into the boom. Tide February 1, 1891; 150 logs came into the boom. Tide February 9, 1891; the river rose six feet, the shore dam broke, and a number of logs were lost. Tide November 10, 1891; freshet; 5,000 logs came into the boom. Tide November 11, 1891; brought logs to boom. Tide November 3, 1891; fine freshet; logs coming. Tide December 3, 1891; fine freshet; 1,000 logs came into the boom. Tide December 7, 1891; logs came into boom. Tide January 13, 1892; freshet; logs came into boom. Tide January 14, 1892; water 7 inches above counters in stores. Freshet August 14, 1893; logs coming to boom. September 10, 1893; rise; logs coming to boom. September 12, 1893; boom broken. December 10, 1894; logs came. Dec. 12, 1894; logs came. April 7, 1895; logs came; boom burst." She also testified that during portions of the years mentioned she was not at Dillsboro, and did not keep her diary. I am of the opinion that the evidence, in a just and reasonable view of it, was not sufficient to be submitted to the jury, under the issue.

(123 N. C. 689)

DELOZIER et al. v. BIRD et al.
(Supreme Court of North Carolina. Dec. 20, 1898.)

APPEAL — NOTICE — EXCEPTION — CONTEMPT — PURSUEMENT.

1. The record need not show service of notice of appeal, where the findings of fact and the judgment thereon, constituting the case on appeal, state that appeal was taken.

2. The appeal is sufficient exception to the judgment rendered on the findings of fact by the court.

3. Advice of counsel is no protection to an intentional violation of orders of court placing property in possession of a receiver.

4. Where persons, in violation of an order placing premises in possession of a receiver, go onto the same, and remove the house, their failure to obey the order to restore possession is a contempt, and likewise their failure to obey an order to return the house, in the absence of a showing of inability to comply therewith.

5. Compliance with orders to restore property to possession of a receiver may be coerced by imprisonment till such restoration.

Appeal from superior court, Swain county; Hoke, Judge.

Action by T. M. Delozier against R. L. Bird and another to recover possession of certain premises. A receiver was appointed for the premises, and from an order adjudging plaintiff and others in contempt for taking posses-

sion thereof, and refusing to surrender the same, they appeal. Affirmed.

Davidson & Jones, for appellees.

CLARK, J. The record must show that notice of appeal was served, unless it affirmatively appear that the appeal was taken in open court. *Investment Co. v. Kelly* (at this term) 31 S. E. 671. If this were not so, there would be a presumption that notice of appeal was given, when, on the contrary, it must appear from the record in order to constitute the appeal in this court. *Howell v. Jones*, 109 N. C. 102, 13 S. E. 889, and cases there cited. But here the findings of fact and the judgment thereon, which constitute the case on appeal, state that the appeal was taken. This necessarily shows that it was taken in time. *Atkinson v. Railway Co.*, 113 N. C. 581, 18 S. E. 254. Neither do we find any force in the objection that no exceptions are filed. The appeal is itself a sufficient exception to the judgment which is rendered upon the findings of fact by the court. *Cummings v. Hoffman*, 118 N. C. 267, 18 S. E. 170. The motion of the appellee to dismiss upon the above grounds is denied.

This is an appeal from a judgment in contempt. From the facts found by the judge it appears that the plaintiff in the cause, and the other two appellants aiding him, entered in the nighttime upon the premises, which, by an order in the cause, were in the possession and control of the court through its receiver, theretofore duly appointed in this action, and hold possession of the same by force and in defiance of the orders of the court; that they have torn down and removed the dwelling house which was on the premises, and have committed other spoil and injury to the premises and property. The said Delozier and his two associates appeared in response to the notice served upon them, and replied that they acted under advice of counsel, and disclaimed any intentional contempt or disobedience of the orders of the court. Thereupon the court adjudged them in contempt till they restore the house to said premises in the same condition as before their wrongful tearing down and removing the same, and that they turn over the premises to the defendant, to be held by him subject to and under the orders of said receiver; and, if this order is not obeyed within 10 days, said parties to be committed to the common jail of the county until they shall comply with the above order, with leave to move before any judge at chambers in that judicial district, upon notice to the defendant, to have the attachment for contempt dissolved upon showing compliance with this order. From this order the respondents appealed, but they do not appear here and show any cause why it should be held invalid in any respect, and upon examination of the record we find none. The plaintiff was fixed with a knowledge of the order appointing a

receiver to take charge of the property. The entrance in the nighttime to get possession was significant; and, when ordered to restore the possession of the premises to the receiver, the respondents merely content themselves with saying they acted under advice of counsel, and intended no intentional contempt of the court, and they do not show any inability to return the house. The failure to obey the order of the court to restore the possession of the premises to the receiver is a direct contempt. *State v. Mott*, 49 N. C. 449; Code, § 648 (4). This is also true as to the return of the house, unless evidence of inability to comply has been shown. *Boyet v. Vaughan*, 89 N. C. 27; *Smith v. Smith*, 92 N. C. 304; *Pain v. Pain*, 80 N. C. 322. The advice of counsel is no protection to an intentional violation of the orders of the court placing the property in possession of the receiver (*Green v. Griffin*, 95 N. C. 50; *Baker v. Cordon*, 86 N. C. 116), and counsel in such cases advising violation of the orders of a court may become guilty of contempt himself. The remedy for a supposed erroneous order of a court is by an appeal, and not by a forcible violation of it. While the court could not punish the contempt already committed by imprisonment of indefinite duration, it had the right to coerce obedience to its order of restitution by imprisoning the contumacious parties until they shall comply. *Cromartie v. Commissioners*, 85 N. C. 211; *Thompson v. Onley*, 96 N. C. 9, 1 S. E. 620. No error.

(123 N. C. 685)

RAMSEY v. RAMSEY.

(Supreme Court of North Carolina. Dec. 23, 1898.)

EXPRESS TRUSTS—POWERS OF ATTORNEY—AGENTS.

Intestate, by an instrument in writing, appointed defendant as his agent and attorney in fact, with full power to prosecute, in the name of the intestate, a suit already commenced against S. for a tract of land, and authorized him to have the deed to the same made to himself, to sell the land, and from the proceeds to maintain the intestate and his wife for their lives, or for the life of the survivor, and to pay the balance, if any, to the intestate's children, after deducting for his own trouble and expenses. Defendant elected to take the proceeds of the sale of the land involved in the suit with S. instead of taking title in himself. *Held*, that the instrument created an express trust, and not a mere agency, so that, after the death of the intestate, the proceeds of the sale must be applied to the widow's support instead of going to his administrator.

Appeal from superior court, Madison county. Hoke, Judge.

Action by Edward Ramsey, administrator of John Ramsey, deceased, against W. C. Ramsey. From a judgment for defendant, plaintiff appeals. Affirmed.

W. W. Zachary, for appellant. Davidson & Jones, for appellee.

FAIRCLOTH, C. J. The question presented is whether W. C. Ramsey was an agent or

trustee of John Ramsey, and that depends on the construction of the following written instrument, marked "Exhibit A": "Know all men by these presents that I, John Ramsey, have this day constituted and appointed W. C. Ramsey my lawful agent and attorney in fact, with full power and authority to do and transact all of the business hereinafter named; that is to say, the said W. C. Ramsey is to prosecute in my name a suit I have commenced against R. J. Sams for a certain tract of land, and to have authority to have the deed to the same made to himself, said W. C. Ramsey, and is hereby directed that out of the proceeds of the sale of said lands, which the said W. C. Ramsey is hereby authorized to make, the said W. C. Ramsey is to maintain me and my wife Drucilla, or the survivor of us during our natural life or the life of the survivor of us, and then, at the death of the survivor of us, to use the balance of the proceeds of said lands, if any is left, to payment of such of my children as have not been so much advanced as the others, so as to make my advancements to them agree, the said W. C. Ramsey is to his trouble and expenses in every way paid off and discharged of once about the business where named. Given under my hand and seal this 31st of August, 1880. [Signed] John Ramsey. [Seal.] [Signed] J. M. Gudger. [Seal.]" After the pleadings were filed, a reference was ordered to state an account between the parties. The referee reported and found that a small balance was due the plaintiff. He also held that, under Exhibit A, W. C. Ramsey was an agent of John Ramsey, who is dead, leaving him surviving his wife and children. The defendant filed exceptions to the report, and they were sustained by his honor, who entered the following judgment, after allowing one or more payments made by the defendant since the death of John Ramsey: "It is agreed in open court that the money claimed by the plaintiff 'n this suit went into the hands of defendant under and by virtue of the power of attorney and instrument alleged in, and annexed to, the answer. The court sustains the exceptions of the defendant; and further finds as a fact that there was no demand for settlement or termination of agency during the lifetime of John Ramsey, the intestate, but demand was made by the administrator before bringing this suit. The court further finds that defendant did not receive entire amount charged against him by \$25 (see evidence of Tilson), and is therefore entitled to an additional credit for that amount, and that defendant was in no default, but in exercise of ordinary care and prudence, in not litigating about the same with Tilson. The court therefore sustains all of defendant's exceptions, and finds as conclusions of law that the widow of John Ramsey, now living, is proper owner of any amount due at present by reason of this fund; that the payment of fifty dollars to said widow is a proper payment, and should be allowed; that defendant is entitled to an additional

credit of \$25, the evidence showing that said amount of the compromise money was not received by him; and it is ordered and adjudged that defendant go without day, and recover of plaintiff and sureties on his bond, [and] costs [of] action to be taxed by the clerk, including the sum of \$20 to referee."

On the back of the case on appeal is the following indorsement: "I accept service of the written case on appeal, this the 13th day of April, 1898. * * * I agree that the judgment of the court is the case in supreme court, August 13, 1898. J. S. McElroy, Atty. for Def."

The defendant elected to take the proceeds of the sale of the land involved in the suit with Sams instead of taking title to himself. If Exhibit A is construed as only an agency, the plainly-expressed intention of John Ramsey would be defeated. Treating it, however, as a trust, the intention can be fully enforced. Exhibit A is a plain express trust reduced to writing, and does not fall within the class of constructive trusts referred to in *Wood v. Cherry*, 73 N. C. 110. This is our conclusion, in any point of view we can take. That view gives full effect to the kind intention of the husband and father, and it seems that in justice it should be so considered. **Affirmed.**

(123 N. C. 649)

STONESTREET et al. v. FROST et al.
(Supreme Court of North Carolina. Dec. 23, 1898.)

ADMINISTRATORS—ATTORNEY'S FEES—CLAIMS—ADMISSIONS.

1. An administrator should not be allowed an attorney's fee paid for services in defending an action by the distributees against the administrator to recover what belonged to them.

2. Before the death of a judgment debtor of a county, an execution was issued, and after his death it was presented by the sheriff to the debtor's administrator, who recognized it as a valid debt against the debtor's estate. *Held*, that the claim of the county was filed with the administrator, within Code, § 164, providing that such a filing will preclude the running of limitations.

3. An administrator admitting the validity of a judgment against his intestate thereby admits the correctness of the amount.

Montgomery, J., dissenting.

Appeal from superior court, Davie county; McIver, Judge.

Action by N. A. Stonestreet and others against E. Frost, administrator of the estate of Wilbourn Stonestreet, deceased, and others, for an accounting. From a judgment for defendants, plaintiffs appeal. **Modified.**

Watson, Buxton & Watson, for appellants. Glenn & Manly, E. L. Gaither, T. B. Bailey, and Holton & Alexander, for appellees.

CLARK, J. The referee found as a fact that in July, 1897, Frost, the administrator, paid an attorney's fee of \$100, and that he paid before that time to other attorneys for services in the settlement of the estate. \$40. Upon that finding of fact, the referee

held, as a matter of law, that, as the administrator had paid \$40 for counsel fees in the settlement of the estate, and as there was no evidence to show that he had any unusual trouble in transacting the business of the estate, and that the \$100 was paid 17 years after anything had been done by the administrator in closing up the estate, and after this action was begun, the administrator was not entitled to have any allowance out of the estate for the fee of \$100. The defendant Frost, administrator, excepted to these findings of the referee; the exception was sustained; and the plaintiffs excepted.

There was error in the ruling of his honor. We think that the administrator should not have been allowed the \$100 fee which he paid to his attorney out of the assets of the estate, for the reason that the service rendered by the attorney was for the attempted prevention of the recovery against the administrator by the distributees of that which belonged to them.

It follows from what we have said as to the ruling of the court on the attorney's fee of \$100 that the ruling in sustaining the exception of Frost, to which the plaintiffs excepted, was erroneous, and that the amount, therefore, of the balance which the referee reported to be due by the administrator, was the correct amount; the nonallowance of commissions to the administrator by the referee having been approved by his honor.

The fifteenth finding of fact is as follows:

"That after the death of W. Stonestreet, and appointment of E. Frost as administrator of his estate, an execution, issued on said judgment against Stonestreet prior to his death, was presented to the administrator by the sheriff, and payment demanded of him, within one year from the date of his appointment as administrator; and the administrator did not dispute the debt or the liability of the estate to pay the same, but declined to pay for lack of assets in his hands at the time, and recognized said judgment as a valid debt against the estate." Upon that finding of fact, the referee found as a conclusion of law: "(5) That the demand by the sheriff of Frost, administrator, within one year from the date of his appointment as administrator for payment of the judgment of Fulford, treasurer, against W. Stonestreet, and the presentation of execution therefor, were a sufficient presentation of the claim to the administrator; and especially so, as he did not dispute its validity, but recognized it as a valid debt against his intestate's estate, and also afterwards, at the request of one of the distributees, agreed to put off the final settlement of the estate, so that it might pass out of date. (6) That, at the time said execution was presented and payment demanded of said administrator, the said judgment was not barred by the statute of limitations, but was a valid judgment against the estate of W. Stonestreet. (7) That, upon the presentation of said judgment and recognition of its

validity by the administrator, it became unnecessary for the holder to bring action to stop the running of the statute. (10) That, no final settlement having ever been filed by the administrator, the claim of plaintiff and the debt of the board of commissioners of Davie county are not barred by any statute of limitation as to him, and that the said judgment of Fulford, treasurer, against W. Stonestreet, must be paid by the administrator before the distributees receive anything, and, as there are not sufficient assets of the estate to pay said debt that ever came into the hands of the administrator, the board of commissioners of Davie county are entitled to judgment against E. Frost for the sum of \$5,000, to be discharged on payment of the sum of \$544.59, with interest thereon from March 5, 1879, and on \$29.20 from October 11, 1881, and on \$29.25 from April 7, 1881." The exceptions to these findings were overruled, and the court rendered judgment in favor of the commissioners of Davie county in accordance therewith.

It would seem that this was a strict and proper compliance with the provisions of Code, § 164. The execution was not unadvisedly issued, nor void, as it is found as a fact that it was issued prior to the death of W. Stonestreet; the sheriff was the agent of the judgment creditor, the county treasurer, to collect the execution; and, upon the death of the judgment debtor, he presented it to the administrator, "who did not dispute its validity, but recognized it as a valid debt against his intestate, and also afterwards, at the request of one of the distributees, agreed to put off the final settlement of the estate, so that it might pass out of date." In the same finding, it is said that the sheriff, within one year after the qualification of the administrator, demanded of him "payment of the judgment of Fulford, treasurer, against W. Stonestreet," and presented the execution therefor. It is difficult to see how the county could have done more. The debt was merged in the judgment, and the judgment was recorded in the court house. The official agent of the county for purposes of collection, on behalf of the plaintiff in the judgment (the county treasurer), demanded of the administrator payment thereof, and presented, as evidence of the judgment and amount thereof, the execution which had been issued thereon prior to the judgment debtor's death. The administrator acknowledged the validity of the debt,—"recognized the judgment as a valid debt against his intestate." This would have been a sufficient "filing" if the judgment creditor had been a private individual; and there can be no reason why it should not be so when the plaintiff in the judgment is a county treasurer, who is faithfully endeavoring to protect the rights of the public. *Turner v. Shuffler*, 108 N. C. 642, 13 S. E. 243; *Brittain v. Dickson*, 104 N. C. 547, 10 S. E. 701. If the county had lost the debt by the failure of its treasurer to present it, he would have

been liable on his bond; but having presented it like any other creditor (who could do so by an agent), upon admission by the administrator of its validity, the amount being ascertained by the judgment, there was no reason why the treasurer should have instituted suit. Had he done so, he should have been taxed with the costs individually. The creditor can never compel the administrator to "string" the claim. He has done his part when he has presented it to the administrator, with sufficient certainty as to the nature and amount of the debt, and the admission of its validity by the administrator dispenses with any formal proof thereof. When the administrator admitted the validity of the judgment, he admitted the correctness of the amount. There was nothing else to prove. Modified and affirmed.

MONTGOMERY, J. (dissenting). The referee found as a fact that in July, 1897, Frost, the administrator, paid an attorney's fee of \$100, and that he had paid before that time to other attorneys, for services in the settlement of the estate, \$40. Upon that finding of fact, the referee held, as a matter of law, that as the administrator had paid \$40 for counsel fees in the settlement of the estate, and as there was no evidence to show that he had any unusual trouble in transacting the business of the estate, and that as the \$100 was paid 17 years after anything had been done by the administrator in closing up the estate, and after this action was begun, the administrator was not entitled to have any allowance out of the estate for the fee of \$100. The defendant Frost, administrator, excepted to these findings of the referee; and his honor sustained the exception, and the plaintiff excepted. There was error in the ruling of his honor. We think that the administrator should not have been allowed the \$100 fee which he paid to his attorney out of the assets of the estate, for the reason that the service rendered by the attorney was for the attempted prevention of the recovery against the administrator by the distributees of that which belonged to them.

It follows from what we have said as to the ruling of his honor on the attorney's fee of \$100 that the ruling of his honor in sustaining the third exception of the defendant Frost (to which the plaintiffs excepted) was erroneous, and that the amount, therefore, of the balance which the referee reported to be due by the administrator, Frost, was the correct amount; the nonallowance of commissions to the administrator by the referee having been approved by his honor.

The board of commissioners of Davie county were made a party defendant, of their own motion, after the commencement of this action; and in their answer they averred that a judgment was had in their favor for \$1,642.18 and costs, at the fall term, 1873, of Davie superior court, and that the same is still due and unpaid. The board of commissioners, further, in

their answer, admit the allegations of the complaint, and pray for judgment that a first lien in their favor may be declared upon the estate of the defendant Frost, intestate. In their replication, the plaintiffs plead the statute of limitations against the judgment of the board of commissioners. The referee found as a fact that "after the death of W. Stonestreet, and appointment of E. Frost as administrator upon his estate, an execution, issued on said judgment against W. Stonestreet prior to his death, was presented to the said administrator by the sheriff, and payment demanded of him, within one year from the date of his appointment as administrator; and said administrator did not dispute said debt or the liability of the estate of his intestate to pay the same, but declined to pay for lack of assets in his hands at the time, and recognized said judgment as a valid debt against the estate of his intestate." Then followed findings of law, to the effect that the presentation of the execution to Frost, administrator, was a sufficient presentation and filing, under section 164 of the Code; that the presentation of the execution to the administrator, Frost, and his recognition of the validity of the debt, rendered it unnecessary for the county to bring an action to stop the running of the statute; that the judgment of the board of commissioners was not barred by the statute of limitations; and that the same should be paid by the administrator. Frost, before the plaintiffs, the distributees, should recover anything. The plaintiffs filed exceptions to these findings of law, and his honor overruled the exceptions, and the plaintiffs excepted.

I am of opinion that his honor was in error in refusing to sustain those exceptions of the plaintiffs which were numbered 3, 4, 5, and 6. The language of that part of section 164 of the Code on the filing of indebtedness with the personal representative is: "But if the claim upon which such cause of action is based be filed with the personal representative within the time above specified, and the same shall be admitted by him, it shall not be necessary to bring an action upon such claim to prevent the bar." What is a reasonable construction to be placed upon the word "filed," as used in section 164? It has reference, certainly, to the old custom of stringing on a line or wire papers of value for past or future usefulness, or, may be, both. The same end is subserved by tying together or bundling papers, and labeling them or cataloging them on rolls or lists for future use. Now, the referee found no such filing as that by the sheriff with the administrator, Frost. He found that that officer presented to the administrator the execution for payment, and that the administrator recognized the debt as a valid one, but declined to pay it for lack of assets. The filing of claims, as provided for under section 164 of the Code, is intended to be of advantage to creditors who do not receive, or who do not expect to receive, payment of their debts on presentation, in enabling them to leave with

the personal representative a memorandum of their claims to save the trouble and expense of bringing suit, and to prevent the bar of the statute of limitations. And the act of the creditor in filing the claim is an admission on his part that he does not expect the immediate payment of the debt, but that he wishes the claim entered "Filed" somewhere, in some way, by the personal representative,—better in a book kept for that purpose, or in bundles labeled, or on a file (though such actual filing may not be essential to comply with the Code). The purpose of the creditor, then, is, by filing his claim with the administrator, to avoid the running of the statute against his debt, and to fix the debt by the admission of the personal representative,—the very reverse of presenting the claim for instant payment. Now, it is clear that the sheriff did not file the judgment of the board of commissioners with Frost, the administrator, in the sense of our construction of section 164. The referee did not find that he went to the administrator, Frost, at the request or even suggestion of the board of commissioners; and the presumption must be, from the words of the finding of the referee, that the sheriff only wished, as the officer of the law to whom the execution was issued, to collect immediately the amount of the execution, and return the same, less his commissions, to the board of commissioners. The execution was unadvisedly issued, to say the least, for the reason that it was issued after the death of the judgment debtor, and on that account was void; the judgment having been rendered in 1873, and the defendant in the execution having died in 1877. It follows from what we have said above that the judgment of the board of commissioners was barred by the statute of limitations, and that the defendant board of commissioners was not entitled to receive anything out of the estate or assets of the intestate of Frost, the administrator. The case ought to be remanded to the superior court of Davie county, to the end that the report of the referee might be reformed according to my view herein expressed, and a proper judgment entered thereon in the superior court, in favor of the plaintiffs.

(123 N. C. 764)

STATE v. McDOWELL et al.

(Supreme Court of North Carolina. Dec. 23, 1898.)

JURORS—TALESMEN.

Where, on failure to obtain a jury from the regular jurors, and those then present and called as talesmen, the court ordered the sheriff to summon 50 freeholders, residents of the county, to attend next day, and adjourned till the next morning, persons then called to the jury box cannot be objected to because they were not bystanders the day before, and were present then only by reason of the summons under said order, or because said order directed the summoning only of freeholders.

Appeal from superior court, Cherokee county; Hoke, Judge.

A. McDowell and another were convicted of robbery, and appeal. Affirmed.

There was evidence by the state that — and his wife were going through Cherokee county on or about December, 1897, to Tennessee, when they were pursued by the defendants to a retired place, where defendants raped the woman in presence of her husband,—one holding a drawn knife at the husband's throat, while the other defendant committed the rape; and both then robbed the husband, and threatened to kill them if they did not immediately leave the county, or if they made known the deed. There was no exception to the rulings of the court on questions of evidence, or to the charge to the jury. The cause was called for trial on Wednesday of the second week of the term, afternoon session. The regular jurors were tendered, and all of them objected to, for cause or peremptorily. There were a few persons in the court room at the time, and they were summoned as tales jurors, and tendered to defendants, and objected to for cause, and some peremptorily. Having failed to get a jury from persons then present or in call of the court, or in the village, the court directed the sheriff to summon or notify 50 or 60 freeholders, who were residents of the county, to attend the following day, and adjourned the court till the following morning. On the following morning the trial was proceeded with, and most of the persons so summoned by the sheriff were in attendance. The court then directed the sheriff to call into the box any persons who were then bystanders, and the same were tendered to the state and defendants. Defendants, having exhausted peremptory challenges, objected to several of the jurors for that they were not bystanders the day before, and were then present in court by reason of having been summoned by the sheriff for the express purpose of trying the case, and were present by reason of the summons, and only for that reason. The court overruled the cause of challenge, and the jurors were sworn, and the jury completed. The court did not direct the sheriff in the morning to summon the remaining talesmen from the citizens he had notified to be present pursuant to order of court, nor to confine himself to them, but directed the sheriff to summon talesmen from any freeholders or citizens of Cherokee county who were then present, and the jury was completed. Nine of the jurors who were so summoned and sworn were called from the number who had been notified to attend by the sheriff pursuant to the judge's order, and had come from their homes pursuant to the sheriff's notice. The jurors were otherwise competent and impartial. These nine were all sworn as jurors, and the defendants objected for the reasons above set out, and excepted. There was a verdict of guilty. Motion for new trial, for reasons above set out. Motion overruled, and defendants appealed from the judgment.

Ferguson & Ferguson, for appellants. The Attorney General, for the State.

FAIRCLOTH, C. J. The defendant was tried and convicted of robbery. There was no exception to the evidence, or the charge to the jury. The case was called on Wednesday. The regular jurors were exhausted by challenge for cause or peremptorily. The few persons in the court room were summoned as tales jurors, and they were challenged for cause or peremptorily. Failing to get a jury from persons present or in call of the court, his honor adjourned court until next morning, and directed the sheriff to summon 50 freeholders from the county to attend next day. Next day the court directed the sheriff to call any persons who were then bystanders into the jury box, and they were tendered. The defendant, after exhausting his peremptory challenges, objected to several of the jurors because they were not bystanders on the day before, and were then present only by reason of said summons by the sheriff under said order of the court. Objection overruled, and several of the said summoned jurors sat on the jury. The case states that the jurors were otherwise competent and impartial. Motion for new trial was overruled, and the defendants appealed.

At common law the jury is summoned by a venire, and the sheriff makes return of the writ. 1 Chit. Cr. Law, 505-509. In well-nigh all the states the matter is regulated by statute. Code, c. 89. The power to arrange the order, and to provide for the probable necessities of the business of the court, is incident to all courts. The order was not to bring in talesmen for any particular case. It was an order to bring freeholders of the county within reach of the court when it might become necessary to order talesmen. The order was an expedient act in reference to the business of the court. It was calculated to secure an impartial jury, by getting men from the county,—honest, uncommitted, unbought, and unmerchable men,—rather than the professional, loafing jurymen, who hang about the court houses, ready to be used if it should happen that prosecutors or prosecuting officers, or defendants or defendants' counsel, or sheriffs or their deputies, should so far forget their occupation and honorable obligation as to bring them into the jury box. The purity of the administration of the criminal law does not seem to be endangered by such course. If, growing out of the want of a venire, there was anything going to show that the prisoner is not tried by an impartial jury, *boni et legales homines*, that would be a ground for a new trial. There may be no bystanders then present, or all present may be unfit persons, or they may have been procured to be present by parties in anticipation of a failure of the regular panel. The business of the court must proceed with reasonable dispatch, without injury or preju-

dice to the rights of the accused. "Persons who are not bystanders in the court may be summoned as talesmen, for when they come in they are bystanders." 5 Bac. Abr. 337. *State v. Lamon*, 10 N. C. 175, was a case of murder. The sheriff summoned as talesmen men who were not bystanders in the court house, and it was held that when they came in they were bystanders, and bound to serve, although they had been called from a distance. *State v. Cody*, 119 N. C. 908, 26 S. E. 252, was a case of burglary. The defendant's exception was that the judge, in ordering a special venire, directed the sheriff to summon, as far as possible, only freeholders who were not disqualified by our statute, i. e. to summon *legales homines*. This was not only no error, but was considered by this court as a mode of getting a jury less liable to challenge than would be tales jurors picked up in the court room. *U. S. v. Loughery*, 18 Blatchf. 267, Fed. Cas. No. 15,631, was an indictment for coining, and under an order of the court the marshal summoned as jurymen persons not in or about the court house when the order was made, or when summoned; and it was held that they became bystanders when present, and the opinion states that how long they had been present, or how they happened to be present, is of no consequence, provided no fraud or collusion or improper action is suggested. Challenge is not given to the prisoner that he should have a particular individual on the jury, but that he should not have one against whom he had a valid objection. In other words, he has the right to accept or reject, but not the right to select. The decided cases cited above are cases of felony, but we see no reason why the principle should not apply to misdemeanors, when a necessary occasion arises, provided, always, that no prejudice to the rights of the prisoner shall appear. Affirmed.

(123 N. C. 600)

MARSH v. GRIFFIN et al.

(Supreme Court of North Carolina. Dec. 23, 1898.)

JUDGMENT BY DEFAULT—VACATION—DISCRETION—EXCUSABLE NEGLIGENCE—FINDINGS—SUFFICIENT—APPEAL.

1. A judgment on a motion to set aside a judgment by default, under Code, § 274, giving the court discretionary power to vacate a judgment for excusable neglect, is reviewable on appeal to the extent of determining whether the discretion was legally exercised.

2. On defendant's motion, in a suit to foreclose a mortgage, to set aside a judgment by default, under Code, § 274, giving the court discretionary power to vacate such a judgment for excusable neglect, the court based its decision denying the motion partially on the fact that defendant gave no bond, on a mistaken finding that the action was an ejectment suit. The court also refused to pass on certain questions of fact that had a material bearing on the question of defendant's neglect. Held, that the case should be remanded, as the court had failed to exercise its discretion legally.

Appeal from superior court, Union county; Adams, Judge.

Action by J. W. Marsh against A. T. Griffin and others. From an order refusing to set aside a judgment by default, defendants appeal. Remanded.

Adams & Jerome, for appellants. Shepherd & Busbee, for appellee.

DOUGLAS, J. This is an appeal from the refusal of a motion, under section 274 of the Code, to set aside a judgment by default obtained through the excusable neglect of the defendants. The action was brought to foreclose a mortgage, and incidentally to compel the vendor of the mortgagor to execute to the feme defendant a good and sufficient deed to the land embraced in the mortgage. The plaintiff does not ask for possession of the land, but asked and obtained, among other relief, a personal judgment against the feme defendant for the admitted debt of her husband. The following is taken from the "case" on appeal as settled by the court:

"Judgment was rendered in the above-entitled cause at the August term, 1896, of the superior court of Union county, N. C., as will appear from the record herewith sent. At the January term, 1897, of the said superior court, the defendants A. T. Griffin and wife, after giving notice thereof, moved to set aside the said judgment, and filed certain affidavits in support of said motion. The plaintiff filed certain other affidavits, and the defendants rejoined with additional affidavits. The said motion was continued from term to term, and was finally heard at the July special term, A. D. 1898, of the superior court of Union county, N. C., before his honor, Spencer B. Adams, the presiding judge. His honor, after hearing the affidavits of both parties, and the argument of counsel, in the exercise of a sound discretion, refused the said motion, which said refusal was entered upon the docket at the time. After his honor had refused the said motion, the defendants gave notice of appeal, and the usual entries were made, and the amount of appeal bond fixed, all of which will appear from the record herewith sent. The defendants then requested his honor to find the facts upon which he based his refusal, and this his honor agreed to do. It being Saturday of the last day of court, it was agreed by both parties that his honor might find these facts after the expiration of the term, upon statements to be submitted to him by the respective sides. These statements were accordingly submitted, and his honor found the following facts, as being the only facts sufficiently established by the parties, to wit:

"Findings of Fact.

"Upon the hearing of the motion made by the defendants A. T. Griffin and wife, E. A. Griffin, to set aside the judgment rendered

at the August term, 1896, upon the ground of excusable neglect, the court finds the following facts: (1) That the defendant E. A. Griffin is, and was at the time of the execution of the mortgage sued upon and the rendition of the judgment, a married woman. (2) That the summons in this case was issued on the 30th day of March, 1896, and duly served on the defendants A. T. Griffin and wife, E. A. Griffin, on the 6th of April, 1896; that the complaint was filed on the 30th day of March, 1896; that the superior court of Union county was held on the second Monday before the first Monday in September, 1896, at which term the judgment complained of was rendered, four and a half months after the service of the summons on the defendants; that on the 4th day of December, 1896, after duly advertising according to law, the land described in the complaint, and embraced in the mortgage that was foreclosed, was publicly sold at the court-house door in the town of Monroe, N. C., at which time and place neither of the defendants entered an appearance nor made a protest against said sale; that no counsel was employed, no bond filed, as was required, it being an ejectment suit, and no action was taken by the defendants, or either of them, until the feme defendant filed her affidavit in this cause, on the 7th day of January, 1897. (3) That during the first week of the August term, 1896, of the superior court of Union county, the defendant Marion [Stegall], who resided in the county of Anson, and who was a nominal defendant merely, passed by and stopped at the residence of the other defendants while on his way to Union court; that while at the house of Griffin and wife, the other defendants, Mrs. Griffin said to Stegall that neither she nor her husband were well enough to go to court, and asked him (Stegall) to look after the matter for them; that the said Mrs. Griffin paid Stegall no money to employ counsel, furnished him with no bond nor means to secure one, and the said Stegall made no promise that he would employ counsel or furnish bond; that the said Stegall had no real interest in the suit, and was merely a nominal defendant; that the said Stegall went on to court, found that the case was not calendared for jury trial, and so reported to the other defendants; that he employed no counsel, gave no bond, made no arrangements to do so, all of which the other defendants well knew. (4) That it is the opinion of the court that it was inexcusable negligence on the part of the defendants Griffin and wife to remain still, and make no effort to put in their defense, from the 6th day of April, 1896, the time of the service of the summons upon them, to the 7th day of January, 1897, the time of the filing of their first affidavit, and to content themselves with simply requesting a nominal defendant who accidentally passed their house, while en route to court, to attend to

the matter for them, without furnishing him with the means to do so; and this is especially so when the said defendant failed to employ counsel or give bond, as Griffin and wife well knew. And, upon the facts found, as hereinbefore set forth, the court refuses, in the exercise of a sound discretion vested in it by section 274 of the Code, to set aside said judgment.

"Spencer B. Adams, Judge Presiding."

"Exceptions.

"To the said judgment and finding of facts the defendants A. T. Griffin and E. A. Griffin except, and assign the following exceptions and errors: (1) For that there was no evidence that the action was one of ejectment, in which it was necessary for defendants to file bond, but, on the contrary, the complaint discloses plaintiff's cause of action as one for the foreclosure of a mortgage. (2) For that the judge failed to pass upon all the questions of fact raised by the respective parties, and which were necessary for a correct determination of the question of excusable neglect, in that he failed to pass upon and determine: (a) Whether the plaintiff requested the defendant Stegall to come to Monroe and see plaintiff's attorneys about the matter, and whether plaintiff's counsel informed said Stegall that the case was not for trial at that term, and that, if anything was to be done about the case at said term, he would write to Stegall in time and inform him what was to be done; and whether Stegall told Mrs. E. A. Griffin on his return that nothing was to be done about the case unless they were notified. (b) Whether A. T. Griffin and E. A. Griffin were prevented from attending the return term of court, when the judgment was rendered against them, on account of the sickness of A. T. Griffin and the ill health of E. A. Griffin. (c) Whether, under a rule of said court, applicable to all cases brought in said court, 60 days were allowed to plaintiffs to file their complaints and 60 days thereafter allowed to defendants to file answers. (d) Whether the plaintiff has taken a personal judgment against the feme defendant, E. A. Griffin, as a simple inspection of the said judgment will show such personal judgment against her. (3) For that he failed to set aside the personal judgment against the feme defendant, E. A. Griffin, after having found that she was a married woman at the time of the execution of the mortgage sued upon and the rendition of the judgment, and it appearing in the complaint that she was a married woman. (4) For that he erred in not setting aside the judgment upon the facts as found by the court."

The defendants filed several affidavits in support of their motion tending to prove the facts alleged therein.

Upon the foregoing facts we are of opinion that his honor should have found all the material facts, both for the purpose of enabling

him to exercise, in a legal and reasonable manner, the discretion vested in him by law, and to enable us to review his judgment to the extent of determining whether it was within his legal discretion. Section 274 of the Code provides that "the judge may likewise, in his discretion, and upon such terms as may be just, allow an answer or reply to be made, or other act to be done, after the time limited, or by an order to enlarge such time; and may also in his discretion and upon such terms as may be just, at any time within one year after notice thereof, relieve a party from a judgment, order, verdict or other proceeding taken against him through his mistake, inadvertence, surprise or excusable neglect." In the cases construing this section, the words "mistake," "inadvertence," and "surprise" seem to have been ignored with singular unanimity. The phrase "excusable neglect" is apparently taken as embodying the meaning of the section. It has been uniformly held that such a motion rests in the discretion of the court, and yet the result of the decided cases is that such discretion is not reviewable when the judge overrules the motion, but is reviewable when he sustains it. In *Stith v. Jones*, 119 N. C. 428, 431, 25 S. E. 1022, this court, in reversing the action of the court below in setting aside the judgment, says: "The judge does not find that there was excusable neglect, nor does he find facts which would justify such conclusion of law. If there was excusable neglect, the judge, in his discretion, might set aside the judgment, or refuse to do so, and the exercise of such discretion is not reviewable,"—citing *Simonton v. Lanier*, 71 N. C. 498; *Brown v. Hale*, 93 N. C. 188. "But the discretionary power only exists when excusable neglect has been shown." This rule, which is amply sustained by authorities, can have but one intelligent meaning, and that is that the discretion of the judge is a legal discretion, which must be exercised within legal limits and upon legal principles. The matter is necessarily appealable, so that this court may determine whether that discretion has been legally exercised. If so exercised, it will not be interfered with unless clearly shown to have been abused. *Bank v. Foote*, 77 N. C. 131; *Kerchner v. Baker*, 82 N. C. 169; *Churchill v. Insurance Co.*, 88 N. C. 205; *Wyche v. Ross*, 119 N. C. 174, 176, 25 S. E. 878; *Cowles v. Cowles*, 121 N. C. 272, 275, 28 S. E. 476. It is well settled that a palpable abuse of this discretion is reviewable, and, even where there is no actual or intentional abuse in the ordinary acceptation of the term, a failure to exercise such legal discretion, from a mistake of law or any other cause, is equally reviewable. The defendant is entitled to have his motion fairly heard, his material allegations found one way or the other, and the intelligent and reasonable exercise of the legal discretion of the judge upon the facts as found. In *Warren v. Harvey*, 92 N. C. 137, 139, 141, this court

says: "We have little hesitation in placing the present application within the discretionary power committed to the court, which the judge, holding the neglect not excusable, did not undertake to exercise. * * * There was therefore error in the ruling that the facts do not show surprise or excusable neglect within the intent of the statute, and the application must be reheard, to the end that the reasonable discretion confided to the judge may be exercised in the premises, upon the facts as they now appear before us." However incapable of exact definition, that "judicial discretion" is not absolutely without limitation is clearly recognized in other jurisdictions entitled to respect. Lord Mansfield in *Rex v. Wilkes*, 4 Burrows, 2539, says: "Discretion," when applied to a court of justice, means sound discretion, guided by law. It must be governed by rule, not by humor; it must not be arbitrary, vague, and fanciful, but legal and regular." In *Tripp v. Cook*, 26 Wend. 152, it is said: "Judicial discretion" is a phrase of great latitude, but it never means the arbitrary will of the judge. It is always (as Chief Justice Marshall defined it) 'a legal discretion to be exercised in discerning the course prescribed by law. When that is discerned, it is the duty of the courts to follow it. It is to be exercised, not to give effect to the will of the judge, but to that of the law.'"

In the case at bar there is no suggestion of any intentional abuse on the part of his honor, but it clearly appears that, in addition to his failure to find certain facts, he was inadvertent to other material facts. How this inadvertence arose does not appear from the record, but it has been suggested that certain papers were not before him. Whatever its cause, its existence is apparent. He states in his findings of fact that the action is an "ejectment suit," and bases his decision partially upon the fact that the defendant gave no bond. As the pleadings show none of the requisites of an action in ejectment, the defendant was not required to give bond, and therefore the action of his honor was clearly based upon a misapprehension of fact and law. The case must be remanded, as was done in *Warren v. Harvey*, supra, in order that the application may be reheard and determined in the legal discretion of the court. Upon being remanded, it will stand for hearing as if it had never been heard. Case remanded.

CLARK, J. (concurring in result). On a motion to set aside a judgment for excusable neglect, the findings of fact by the judge are conclusive, and this court cannot look into the affidavits to review his findings (*Well v. Woodard*, 104 N. C. 94, 10 S. E. 129; *Albertson v. Terry*, 108 N. C. 75, 12 S. E. 892; *Sikes v. Weatherly*, 110 N. C. 131, 14 S. E. 511); and, indeed, they are no part of the record proper, and should not be sent up. Whether, upon the findings of fact, there was excusable

or inexcusable negligence, is a matter of law, and always reviewable at the instance of either party. *Winborne v. Johnson*, 95 N. C. 46; *Well v. Woodard*, supra; *Clark's Code* (2d Ed.) pp. 230-233. If, upon such findings of fact, the negligence was inexcusable, the court below had no power to set the judgment aside. If there was, upon such findings, excusable negligence, then the judge, in his discretion, can set aside, or refuse to set aside, the judgment, and the exercise of such discretion is irreviewable, at the instance of either party (*Manning v. Railroad Co.*, 122 N. C. 824, 28 S. E. 963; *Stith v. Jones*, 119 N. C. 428, 25 S. E. 1022; *Sikes v. Weatherly* and *Winborne v. Johnson*, supra, and cases there cited), except, possibly, for a gross abuse of discretion (*Wyche v. Ross*, 119 N. C. 174, 25 S. E. 878), which does not appear in this case. There was no omission to find material facts, as in *Smith v. Hahn*, 80 N. C. 241, for his honor says the facts found are "the only facts sufficiently established by the parties," and the credit a judge gives to the testimony of witnesses cannot be supervised by an appellate court. But, while we cannot look into the affidavits to review the findings of fact, we see that his honor found that there was "no bond filed as was required, it being an ejectment suit"; when from the record proper it appears that the action was not an ejectment suit, but for foreclosure, and no bond was required. The judge below evidently found that this was a case of excusable neglect (as he refuses the motion in the exercise of his discretion), and, as the plaintiff does not appeal, that finding stands. But it is impossible to see how far the exercise of his discretion was influenced by the erroneous opinion the judge expressed as to the nature of the action and the necessity of filing a bond. I think the case should be remanded, that the judge below exercise his discretion upon the facts already found.

(123 N. C. 623)

FEATHERSTON v. WILSON et al.
(Supreme Court of North Carolina. Dec. 23, 1898.)

NONSUIT—DISCRETION OF COURT—EVIDENCE.

Under Acts 1897, c. 109, providing for motion for nonsuit at the close of plaintiff's evidence, the court has discretionary power to hear further evidence from plaintiff, without passing on the motion for nonsuit.

Appeal from superior court, Buncombe county; Hoke, Judge.

Action by Clara Featherston against Samantha Wilson and others. There was a judgment for plaintiff, and defendants appeal. Affirmed.

Merrimon & Merrimon, for appellants. A. S. Barnard, for appellee.

FAIRCLOTH, C. J. This is the fifth time this case has come before this court. See 118 N. C. 840, 24 S. E. 714; 119 N. C. 588, 26 S.

E. 155; 120 N. C. 446, 27 S. E. 124; 122 N. C. 747, 30 S. E. 325,—where the facts and history of the whole matter will be found. It was held by this court (119 N. C. 588, 26 S. E. 155) that under the trust deed of John Wilson, husband of defendant and father of plaintiff, the wife and children were tenants in common in the trust estate. The plaintiff is the only surviving child, and owns two-thirds and the defendant one-third of said estate. At the last trial, now here for review, the plaintiff, demanding her two-thirds of the net profits, rents, etc., in the hands of the trustee, introduced her evidence and rested her case. The defendant moved to nonsuit the plaintiff under Act 1897, c. 100. The plaintiff asked permission to introduce other and further evidence, which was allowed by the court, and the defendant excepted. Plaintiff introduced further evidence, and rested again. Defendant renewed the motion for nonsuit under the act of 1897, which was refused, and the defendant again excepted. Defendant then introduced evidence, and the case was tried by the court and jury. The issues were found in favor of the plaintiff, and judgment was entered declaring that the plaintiff was entitled to two-thirds of the rents and profits in fee, and defendant to one-third during her life and remainder to the plaintiff. Appeal by defendant. This recital presents all the facts necessary to the consideration of the real question before us.

The question is, when the defendant first moved for nonsuit was it the imperative duty of the court to pass upon the legal question presented by the motion under said act of assembly, or had he the discretionary power to hear further evidence from the plaintiff against defendant's objection. The court has held in *Purnell v. Railroad Co.*, 122 N. C. 832, 29 S. E. 953, and other cases, that the motion for nonsuit, under Act 1897, c. 100, is a demurrer to the evidence, and the defendant, by noting his exception, preserves his right to have the motion passed on on appeal, although he proceeds to trial with his evidence, contrary to the former practice. Said act of 1897 seems to give the defendant two chances,—(1) With the court; (2) with the jury,—but it gives no direction on the practice or procedure under its provisions. We have discovered nothing in the Code or in any other statute changing the long-established rules of practice in our courts, and, unless some statute is found inconsistent with the former practice and procedure, that system is still the rule. *Insurance Co. v. Davis*, 74 N. C. 78. While the Code dispenses with the formal mode of commencing actions and of pleading, it does not dispense with the rules for conducting trials heretofore established, as essential to the administration of law. By a demurrer to the evidence, the case is put upon the sufficiency of the evidence, which means the exitus issue or end of the case, and, strictly speaking, no issue of law is raised until the opposing party joins therein. Co. Litt. 71b. In the case we

have, there was no joinder in demurrer, but the plaintiff moved for and obtained leave to give further evidence. We do not care, however, to put the case on this strict technical point of pleading. Under the former rules of practice and procedure, had the court the power to receive other evidence on motion of the plaintiff, after the defendant's motion for a nonsuit, as by demurrer, under Act 1897, c. 100? We find, by former decisions, that he had the power in the exercise of his discretion. In *Kelly v. Goodbreed's Ex'rs*, 4 N. C. 468, it is held: "After the testimony in a cause is closed, the introduction of other witnesses is a matter within the sound discretion of the court." *Parish v. Fite*, 6 N. C. 253, says: "The court may, in its discretion, permit new witnesses to be introduced and examined before the jury after the argument of counsel is closed;" but it ought not to be done except for good reasons shown to the court. In *Barton v. Morphis*, 15 N. C. 240, the ruling is that the refusal of the court to permit a witness to be re-examined is no ground for a new trial, it being discretionary with the court to permit it or not. *State v. Rash*, 34 N. C. 382: "In criminal, as well as civil, cases, all the testimony on both sides should be introduced before the argument commences. After that, the parties have no right to introduce additional testimony, though the court, in its discretion, may permit it to be done." This rule will be found in later cases. The argument made is that, if the above rule of practice prevails, it destroys Act 1897, c. 100. Not necessarily so; for, if the judge refuses to hear other evidence, the defendant puts to the test the strength of the plaintiff's case on which he rested. The charge of the court is very full, and seems to cover the material parts of the defendant's prayers for special instructions. The hardship of the result to the defendant was referred to in the argument, but, whatever we might think of that, we are not authorized to express any opinion about it. Affirmed.

(123 N. C. 628)

ERWIN et ux. v. BAILEY et al.

(Supreme Court of North Carolina. Dec. 23, 1898.)

DEPOSITIONS—WAIVER—BASTARDS—REPUTATION—EVIDENCE—COMPETENCY—JURY.

1. Where opposing parties were present at taking of depositions, and examined the witnesses, they cannot complain that the notice on which they were taken did not state the title of the case correctly.

2. On the issue of the legitimacy of a child of slave parents, evidence that the father at one time was permitted by his master to take another wife, but afterwards returned to the mother, and lived with her as man and wife, was properly excluded; the child not having been begotten during the time that the father was living with the other woman.

3. General reputation that one was not the child of her alleged father is inadmissible on the question of legitimacy, and this though the parents

were slaves, since they were declared man and wife under Acts 1866, c. 40, § 5.

4. On the issue of legitimacy, the fact that the parents frequently quarreled about the child, the father claiming it was not his, was improperly excluded.

5. Where the issue was a child's legitimacy, and there was evidence of nonaccess, and that the parents frequently quarreled about the child, the father claiming it was not his, it was a case for the jury.

Appeal from superior court, Buncombe county; Hoke, Judge.

Action by Albert Erwin and wife against L. A. Bailey and others. There was a judgment for plaintiffs, and defendants appeal. Reversed.

Ejectment. The land sued for was admitted to have belonged to Caesar Swinton, who died before suit was brought. Caroline Erwin, the feme plaintiff, claimed one-third of the land as heir at law of Caesar Swinton; and defendants Hester Bailey and one other (two children and heirs at law of Caesar Swinton) answered, claiming the entire interest in the land,—alleging that Caroline was not the child of Swinton. Plaintiff offered depositions of Susan Cochran and Henry Vanderhost. These depositions had been opened by consent, under an agreement that any objection thereto might be made and passed upon at the trial. Defendants objected to reading such depositions on the ground that the notices were entitled "Alfred Erwin and Wife vs. Ella Bailey et al," whereas the true title of the cause was "Erwin & Wife against L. A. Bailey and Hester Bailey et al." It appeared that defendants had been duly served with a notice, entitled "Alfred Erwin and Wife vs. Ella Bailey et al," giving correct time and place where the depositions were taken, and defendants had filed cross interrogatories at the taking of the same, which were answered, and that no objection to taking them had been made at the time they were taken. The court overruled the objection, and allowed the plaintiff to amend the notice so as to properly entitle the notice, and allowed the depositions to be read. Defendants excepted. These depositions, with other evidence of plaintiff, tended to show that Swinton and Catherine Swinton, mother of plaintiff and of defendants, were slaves belonging to Frank Johnston; that during the war, and before, Caesar and Catherine lived together as man and wife, after the manner of slaves, and while they so lived together Catherine gave birth to Hester Bailey and Caroline Erwin, and another child, who is also a defendant; that Hester and Caroline were born during slavery, and it did not appear when the last child was born, but at some period while Caesar and Catherine lived together as man and wife; that they were thus living together at the surrender, and thereafter moved to North Carolina, where they continued to so live till the death of Catherine, in 1868 or later; that they never went before the clerk or justice and made

acknowledgment of their marriage, as required by the act of 1866, c. 40, § 5; that Caesar Swinton bought the land now sued for; that he and Catherine are both dead, and the parties now claim the land as his children and heirs at law. To prove that plaintiff Caroline was not the child of Caesar, the defendants introduced Mrs. Lelia Coffin, who testified that Caesar and Catherine were slaves belonging to her father, Frank Johnston, and that Catherine was her mother's maid, who came with the family every summer to Flat Rock, N. C., and that Caesar remained on the rice plantation in South Carolina; that the family came to North Carolina about the 1st of May, and went back to South Carolina about the latter part of November, and Caroline was born about a month after the family had come to Flat Rock,—some time during the war. The witness was further questioned about that date, and stated that the family were in the habit of coming up the 1st of May, and went back the last of November, and that Caroline was born within a month after the family moved up to Flat Rock for the summer. The defendants offered to show by this witness that it was the general reputation in her father's family that Caroline was not the child of Caesar Swinton, but of her father's coachman. Plaintiff objected. Objection sustained, and defendants excepted. Defendants offered to show by this witness and others that both Caesar and Catherine were heard to say, while they lived together as aforesaid, that Caroline was not the child of Caesar. Plaintiff objected. Objection sustained, and defendants excepted. Defendants further offered to show that it was the general reputation in Caesar's family that Caroline was not the child of Caesar. Plaintiff objected. Objection sustained, and defendants excepted. Defendants further offered to prove that while Caesar and Catherine were thus living together they had constant quarrels about Caroline not being Caesar's child. Plaintiff objected. Objection sustained, and defendants excepted. Defendants offered evidence to show that Caesar became dissatisfied with his wife's being in the mountains, and asked his owner, Frank Johnston, to let him take another wife, and he gave his permission, and Caesar did take another woman, and lived with her as his wife till Catherine went back, and Catherine took on so about it that Caesar gave up the new wife, and renewed his relations with Catherine, which continued till the surrender, and afterwards, as above set forth. This interruption of Caesar's relation with Catherine was not during any period when Caroline was begotten or born; nor were any declarations of Caesar or Catherine, tending to make Caroline illegitimate, shown to have been made while their relations were so interrupted. Defendants further offered Dr. Glenn as a witness, who testified that the ordinary and natural period of pregnancy was nine months; that children were born at sev-

en months not infrequently, and lived and became vigorous, though a child born at that period was ordinarily not fully developed at first,—the finger nails were not perfect, or some other imperfection; that a child could be born and live at six months, but could not do so without the aid of an incubator, and witness did not think it possible for a child born at six months to live without such incubator. He did not state between six and seven months, except as shown in the above evidence. The foregoing was the evidence in the case. The court was of opinion, and so instructed the jury, that, if Caroline was born during the period when Cæsar and Catherine, the mother, were living together as man and wife, and were so living together at the surrender, and moved to North Carolina, and lived as man and wife after the surrender, till the death of Catherine, the statute declared them man and wife from the beginning of their relations as such, and that in that view there was no competent or sufficient evidence offered to show that Caroline was not Cæsar's child, and, if the jury believed the evidence, the issue should be answered for the plaintiff as to one-third of the land, as shown in the verdict. Defendants excepted, and moved for a new trial for error in the rulings of the court—First, on the depositions; and, second, on questions of evidence; and, third, on the charge as given. The motion was overruled. Judgment for plaintiff for one-third of the land. Defendants appealed.

Geo. A. Shuford, for appellants. A. S. Barnard and Moore & Moore, for appellees.

FURCHES, J. The land in controversy is admitted to have belonged to Cæsar Swinton at the time of his death, and that it descended to his heirs at law. The defendant Bailey is admitted to be an heir of Cæsar. It is also admitted that the other defendants, children of Regina, another daughter of Cæsar, who married Jerry Richardson, are heirs of Cæsar. But they deny that the plaintiff Caroline Erwin is a child and heir of Cæsar. It appeared from the evidence that Cæsar and Catherine were slaves, the property of Frank Johnston, before their emancipation in 1865; that said Johnston was a citizen of South Carolina, and an owner of a summer residence at Flat Rock, Henderson county, N. C.; that Cæsar and Catherine lived together as man and wife, after the manner of slaves, and that the plaintiff Caroline Erwin was born during the slavery of Cæsar and Catherine, and while they lived together as man and wife; that Cæsar and Catherine moved to North Carolina after they obtained their freedom, and continued to live together as man and wife until the death of Cæsar, about 1868; and that Catherine has also died, since the death of Cæsar.

The plaintiff during the trial offered two depositions in evidence for the purpose of sustaining her contention. The depositions were objected to by defendants upon the

ground that the notices upon which the depositions were taken did not state the title of the case correctly. But it appeared that defendants were present at the taking of the depositions, and cross-examined the witnesses. The court overruled these exceptions, and defendants excepted. The exceptions cannot be sustained. If there was such error as is alleged by defendants, it was waived by their cross-examination. They suffered no injury by this error, if it existed, and cannot be heard now to complain.

The defendants contended that Cæsar was not the father of the plaintiff Caroline Erwin, and, to sustain this contention, offered evidence tending to show that Catherine, her mother, was the maid of Mrs. Johnston, and came with her to Flat Rock about the first of May, and remained until about the last of November, while Cæsar was left on the rice plantation in South Carolina, and that, from the time of the birth of Caroline, she must have been begotten during the time Catherine was at Flat Rock, and that she was born about a month after she came to Flat Rock. It was also in evidence on the part of defendants that Cæsar complained that Catherine stayed too much of her time in the mountains of North Carolina, and asked his master to allow him to take another wife; that the master granted this permission, and he took another wife, but, when Catherine came back to South Carolina, Cæsar left his new wife, and continued to live with Catherine as he had formerly done, and they continued to live together as man and wife until Cæsar's death. But it appeared that plaintiff was not begotten during the time Cæsar was living with the other woman as his wife. This evidence was objected to and excluded, and defendants excepted. The defendants proposed to prove that there was a general reputation that plaintiff was not the child of Cæsar. This evidence was objected to and ruled out, and defendants excepted. We do not think there was any error in the court's sustaining plaintiff's objections—and in overruling the exceptions of defendants—to this evidence. The case of *Woodward v. Blue*, 107 N. C. 407, 12 S. E. 453, comes nearer sustaining defendants' exceptions than any case called to our attention. And that case does not do so, as we think.

The defendants then offered to prove that Cæsar and Catherine had frequent quarrels about Caroline, in which Cæsar alleged that she was not his child. This evidence was objected to and excluded, and defendants excepted. It seems to us that this exception is sustained by *Woodward v. Blue*, *supra*, and this evidence should have been admitted. Cæsar and Catherine having lived together as man and wife while they were slaves, and having continued to live together in this relation until the death of Cæsar, about 1868, this made them man and wife, under our statute of 1866, whether they ever went before the clerk and had a record made

of this relation, or not. *State v. Whitford*, 86 N. C. 636. And children born during such cohabitation are presumed to be legitimate, and entitled to the benefit of the law of inheritance. But this presumption of legitimacy may be rebutted, in the case of children of former slaves who sustained the relation of man and wife, just as it may be as to children born during the existence of other legal marriages. *Woodward v. Blue*, supra, and authorities there cited. This being so, we are of the opinion that the evidence tending to show the nonaccess of Cæsar at the time Caroline must have been begotten, and the evidence of the quarrels that Cæsar and Catherine had about the illegitimacy of Caroline (improperly excluded), make a case that should have gone to the jury. It was not a case where the court could instruct the jury "that, if they believed the evidence, they should find for the plaintiff." For the error in ruling out the testimony as pointed out above, and the error committed in charging the jury that, if they believed the evidence, they should find for the plaintiff, there must be a new trial. New trial.

(123 N. C. 745)

STATE v. PIERCE.

(Supreme Court of North Carolina. Dec. 23, 1898.)

BURNING GIN HOUSE—INDICTMENT—WANTONNESS—FELONIES—APPEAL—ABSENCE OF DEFENDANT FROM COURT ROOM.

1. An indictment charging the "unlawfully, willfully, and feloniously" setting fire to and burning a gin house, though bad if sustainable only under Code, § 985, subsec. 6, for failure to use the words "wantonly and willfully," is good under subsection 2, which makes the "willful" burning of a gin house punishable.

2. Code, § 985, subsec. 2, providing merely that every person convicted of, *inter alia*, the willful burning of a gin house, shall be imprisoned for not less than five nor more than ten years, creates an offense, notwithstanding it does not expressly state that such person shall be guilty of a felony.

3. Error in not having the accused in court during the closing argument of his counsel cannot be first urged on appeal.

4. The absence of defendant from the court room during part of the closing argument to the jury, in a case not a capital one, is not reversible error, unless prejudice to him is clearly made to appear.

Appeal from superior court, Union county; Starbuck, Judge.

Will Pierce was convicted of setting fire to and burning a gin house, and he appeals. Affirmed.

Adams & Jerome and Armfield & Williams, for appellant. The Attorney General, for the State.

CLARK, J. The indictment charges that the defendant "did unlawfully, willfully, and feloniously set fire to and burn a certain gin house belonging to J. L. Bannett and in the possession of one G. W. Bailey." Verdict of guilty, and defendant moved in arrest of

judgment, for that Code, § 985, subsec. 6, has been amended (Laws 1885, c. 66) by striking out the words "unlawfully and maliciously," and inserting in lieu thereof "wantonly and willfully," and that the words used in the indictment are not synonymous with those required by the amended statute. The objection would be well taken if this indictment was sustainable only under subsection 6 of section 985. *State v. Morgan*, 98 N. C. 641, 3 S. E. 927; *State v. Massey*, 97 N. C. 465, 2 S. E. 445. But it is a valid indictment, under Code, § 985, subsec. 2, as was held in *State v. Thorne*, 81 N. C. 555, cited and followed in *State v. Green*, 92 N. C. 779.

The defendant, however, insists that subsection 2, § 985, does not create an offense, because it merely prescribes that "every person convicted of" the acts therein described "shall be imprisoned in the penitentiary not less than five nor more than ten years," and does not expressly add that such person shall be guilty of a felony. The objection is without force. Convictions, under subsection 2, were expressly sustained in the two cases last cited, and its validity has also been directly recognized in *State v. England*, 78 N. C. 552, and *State v. Wright*, 89 N. C. 507. Indeed, the doctrine is well settled that where the statute either makes an act unlawful, or imposes a punishment for its commission, such act becomes a crime, without any express declaration that it shall be a crime or of its grade. In the former case it is a misdemeanor, and in the latter a felony or a misdemeanor, according to the nature of the punishment prescribed. Laws 1891, c. 205; *State v. Parker*, 91 N. C. 650; *State v. Bloodworth*, 94 N. C. 918; *State v. Addington*, 121 N. C. 538, 27 S. E. 1007. Indeed, the court has held recently that the bare addition to section 35 of the Code of a provision that one found to be the father of a bastard child, upon an issue of paternity, shall be "fined" "not exceeding \$10, which shall go to the school fund," of itself, nothing more being said, made the father guilty of a crime, and changed the proceeding from a civil action, as it had always theretofore been recognized, into a criminal action, with all the incidents following such change. In *State v. Ostwalt*, 118 N. C., at page 1212, 24 S. E. 661, the court says: "It seems never before to have been doubted that the legislature creates a criminal offense whenever it prescribes that a certain act shall be punishable either by fine or imprisonment, or forbids it generally, and by implication empowers the court to impose either fine or imprisonment." The dissenting opinions in *State v. Ostwalt*, supra, and in *State v. Ballard*, 122 N. C. 1024, 29 S. E. 899 (which hold bastardy a criminal offense), do not controvert that as a general proposition, but rest upon the ground that the bastardy act, taken as a whole, and the construction the courts had uniformly placed upon it, and the nature and purpose of the proceeding, negative the inference of any intention in the legislature

to change the proceeding into a criminal action, with its grave inconveniences, from the incidental provision (in one section of the chapter on bastardy) of \$10 for the school fund,—a doctrine analogous to that of *State v. Snuggs*, 85 N. C. 541; but the majority of the court settled the law otherwise. If the incidental imposition of "not exceeding \$10" for benefit of the school fund creates a crime, a fortiori a provision that "every one convicted of the willful burning of a gin house * * * shall be imprisoned in the penitentiary not less than five nor more than ten years" creates a crime.

"During the argument there was a recess of the court at noon, and defendant was taken to the jail. Upon reassembling of court, one of defendant's counsel began his argument to the jury. Defendant had not been brought into court, but the court did not notice his absence until defendant's counsel had proceeded with his argument about a minute, when the solicitor suggested that the defendant was in custody, and not in court. Thereupon the defendant's counsel stated he would waive defendant's presence, and proceeded with his argument. About 10 minutes later the sheriff produced the defendant in court." No exception was taken to this at the time, and it was too late to make this exception for the first time in the appellant's case on appeal, which is admissible only as to exceptions to the charge. *Taylor v. Plummer*, 105 N. C. 56, 11 S. E. 286; *Lowe v. Elliott*, 107 N. C. 718, 12 S. E. 383; *Blackburn v. Insurance Co.*, 116 N. C. 821, 21 S. E. 922. But, had the exception been taken at the time, it would not have availed the defendant, in a case not capital, unless it had been clearly made to appear that he had been prejudiced thereby. *State v. Paylor*, 89 N. C. 539. The other exceptions in the case do not require discussion. No error.

(123 N. C. 604)

COX v. NORFOLK & C. R. CO.

(Supreme Court of North Carolina. Dec. 23, 1898.)

NEGLECTANCE—RAILROADS—NONSUIT—SUFFICIENCY OF EVIDENCE—BURDEN OF PROOF—CONTRIBUTORY NEGLIGENCE.

1. Plaintiff sued to recover for the killing of his intestate on defendant's track. No one saw the accident, which occurred on a bright, moonlight night. A witness testified that he found the body of intestate about midnight, lying across the track; that he saw a train pass two hours before on defendant's road, but that he heard no bell or whistle, though only 200 yards from the train. Another testified that he examined the body as it lay on the track, and that it was in the track, and near a public footpath; that intestate could not go out of town in any way without crossing a railroad; that a person could easily be seen near the path, on the night of the accident, from the depot. An expert engineer testified that the body was found 250 feet from the depot; that there was no obstruction between the depot and the path; that, if a man was keeping a lookout, he could see a man on the track for 100 yards on a bright, moon-

light night; that, if the train was moving 4 miles an hour, it could have been stopped in 15 feet, or, at 8 miles an hour, in 30 feet. The path was an old road before the town was laid off into streets, and had been used by foot passengers ever since. There was evidence that deceased had been drinking. It was admitted that intestate was killed by the train. *Held* sufficient to submit the question of negligence.

2. The burden of proving contributory negligence is on defendant.

3. The jury alone can determine the relative weight of the evidence in deciding whether the burden of proving negligence, or contributory negligence, has been sustained.

4. The rule that where there is no evidence, or a mere scintilla, "or the evidence is not sufficient, in a just and reasonable view of it, to warrant an inference of any fact in issue," the court should direct a verdict against the party on whom rests the burden of proof, does not authorize, in an accident case, the directing of a verdict for defendant on the contributory negligence of plaintiff, since the burden of proving contributory negligence is always on defendant; and hence, on a motion for a nonsuit, the court can consider only the evidence relating to defendant's negligence, and must submit the case to the jury if there is more than a scintilla tending to prove such negligence.

Faircloth, C. J., dissenting.

Appeal from superior court, Halifax county; Norwood, Judge.

Action by J. S. Cox, administrator of N. L. Cox, against the Norfolk & Carolina Railroad Company. From a judgment of nonsuit, plaintiff appeals. Reversed.

W. A. Dunn and Claude Kitchin, for appellant. Thos. N. Hill, MacRae & Day, and David Bell, for appellee.

DOUGLAS, J. This is an action brought by the plaintiff, as administrator of N. L. Cox, to recover damages for the negligent killing of his intestate by the defendant's engine. At the close of plaintiff's testimony, the defendant moved to nonsuit the plaintiff, under chapter 109 of the Laws of 1897. This is the act that has already given us so much trouble. It was doubtless intended by the legislature to save time and expense by cutting short an action devoid of merit, but its practical result is the very opposite. It gives the defendant two chances to one for the plaintiff, prolongs litigation, and may cause a palpable miscarriage of justice. As stated in *Purnell v. Railroad Co.*, 122 N. C. 832, 835, 29 S. E. 958: "Before this statute, the defendant might make this motion; but if the court refused it, and the defendant offered further evidence, he lost the benefit of that motion. The motion could be renewed at the close of the evidence in the case, but would then depend upon the whole evidence,"—citing *Sugg v. Watson*, 101 N. C. 188, 7 S. E. 700. Now, however, the defendant, if his motion is overruled, can file his exception, and proceed with the case. In passing upon that exception, we would be compelled to ignore all the subsequent proceedings, including the additional evidence, the verdict, and the judgment. If we sustained the exception, the plaintiff must be nonsuited, even if the subsequent evidence of the defendant himself

should show the plaintiff clearly entitled to recovery. If we overruled the exception, we must then proceed to review the case upon its merits. Thus, there would be practically two appeals, in one of which we might be compelled to nonsuit a plaintiff who had obtained a just judgment. We do not intend to criticise the legislature, but simply to call attention to the fact that the law in practical operation does not meet the public purposes of its enactment. While doing so, we still deem it our duty to enforce it.

The case as now before us presents the single question whether there was sufficient evidence to go to the jury as to the negligence of the defendant. The plaintiff's evidence must, for the present purpose, be accepted as true, and construed in the light most favorable for him. *Avera v. Sexton*, 35 N. C. 247; *Hathaway v. Hinton*, 46 N. C. 243; *State v. Allen*, 48 N. C. 257; *Abernathy v. Stowe*, 92 N. C. 213; *Gibbs v. Lyon*, 95 N. C. 146; *Springs v. Schenck*, 99 N. C. 551, 6 S. E. 405; *Hodges v. Railroad Co.*, 120 N. C. 555, 27 S. E. 128; *Collins v. Swanson*, 121 N. C. 67, 28 S. E. 66; *Cable v. Railroad Co.*, 122 N. C. 892; 29 S. E. 377; *Whitley v. Railroad Co.*, 122 N. C. 987, 29 S. E. 783; *Railway Co. v. Lowell*, 151 U. S. 209, 14 Sup. Ct. 281. It is well settled that, if there is more than a mere scintilla of evidence tending to prove the plaintiff's contention, it must be submitted to the jury, who alone can pass upon the weight of the evidence. *State v. Shule*, 32 N. C. 153; *State v. Allen*, 48 N. C. 257; *Wittkowsky v. Wasson*, 71 N. C. 451; *Sprull v. Insurance Co.*, 120 N. C. 141, 27 S. E. 39; *Hardison v. Railroad Co.*, 120 N. C. 492, 26 S. E. 630; *Anniston Nat. Bank v. School Committee of Durham*, 121 N. C. 107, 28 S. E. 134; *White v. Railroad Co.*, 121 N. C. 494, 27 S. E. 1002; *Collins v. Swanson*, *supra*; *Eller v. Church*, 121 N. C. 269, 28 S. E. 364; *Cable v. Railroad Co.*, *supra*.

Applying these principles, we find the following evidence, which we think is certainly more than a scintilla, and which should have been submitted to the jury as tending to prove the negligence of the defendant. No one saw the killing, nor does it appear how long the deceased had been killed when found. *Thomas Griffin* testified: "That between 12 and 1 o'clock he found some one dead on the railroad [proved to be deceased]. He was lying across the track, with one hand cut off on one side, and one foot on the other. * * * Saw a train pass that night about two hours before I saw Cox. I was about 200 yards from it, I guess. The train was running backward when I saw it. It made no stop. At the time when I saw the train, it was on the Norfolk & Carolina Railroad. It was on the Y the last time. Heard no bell or whistle. The moon was shining bright." *James Sills* testified that "Tom reported to Massey, the night operator, that he had found a dead body on the road. We went and examined, and found it was Cox.

He was lying cater-cornered across the railroad, one side of his face torn, his skull crushed, one of his hands cut off. His hat was lying on the right-hand side of the switch, and his foot was lying crushed off, and one of his legs was broken. The roads run pretty near together up there. The switch goes from the Norfolk & Carolina to the Wilmington & Weldon. There is a public footpath there. It was the old county road. It goes right by my store from the main road across the W. & W. Railroad. It goes out into the main road. Most people traveling afoot go on that road. Cox could not go out of town anyway without crossing a railroad. This was the usual path to his house,—the path he always walked. No obstructions nor anything from the railroad in the way of the path. A person could easily be seen that night on the railroad near the path from the depot. It was a moonlight night,—a bright, moonlight night. Heard no noise, signals, nor anything of that kind. Heard no bell or whistle." *P. E. Smith*, admitted to be an expert engineer, testified: "It was 250 feet from the depot to where he was found. This was about 10 feet from path. That there was no obstruction between depot and point opposite depot to this road and path. There is a small cut in road, right opposite depot, but after that it is level all the way. Small tree between house and railroad; 24 feet from center of road to center of tree. House and tree would not interfere with view from train if any one was moving along the track by this switch. If I were looking out for a man, I could see him 100 yards ahead of me, on a bright, moonlight night. If a man was keeping a lookout, he could see a man on the track for 100 yards." The witness was asked: "Would the manner in which this road was curved around prevent you from seeing him?" The witness answered: "There is no obstruction in the view because the man is on a level. You can look across the track. You cannot look straight down, but you can look across." On the redirect examination, he stated that, "if the train were moving at a speed of 3 or 4 miles an hour, it could have been stopped in 15 feet; if 8 miles an hour, in double that distance." The plaintiff testified that the deceased was his brother, and he got some gentlemen on Monday night, and went out there, and "took a hand off my farm, about the size of my brother. Made him lie on the track. Went to about even with course of warehouse, and could see him while standing up. He lay down, and I could see him. The night was moonlight, and a little cloudy. * * * The path was the old road at one time before the town was laid off into streets, and had been used by foot passengers ever since." *R. M. Quidly* testified that "he was in Hopgood that night. It was a clear, moonlight night. I saw train about 10 o'clock pass. Heard neither signal nor bell. I was about 100 yards from the track." There was

also testimony tending to show the deceased had been drinking.

Taking this evidence in the light most favorable to the plaintiff, we find a train running backward in a town at night, and neither sounding the whistle nor ringing the bell, although passing over a track on the old county road which has ever since been habitually used as a footpath. It is admitted that the deceased was killed by the train, which would be the natural inference from the evidence. This is certainly more than a scintilla of evidence tending to prove the negligence of the defendant, which should have been submitted to the jury. There was error in directing a nonsuit.

Had the question not been again presented by counsel, it would almost seem needless to repeat what we have so often said,—that the burden of proving negligence rests upon the plaintiff, while the onus of showing contributory negligence rests upon the defendant. In both cases this must be shown by a greater weight of the evidence, and of this relative weight the jury alone can determine. A negative presumption necessarily accompanies the burden, and remains until the burden is lifted or shifted by direct admissions or a preponderance of proof. Each issue bears its own burden, and it rarely happens that the burden of all the issues rests upon the same party. In cases of negligence like the present, it changes with each successive step, it being necessary for the plaintiff to prove the negligence of the defendant, the defendant the contributory negligence of the plaintiff, and, again, for the plaintiff to show the last clear chance of the defendant if that issue becomes material. Each of these issues depends upon the one preceding. The plaintiff must first prove that he was injured by the negligence of the defendant. If he fails to prove it, that is an end of the case, and the defendant is not then required to prove contributory negligence. Properly speaking, there can be no contributory negligence unless there is negligence on the part of the defendant. 7 Am. & Eng. Enc. Law (2d Ed.) 373. This distinction is important as affecting the burden of proof and the consequent direction of a verdict. If the negligence by which the plaintiff is injured is entirely his own,—as in *Mesic's Case* (N. C.) 26 S. E. 633, where, instead of the train running into the horse, the horse ran into the train,—then there is no evidence to go to the jury on the first issue, and the question of contributory negligence becomes immaterial. Where there is evidence tending to prove negligence on the part of both parties, the case must always be submitted to the jury, and it makes no difference if this evidence appears in the testimony of the plaintiff. The court may say to the jury that there is no evidence tending to prove a fact, but it can never say that a fact is proved. Under exceptional circumstances, not now before us, it may say that, if the jury believe the evidence, they will

answer the issue "Yes," for that is equivalent to charging the law upon a given state of facts, leaving entirely to the jury the credibility of the witnesses. Even then, if there is any conflict of testimony, the verdict is vitiated.

It is the settled rule of this court that a verdict can never be directed in favor of the party upon whom rests the burden of proof, who in all cases is considered to have the affirmative of the issue, whatever may be its form. Though this rule was discussed and reaffirmed in *Sprull v. Insurance Co.*, 120 N. C. 141, 27 S. E. 39, it did not have its origin in that case, but in *Wittkowsky v. Wasson*, 71 N. C. 451, where the doctrine was distinctly laid down in the following words, quoted from the opinion of Welles, J., in the court of exchequer chamber: "There is in every case a preliminary question which is one of law, viz. whether there is any evidence on which the jury could properly find the question for the party on whom the burden of proof lies. If there is not, the judge ought to withdraw the question from the jury, and direct a nonsuit if the onus is on the plaintiff, or direct a verdict for the plaintiff if the onus is on the defendant." In other words, the verdict must in either event be directed against the party on whom lies the onus, and, by necessary implication, can never be directed in his favor. In *Sprull v. Insurance Co.*, 120 N. C., on page 147, 27 S. E. 41, this court has said: "That where there is no evidence, or a mere scintilla of evidence [for the evidence is not sufficient, in a just and reasonable view of it, to warrant an inference of any fact in issue], the court should not leave the issue to be passed upon by the jury, but should direct a verdict against the party upon whom the burden of proof rests." The words in brackets have been cited as authorizing the court below to pass upon the entire evidence, and direct a general verdict in favor of the defendant upon the contributory negligence of the plaintiff. That opinion will bear no such construction, as the burden of proving contributory negligence is always upon the defendant. Therefore a direction in his favor, based in any degree upon the contributory negligence of the plaintiff, would be a direction in favor of the party upon whom rested the burden of proof, which is directly opposed to the uniform current of our decisions. *Hardison v. Railroad Co.*, 120 N. C. 492, 26 S. E. 630; *Collins v. Swanson*, supra; *Anniston Nat. Bank v. School Committee of Durham*, 121 N. C. 107, 28 S. E. 134; *Eller v. Church*, supra; *Caldwell v. Wilson*, 121 N. C. 425, 28 S. E. 363; *White v. Railroad Co.*, 121 N. C. 484, 27 S. E. 1002; *Everett v. Receivers*, 121 N. C. 519, 27 S. E. 991; *Cable v. Railroad Co.*, 122 N. C. 892, 29 S. E. 377; *Johnson v. Railroad Co.*, 122 N. C. 955, 29 S. E. 784; *Whitley v. Railroad Co.*, 122 N. C. 987, 29 S. E. 783. If there had been any reasonable doubt that the burden of proving contributory negligence rested up

on the defendant, it has been set at rest by chapter 33 of the Laws of 1887. The same rule prevails in the federal courts. *Railroad Co. v. Gladmon*, 15 Wall. 401; *Coasting Co. v. Tolson*, 139 U. S. 551, 11 Sup. Ct. 653. It therefore follows that, on a motion for nonsuit, the court can consider only the evidence relating to the negligence of the defendant; and, if there is more than a scintilla tending to prove such negligence, the motion must be denied, and the case submitted to the jury.

We have discussed this question fully, because the learned counsel for the defendant contended that the judgment of nonsuit should be affirmed, on the ground of the contributory negligence of the plaintiff. To this doctrine, so ably presented and elaborately discussed, we are permitted to assent neither by the current of our decisions nor the policy of our laws. The judgment of nonsuit is reversed, and a new trial ordered. New trial.

FAIROLOTH, C. J., dissents.

(123 N. C. 614)

BOLDEN v. SOUTHERN RY. CO.

(Supreme Court of North Carolina. Dec. 23, 1893.)

INJURY TO EMPLOYE—NEGLIGENCE AND CONTRIBUTORY NEGLIGENCE—QUESTION FOR JURY—ASSUMPTION OF RISK.

1. A bridge repairer, in repairing a railroad bridge, removed a footway and guard rail built across the ties on it for a watchman, and directed him, who was under his control, to continue the performance of his duties. It was the watchman's duty to replace cross-ties whenever they got out of place, and, in attempting to so replace one, it gave way, and precipitated him on the trestle below. He was only required to inspect the tie on the outside, and there it was sound, the duty of a further inspection belonging to another employé. The bridge repairer knew of the defective condition of the bridge. *Held*, that the question of the master's negligence was for the jury.

2. The burden of the defense of contributory negligence being on defendant, the question whether plaintiff's evidence is sufficient to overcome the presumption in his favor arising from the burden of proof is for the jury.

3. The question whether a railroad bridge watchman, by continuing in his employment, and walking across the bridge on the cross-ties, after a bridge repairer had taken up a footpath and guard rail strung across the ties for his use, assumed the risk incident to defective ties, is for the jury.

Faircloth, C. J., dissenting.

Appeal from superior court, Guilford county; Robinson, Judge.

Action by S. M. Bolden against the Southern Railway Company. Plaintiff was nonsuited, and he appeals. Reversed.

Schenck & Schenck and C. M. Stedman, for appellant. F. H. Busbee, for appellee.

DOUGLAS, J. This is an action for damages for personal injuries received by the plaintiff through the alleged negligence of the defendant. The only evidence in this case was that of the plaintiff, who testified sub-

stantially as follows: That he was a watchman for the Southern Railway Company at a bridge over Reedy Fork, in August or December, 1895. That one Reister was the bridge builder of the defendant, under the "supervision" of the bridge department of the Southern Railway Company. That Bolden was under the control of the said Reister, as a watchman. That Reister began to repair the bridge. That, before Reister began on the bridge, there were two planks nailed down between the rails as a footway over which he could easily walk, and that there was a guard rail of wood outside of the iron rails on either side, which had daps or square notches in them, that fitted down on the cross-ties, and were confined to the cross-ties, and kept them from slipping. That Reister took up this footway plank and the guard rails, which made it much more difficult, if not dangerous, for plaintiff to walk over the bridge in the discharge of his duty. That the plaintiff then remonstrated with Reister about the matter, but Reister promised him (Bolden) that he would fix the bridge in a day or two, and ordered the plaintiff to continue his work. That under the orders of the said Reister, and relying on his promise to fix the bridge, and in order to keep his job, he continued in the discharge of his duty, which consisted in going over the bridge, after every train crossed, to see that it was all right, and, if the cross-ties had been moved out of place, to space them up again in proper shape. That the company furnished him a large hammer for this purpose, called a "spiking hammer." That, about the fourth day after Reister promised him, he was obeying orders, and at the further end of the bridge he found a cross-tie out of place, about daylight. He undertook to knock it back into place, as usual, when it broke at the end, where it was resting upon a piece of timber, and it gave way with him, causing the said Bolden to fall some distance, onto the trestle of the bridge, by which he was severely and painfully injured. Bolden knew nothing of the defect in this cross-tie. It looked "perfectly sound" outside. It was not his duty to inspect the cross-tie inside, but only to observe it on the outside, as he passed over it. That it was the inspector's duty to examine the cross-tie inside. Witness did not suppose that there was "immediate danger" in discharging the duty, when he obeyed the order of Reister to continue in the usual discharge of his duty. That Reister, the bridge builder, knew of the defective condition of the bridge, and that it needed repairs. That one Welker was the bridge inspector of the defendant company. Upon the foregoing evidence, his honor intimated the opinion that the plaintiff "was not entitled to recover." The plaintiff took a nonsuit.

This presents to us the single question whether, taking the evidence of the plaintiff to be true, and construing it in the light most favorable to him, there was anything more

than a mere scintilla tending to prove negligence on the part of the defendant. If there was such evidence, then the case should have been submitted to the jury, under proper instructions. We think there was such evidence strongly tending to prove negligence on the part of the defendant; but whether it was sufficient to prove such negligence is a question for the jury, and neither for us nor for the court below. This court has said in *Chesson v. Lumber Co.*, 118 N. C. 59, 67, 23 S. E. 925, that "the plaintiff was injured while loading trucks with lumber, because the stringers that supported the floor of the platform, which he was required to use, were rotten, when an ordinary examination would (as a witness testified) have disclosed its defect. The defendant was therefore negligent in that aspect of the evidence if it failed to have such inspection made, or if it failed to repair the stringers within a reasonable time after discovering their condition. The two carpenters employed to inspect the platform, and make needed repairs, were, in so far as that duty was concerned, not fellow servants of the plaintiff, but representatives of the company,"—citing *Railroad Co. v. Herbert*, 116 U. S. 642, 6 Sup. Ct. 590. To this may be added *Hough v. Railway Co.*, 100 U. S. 225.

The counsel for the defendant contended that the judgment of nonsuit should be sustained on account of the evidence of contributory negligence on the part of the plaintiff. This question has been so fully discussed in *Cox v. Railroad Co.* (at this term) 81 S. E. 848, that it is useless to repeat what we have there said. By force of statute, as well as a settled rule of decision, the plea of contributory negligence is an affirmative defense, in which the burden both of allegation and proof rests upon the defendant. It is true that contributory negligence may be shown by the evidence of the plaintiff; but whether the weight of that evidence is sufficient to overcome the presumption in his favor arising from the burden of proof is a question for the jury.

The action of the plaintiff in going upon the bridge was argued as contributory negligence, but, if it be viewed as an implied assumption of risk, the same rule will apply. Both doctrines are alike, as being in the nature of a plea of confession and avoidance, inasmuch as they are affirmative defenses set up to excuse the negligence of the defendant. As such, the burden of proof is, in both cases, upon the defendant, and an issue can be found in its favor only by a jury. The doctrine is fully discussed in an elaborate note in *Steel Co. v. Mann* (Ill.) 40 Lawy. Rep. Ann. 781 (s. c. 48 N. E. 417), and also in the *American and English Encyclopedia of Law*. But it is useless for us to consider it at greater length, as the only question before us is not what instructions should have been given to the jury, but whether the case should have been submitted to the jury. For error in the intimation of his honor, the judgment of non-

suit must be set aside, and a new trial ordered. New trial.

FAIRCLOTH, C. J., dissents.

(123 N. C. 758)

STATE v. MISENHEIMER.

(Supreme Court of North Carolina. Dec. 23, 1898.)

DIVORCE—DECLARATIONS—FOREIGN JUDGMENT—SLANDER—MALICE.

1. Declarations of defendant that he had procured a divorce from prosecutrix is evidence of the fact of divorce on a prosecution of him for slandering her.

2. Judgment on another state is not admissible in evidence; it alone, and not the whole record, as required by the act of congress, being certified.

3. On a prosecution for slander, defendant having testified that what he said to A. was what prosecutrix had told him, and that he so told A., and A. not having contradicted this, but testified that what defendant told him was in a friendly conversation between them, induced by A., and that defendant exhibited no malice, but sorrow only, it was error to charge that malice would be presumed if prosecutrix was an innocent woman, but the jury should also be required to find that prosecutrix had not told defendant what he said she told.

4. The character of prosecutrix being shown good except for intercourse with him before her marriage to him, she is, so far as he is concerned, an innocent woman, within Code, § 1113, relative to slander.

Appeal from superior court, Stanly county, Starbuck, Judge.

C. C. Misenheimer was convicted of slander, and appeals. Reversed.

Adams & Jerome, for appellant. The Attorney General, for the State.

FURCHES, J. This is an indictment under the statute (Code, § 1113) for slandering an innocent woman. The defendant and the prosecutrix, L. C. Misenheimer, whom it is alleged the defendant had slandered, had been married, but, troubles having arisen between them, the defendant left the prosecutrix (his wife), and went to the state of Texas, where he remained some three years, when he returned. Upon his return he stated that while he was in Texas he procured a divorce in the courts of that state from the prosecutrix. The prosecutrix testified that while defendant was absent papers were served on her in a case of the defendant against her in an action of divorce in Texas. The state also offered in evidence a properly certified "judgment" of a court in Texas, granting a divorce of defendant from the prosecutrix. Upon the view we take of the case presented by the record, it does not turn upon the ruling of the court on the admission of evidence. But, as the same questions may be presented upon another trial, and as we have considered them, it seems to be proper to say that, in our opinion, the admissions of the defendant that he had been divorced from the prosecutrix were competent and admissible as evidence. It is held in *State v. Melton*, 120 N.

C. 591, 26 S. E. 933, in an indictment for bigamy, that the admissions of the defendant that he had been married to another woman in South Carolina were admissible as evidence for the purpose of showing a former marriage. And we do not see the difference in principle in allowing declarations to show marriage and in allowing declarations to show that a marriage had been dissolved. But as it seems that only the judgment of the court of Texas was certified, we do not think this was a compliance with the act of congress (2 Code, p. 732), which requires that the whole record shall be certified. For this reason, the judgment offered in evidence was incompetent, and should have been excluded.

The defendant and the prosecutrix were members of the same church, and the church took up the matter, passed resolutions requiring the defendant to appear before the church and show cause why he abandoned his wife, and appointed a committee to notify defendant of the action the church had taken in the matter. This committee waited on the defendant, notified him of the action the church had taken, and a church trial ensued. The statements of defendant to this committee and the statements he made at the church trial were properly excluded by the judge on the trial below; or, where they were not entirely excluded, the jury were properly instructed that there was no presumption of malice against the defendant, and that, to convict the defendant on these statements, the state must establish malice beyond a reasonable doubt. But the court, after properly charging the jury as to the other evidence, charged them as follows in a separate paragraph: "That, as to the statement to Allmond, if the prosecutrix was an innocent woman, the law presumed that the statement was malicious, and the burden was put upon the defendant to show to the satisfaction of the jury that it was not malicious." In this paragraph there is error. The defendant alleged that the prosecutrix had told him what he told Allmond, and that he only repeated to Allmond what the prosecutrix had told him; that he told Allmond that prosecutrix had told him what he told Allmond. This was not contradicted by Allmond, but he testified that what defendant told him was in a friendly conversation between them, induced by Allmond; that defendant exhibited no malice, but sorrow only. This, in our opinion, did not imply malice, unless it was shown that the prosecutrix did not tell the defendant what he told Allmond she did; and that, in the absence of the finding of that fact,—that the prosecutrix had not told the defendant what he told Allmond she did,—there was no presumption of malice, and the burden was not thrown on the defendant to rebut such presumption. If the court, in this paragraph of the charge, had submitted the truth of this statement to the jury, so as to make the paragraph read as follows: "That, as to the statement

of Allmond, if the prosecutrix was an innocent woman, and she had not told the defendant what the defendant told Allmond she had, the law presumed that the statement was malicious, and the burden was put upon the defendant to show to the satisfaction of the jury that it was not malicious,"—the charge would have been correct.

It was in evidence and admitted that the prosecutrix had had sexual intercourse with the defendant before their marriage (under promise of marriage, as she alleges), and that she became the mother of a child about five months after they were married. But her character was proved to be good before and since her marriage, with this exception. It was contended by the defendant, and the court was asked to charge the jury, that, it being shown and admitted that the prosecutrix had had criminal intercourse with the defendant before their marriage, that she was not an innocent woman, under section 1113 of the Code, and that the jury should return a verdict of not guilty. This prayer for instructions was properly refused. *State v. Grigg*, 104 N. O. 882, 10 S. E. 684. It must be understood that a man cannot seduce a virtuous woman, and then slander her with impunity, and, when indicted for such slander, claim protection against the penalties of the law by pleading her disgrace, which he had caused to be brought upon her. The statute would fail to give that protection to innocent women that was intended, if this was allowed. There were some other exceptions presented by the record, but they cannot be sustained. For the error pointed out in the charge of the court below, there must be a new trial

(123 N. C. 636)

HARKINS et al. v. CITY OF ASHEVILLE.
(Supreme Court of North Carolina. Dec. 23, 1896.)

EMINENT DOMAIN—CONDEMNATION PROCEEDINGS—NOTICE.

Failure of the city authorities to give notice of condemnation proceedings to the holder of the legal title to land under a trust deed, where notice was given to the grantor in the trust deed, who was in possession of the land, does not make the proceedings void.

Appeal from superior court, Buncombe county; Green, Judge.

Action by H. S. Harkins and others against the city of Asheville. From a judgment of nonsuit, plaintiffs appeal. Affirmed.

Moore & Moore and Whitson & Keith, for appellants. Geo. A. Shuford, for appellee.

MONTGOMERY, J. At the conclusion of the evidence his honor said that in no view of the evidence were the plaintiffs entitled to a verdict and judgment, whereupon the plaintiffs submitted to a judgment of nonsuit, and appealed.

On the chief matter in dispute, and the only one necessary for us to consider, in our

view of the case, there was no conflict in the evidence, and from it the following facts might have been agreed upon by the parties as upon a controversy submitted without action, if they had so desired: That in August, 1891, G. W. Cannon was in the possession and actual occupation of a parcel of land described in the pleadings; that Cannon, being the owner of the property, theretofore, on the 13th of June, 1890, executed a deed of trust to C. J. McCape upon the lot to secure a debt due to Mrs. Hendrickson; that on the 11th day of August, 1891, the proper authorities of the city of Asheville, in the manner required by the private laws of the general assembly of 1893 (chapter 111), condemned for the purposes of a public street a part of the lot described in the complaint; that the jury summoned to assess the damages made report, to which report, on account of insufficiency of damages, Cannon made exception; that by consent of defendant and Cannon arbitrators were appointed to settle the matter, and to fix the amount of damages; that the arbitrators met, and agreed upon the damages, reported the same, and the amount was paid by the city to Cannon; that notice of condemnation was given to Cannon, and no notice given to McCape, trustee; that the land, since its condemnation in 1891, has been used as a public street; that under a sale of the property made by one Westall, a substituted trustee in place of McCape, in 1895, the plaintiff became the purchaser of the whole lot of land, and received a deed therefor. In the argument here the counsel for the plaintiffs questioned the power of the city authorities to condemn the piece of land for a public street, but upon a review of the trial it appears that that objection was not made in the court below. The case was tried on the theory that the land had been condemned and the street laid out by the city authorities under the powers of law and under the authority of the act of the general assembly. The meeting of the jury for the assessment of damages, the dissatisfaction of Cannon to the amount of the assessment, the submission of the dispute between Cannon and the city authorities on the question of the assessment, the award of the arbitrators, and the payment of the amount mentioned in the award, were all put in evidence by the defendants without objection on the part of the plaintiffs. The contention on the trial below was, not that the city authorities acted *ultra vires*, but that they failed to give notice of condemnation proceedings to the trustee, McCape; that the notice to Cannon, the equitable owner, who was in possession at the time of condemnation, was not a sufficient notice, and that the whole proceeding was void. It is a fundamental principle that the state in the exercise of the right of eminent domain cannot appropriate the property of an individual without making to the individual due compensation for the property taken. It cannot be, however, that in a case

where a city has condemned a piece of land, the property of an individual, for the purpose of a public street, that the proceeding can be held void because of a failure to give notice to all persons who may have had an interest in the land. If the proceedings of condemnation be *infra vires*, the condemnation and appropriation to the public use of the land must stand, and the only question that can be left for settlement would be the compensation to the owner of the property. *Land v. Railroad*, 107 N. C. 72, 12 S. E. 125; *Narron v. Railroad Co.*, 122 N. C. 856, 29 S. E. 356. The question as to whom the compensation for the land condemned by the city should have been paid—whether to Cannon, the trustor, or to McCape, the trustee, of Mrs. Hendrickson—is not raised in this case. There was no error in the ruling of his honor, and the judgment is affirmed. Affirmed.

(123 N. C. 755)

STATE v. HINSON.

(Supreme Court of North Carolina. Dec. 23, 1898.)

CRIMINAL LAW—APPEALS BY STATE—COURTS—
TRIAL DE NOVO.

1. A ruling of the superior court granting a trial de novo in that court to one convicted in a criminal circuit court is not one of the cases enumerated by Code, § 1237, in which the state may appeal.

2. Under the constitution, an appeal cannot be taken from the criminal circuit courts direct to the supreme court.

3. Under Code, § 800, providing that the practice and pleading in the inferior courts shall be as provided for the superior courts, and that appeals may be taken from these courts to the superior courts for error assigned in matters of law in the same manner as provided for appeals from the superior courts to the supreme court, and the final decision of each superior court shall be certified to the court below, that final judgment may be rendered, one convicted in an inferior court is not entitled to a trial de novo on an appeal to the superior court.

Appeal from superior court, Mecklenburg county; Starbuck, Judge.

Jasper Hinson was convicted of murder, and was granted a trial de novo in the superior court. The state appeals. Dismissed.

The Attorney General, for the State. Osborne, Maxwell & Keerans and Clarkson & Dula, for appellee.

FAIRCLOTH, C. J. The defendant was indicted in the circuit criminal court of Mecklenburg county for murder, and convicted. The case was certified to the superior court of said county, and there the defendant claimed the right to have his case tried on its merits before a jury. The solicitor of the superior court contended that his honor should only hear and pass upon questions of law presented in the record from the criminal court. His honor ruled that the defendant was entitled to a trial de novo in the superior court, and the solicitor appealed.

The appeal must be dismissed, as it is not

one of the only instances in which the state can appeal. Code, § 1237; *State v. Moore*, 84 N. C. 724. The question argued is of such public importance that we have no hesitancy in passing on it without further delay. In *State v. Ray*, 122 N. C. 1097, 29 S. E. 61, it was held that the act of 1895 (chapter 75, § 5) providing that appeals to the supreme court may be prosecuted from the judgments of said criminal courts in the same manner as from the superior courts was unconstitutional, and that decision applies equally to the same act, chapter 156, § 5. *State v. Haywood Co. Com'rs*, 122 N. C. 661, 29 S. E. 80. No appeal can lie from a criminal or inferior court direct to the supreme court. *State v. Hanna*, 122 N. C. 1076, 29 S. E. 353. The appeal must be taken to the superior court and thence to the supreme court. *Rhyne v. Lipscombe*, 122 N. C. 650, 29 S. E. 57.

Recurring to the main question, was the defendant entitled to a trial de novo in the superior court? The question is answered by Code, § 809 (Acts 1879, c. 141; Const. art. 4, § 8), in these words: "The practice, pleading, process and procedure in such (inferior) courts shall be in all respects as provided for the superior courts. Appeals may be taken from these courts to the superior courts in term time for error assigned in matters of law in the same manner and under the same restrictions provided by law for appeals from the superior courts to the supreme court, and the final decision of each superior court shall be certified to the court below that final judgment may be rendered." In *State v. Thompson*, 83 N. C. 595, and *State v. Ham*, Id. 590, it was expressly held that a defendant convicted in the inferior court was not entitled to a trial de novo upon an appeal to the superior court, but only to a review of questions of law passed upon by the inferior court. Our conclusion is that the defendant was not entitled to a trial de novo in the superior court, but only to a review of matters of law or legal inference found in the case on appeal from the criminal court. Under the broad provisions of the Code (section 809), the cause goes from the criminal to the superior court by appeal, as it does from the superior to the supreme court. The appeal should contain a concise statement of the case, as in appeals to this court from the superior courts. Appeal dismissed.

(123 N. C. 596)

PELLETIER v. GREENVILLE LUMBER CO. et al.

(Supreme Court of North Carolina. Dec. 23, 1898.)

RECEIVERS — JUDGMENT — EXECUTION — LEAVE OF COURT — DISCRETION.

1. Property in the hands of a receiver cannot be sold under execution without leave of court.
2. A court may grant leave to sell land under a judgment, though the land is in the hands of a receiver of one holding title subject to the judgment lien.

3. A vacation of an order restraining a judgment creditor from selling land in the hands of a receiver impliedly gives leave to sell.

4. Where a receiver is appointed for a corporation holding land subject to a judgment lien, and the creditors of the corporation ask for a division of the land into building lots, and for a sale by the lot, the expenses to be paid from the proceeds of sale, it is a proper exercise of discretion to give the judgment creditor leave to sell.

Appeal from superior court, Craven county; Bryan, Judge.

Proceedings by P. H. Pelletier against the Greenville Lumber Company and others to place said company in the hands of a receiver as an insolvent. From an order refusing to continue an injunction against the sale of the company's land under a judgment for Mrs. Callie Langston, plaintiff appeals. Affirmed.

Clark & Gulon, for appellant. Jones & Boykin, for defendant Joyner.

DOUGLAS, J. This case comes before us on an appeal from the refusal of the court below to continue an injunction against the sale of real estate of the defendant corporation under a judgment in favor of Mrs. Callie Langston, now Callie Joyner. There is no question that this land is subject to execution under this judgment, as held in *Langston v. Improvement Co.*, 120 N. C. 132, 26 S. E. 644. That judgment is superior, not only to the claims of all the other judgment creditors in this case, but even to the original title of the insolvent corporation itself. The only question is whether the land can be levied upon and sold under that judgment while in the hands of a receiver. In other words, can land belonging to an insolvent corporation be sold after the appointment and possession of a receiver upon a valid judgment obtained before such appointment? We think that, as a matter of right, the land cannot be sold without leave of the court. Property in the actual or constructive possession of the receiver is in custodia legis, as the possession of the receiver is that of the court, — he being merely the hand of the court. This exclusive possession of the receiver does not interfere with or disturb any pre-existing liens, preferences, or priorities, but simply prevents their execution, by holding the property intact until the relative rights of all parties can be determined. Another essential object sought to be obtained by the appointment of a receiver for an insolvent corporation is to prevent the sacrifice of its assets by a multiplicity of suits and petty executions. Both these objects would be destroyed by permitting any one, no matter what may be his title or claim, to interfere with property in custodia legis without leave of the court by which such custody is held. 1 *Freem. Ex'ns*, § 129; *Beach, Rec.* §§ 207, 213, 738; *High, Rec.* § 163; 20 *Am. & Eng. Enc. Law*, 138. Under the old equity practice, when a person holding a prior or paramount

claim or title was prejudiced by having a receiver put in his way, the course was either to give him leave to bring an ejectment, or to permit him to be examined *pro interesse suo*. The same result can now be accomplished by a petition and motion in the cause. In the case of *Wiswall v. Sampson*, 14 How. 52, 66, where this question is fully and ably treated, the court says, "A party, therefore, holding a judgment which is a prior lien upon the property, the same as a mortgagee, if desirous of enforcing it against the estate after it has been taken into the care and custody of the court, to abide the final determination of the litigation, and pending that litigation, must first obtain leave of the court for this purpose." We cannot assent to the doctrine laid down by Chancellor Walworth in *Bank v. Schermerhorn*, 9 Paige, 372, 378, that real estate in the custody of a receiver can be levied upon and sold under execution, provided only that the actual possession of the receiver is not interfered with. Its practical effect would be either to permit outside parties to stop all further proceedings of a court of equity by disposing of the subject-matter in controversy, or else to put that court in the position of holding simply the naked possession of property, and gravely proceeding to determine who would have been entitled to the property if it had not been sold. This doctrine is distinctly denied in *Wiswall v. Sampson*, *supra*, where it is said that the court must administer the property "independently of any rights acquired by third persons pending the litigation; otherwise the whole fund may have passed out of its hands before the final decree, and the litigation become fruitless." The case of *Skinner v. Maxwell*, 68 N. C. 400, although dealing with personal property, lays down the same general rule.

As it is well settled that the property cannot be sold under execution without leave of the court, it is equally clear that in proper cases such leave can be given. A court of equity is not required to retain possession of property when it would be inequitable to do so.

It simply remains to be seen whether the judgment creditor has leave of the court, express or implied, to proceed with his execution. Upon the hearing of the matter the court decreed "that the said injunction to the hearing is hereby refused; that the restraining order heretofore granted is vacated, * * * and the said Callie Joyner recover her costs incurred herein." We think that this unqualified refusal of the court to continue the injunction is implied leave to proceed. As his honor does not base his action upon want of power, we must assume that he acted in his equitable discretion; and we think that this discretion was properly exercised, under all the circumstances of the case. The judgment of Mrs. Joyner is paramount to the original title of the defendant corporation, and is, of course, paramount to all

claims of its creditors. They are asking to have the land divided up into building lots, and sold by the lot, at the cost of the fund, and consequently at the risk of Mrs. Joyner. If they wish the land so sold, they have the privilege of paying off Mrs. Joyner, and then speculating in the land at their own risk, and in their own way. The judgment is affirmed. Affirmed.

CLARK, J. (concurring in result). If it was the judgment debtor who had been placed in the hands of a receiver, the latter might have applied for an order of the court restraining, in the interest of the fund he represents, the judgment creditor from enforcing his lien by sale; but even in such case the order is not a matter of right, but rests in the discretion of the court. There are many authorities that the sale of real estate in such case under the lien of a prior judgment is lawful, and is not a contempt of court (High, Rec. § 171; *Bank v. Schermerhorn*, 9 Paige, 372); and the purchaser acquires a valid title when the lien of the judgment is prior to the date of the appointment of the receiver (Beach, Rec. § 200; *Bank v. Risley*, 19 N. Y. 369), because the receiver takes subject to all valid liens (*Trust Co. v. Smith*, 158 Ill. 417, 41 N. E. 1076). The rule is different as to personal property, because that is in the actual possession of the receiver, and there is no lien acquired without a levy. *Skinner v. Maxwell*, 68 N. C. 400. But this case is far stronger in support of his honor's action in refusing the restraining order. Here the judgment debtor had executed a mortgage, which this court held, at a late term (*Langston v. Improvement Co.*, 120 N. C. 132, 26 S. E. 644), was subject to the prior lien of the judgment creditor. At the sale under that mortgage the Greenville Lumber Company bought, subject, of course, to Langston's judgment lien. The plaintiff herein instituted this proceeding to place such purchaser, the defendant herein, the said Greenville Lumber Company, in the hands of a receiver, as insolvent, and in that proceeding to wind up the affairs and to distribute the assets of that company, in which Langston, the judgment creditor of the mortgagor, has no interest or right to participate, and to which proceeding he is not a party, but in every sense a stranger; being neither a stockholder in, nor creditor of, such company. The notice is issued to him to show cause why he should not be restrained from proceeding to enforce his lien against the land. The purchaser at the mortgage sale has no equity to stay him from collecting his judgment, having bought with notice thereof, and the receiver of such purchaser is in no better or stronger case. A case very much in point is *Carlin v. Hudson*, 12 Tex. 202, in which it was held that a restraining order would not be granted to the purchaser from a judgment debtor to restrain a sale under the prior judgment lien. It would be a great hardship up

on judgment creditors if they could be restrained from enforcing collection of a judgment and lien given by the court indefinitely, till the receivers of insolvent purchasers, who buy subsequent to, and with notice of, the judgment, shall at their leisure wind up and distribute the assets of such insolvents, in which assets a judgment creditor of the vendor has no interest. His lien is prior to that of the purchaser from the judgment debtor, and he should not be hindered and delayed by such purchasers going into liquidation. *Bostic v. Young*, 116 N. C. 768, 21 S. E. 552.

(123 N. C. 678)

McCOLURE et al. v. SPIVEY et al.
(Supreme Court of North Carolina. Dec. 23, 1898.)

WILLS—PROBATE—COLLATERAL ATTACK.

Under Code, § 2149, requiring the clerk of the superior court to take the proofs and examination of the witnesses touching the execution of a will, and embody the same in his certificate of probate and record it with the will, and section 2150, declaring such record and probate conclusive of the validity of the will till it is vacated on appeal or declared void by a competent tribunal, the probate by the clerk is a judicial act, and cannot be vacated in a collateral proceeding on the ground that the handwriting of testator was proved by only one of the witnesses to the will.

Appeal from superior court, Cherokee county; Norwood, Judge.

Action by W. H. McClure and another against S. M. Spivey and another. Judgment for plaintiffs. Defendants appeal. Affirmed.

J. W. Cooper and A. C. Avery, for appellants. Ferguson & Ferguson, for appellees.

MONTGOMERY, J. The plaintiffs introduced grants from the state, taking title to the land out of the state, and also subsequent and successive conveyances connecting their title with the grants. The defendants offered no evidence. His honor told the jury that, if they believed the evidence, they should find the first issue, "Are the plaintiffs the owners of the land described in the complaint?" in favor of the plaintiffs, and there was no error in that instruction.

In the plaintiffs' chain of title the will of A. W. Spivey was introduced as evidence. The defendants objected to the same, on the ground that it had not been proved according to the requirements of the Code. One of the subscribing witnesses, after the will was attested, removed from the state, and a witness to his signature and handwriting proved the same; but there was no proof of the handwriting of the testator, except the testimony of the other living witness to the will, and that was the objection raised by the defendants. There is no force in the objection. Section 2149 of the Code requires that the clerk of the superior court shall take, in writing, the proofs and examinations of the witnesses touching the executions of wills, and that the substance of the same shall

be embodied, in case the will is admitted to probate, in his certificate of the probate, and that the clerk record the same with the will. The proofs and examinations must be filed in his office. Section 2150 of the Code reads: "Such record and probate are conclusive in evidence of the validity of the will until it is vacated on appeal or declared void by a competent tribunal." The probate of a will by the clerk of the superior court is therefore a judicial act, and his certificate is conclusive of the question adjudicated until it is vacated or declared void by a competent tribunal, in a proceeding instituted for that purpose. If the probate of a will could be vacated in a collateral manner, as is sought to be done in this case, because of some failure of the clerk to examine the witnesses thereto in the strictest matters of the law, or to have proved by them some matter of detail required by statute,—thus rendering all that might have been done in the administration of the estate void and of no effect,—interminable confusion would result, and the office of executor or administrator would be so embarrassing and so full of pecuniary risk to those officers that the settlement of estates of deceased persons (probably the most important of human transactions) could hardly be had. But the matter has been decided by this court. In *Mayo v. Jones*, 78 N. C. 402, it is said: "There is, however, a difference in the formal probate of a deed for registration and the formal probate of a will. A deed is proved by witnesses or acknowledged by the grantor for registration, for preservation, and for notice as a substitute for livery of seisin. But the formal proof of a will amounts to more than that. * * * When the probate judge takes probate of a will in common form, where there are no parties present to look after their interests, and he has the interests of all in his hands, it is just and proper that he should satisfy himself, not only of the formal execution of the will, but of the capacity of the testator; because the law attaches great solemnity to his action, and makes his record of probate conclusive as to all the world until it shall be vacated by a competent tribunal. But where the parties interested come forward, and make an issue, and go before a jury to try the validity of the will, it takes precisely the same form, and is governed by the same rules, as the trial of the validity of a deed or any other instrument. Most of the confusion and conflict of decisions upon the question has grown out of the fact that the distinction between probate in common form and the trial of an issue *devisavit vel non* before a jury has not been observed."

The defendants set up a counterclaim against the plaintiffs in these words: "That the defendants recover from the plaintiffs the sum of \$25, as forfeiture for buying his land under pretended titles, one half to the use of Clay county, and the other half to the use of these defendants for suing for the same."

It is amusing to notice the intense earnestness with which the defendant G. B. Cardon presses this matter of the counterclaim in the brief filed by himself. He insists, notwithstanding that the plaintiffs made out their case and were entitled to the possession of the land, that, because the plaintiffs did not reply to the counterclaim, therefore the defendants were entitled to judgment on account of the counterclaim; and he cites us to section 1333 of the Code (Rev. Code, c. 43, § 7; 32 Hen. VIII. c. 9, §§ 2, 4) as the foundation of his counterclaim. It is only necessary to say that that section of the Code is inoperative, as it was repealed by section 177 of the Code (Acts 1874-76, c. 266, § 1). There was no error, and the judgment is affirmed.

(123 N. C. 682)

STATE ex rel. TILLERY, County Treasurer,
v. CANDLER, Sheriff, et al.

(Supreme Court of North Carolina. Dec. 23, 1898.)

CHANGE OF PARTIES—APPEAL—DECISIONS REVIEWABLE.

1. Where, pending an action by the state, on the relation of county commissioners, to recover taxes of a defaulting collector, the legislature changes the law requiring such actions to be brought on the relation of the board of education, it is proper to allow a substitution of the board of education as relator.

2. A demurrer presents no questions for review, where it was filed by appellant, and was sustained.

Appeal from superior court, Madison county; Hoke, Judge.

Action by the state, on the relation of B. Tillery, treasurer of Madison county, against C. B. Candler, as sheriff and tax collector, and others. From an order allowing a substitution of the board of education in lieu of the relator, defendants appeal. Affirmed.

W. W. Zachary and Geo. A. Shuford, for appellants. J. M. Gudger, Jr., for appellee.

FURCHES, J. This action was originally brought, on the relation of Tillery, treasurer of Madison county, against the defendant Candler, as sheriff and tax collector, and his bondsmen, for failing to pay over and account for the taxes of the county. After the action was commenced, and before it was tried, the legislature changed the law so as to make it the duty of the county commissioners to bring such actions. To meet this legislative change in the relator, the plaintiff moved to amend the complaint by substituting the names of the commissioners for that of treasurer. This motion was allowed, and defendants appealed to this court, where the action of the court below was approved and affirmed. 118 N. C. 888, 24 S. E. 709. The case went back, but before it could be tried the legislature made another change, making the county board of education the proper relator in such actions. Plaintiff again, at

spring term, 1898, found that he had been again legislated out of court, and another motion was made, to be allowed to substitute the board of education instead of the board of commissioners. This was allowed, and defendants again appealed.

The only question presented by the appeal is whether the judge had the power to make this order or not. And this very point is decided in this case at February term, 1896. *Tillery v. Candler*, 118 N. C. 888, 24 S. E. 709. It is true that defendants demurred and the demurrer was sustained. Therefore, while the demurrer was argued by counsel for defendants, no question is presented by the demurrer, for the reason that it was sustained.

There is something about this case rather remarkable to our minds. When it was here before, there was nothing in the case specially to attract our attention. But it appears that, after the first change in the law with regard to the formal parties, before a trial could be had after the necessary change of the plaintiff relator had been made, another legislative change is made, and another order to name new parties becomes necessary; and, when it is made, it is resisted by defendants. And, although the very question had been decided by the court in this very case, the defendants again appealed. It may not be so, but such action as this by a public officer who has been intrusted with the public confidence has the appearance of trifling with public justice, and as being an effort to hold public money that he has no right to hold. The judgment below is affirmed.

(123 N. C. 362)

DAVENPORT et al. v. GANNON et al.

(Supreme Court of North Carolina. Dec. 20, 1898.)

ASSIGNMENT FOR BENEFIT OF CREDITORS—LANDS IN FOREIGN STATE—RIGHTS AND REMEDIES OF CREDITORS.

Defendants' assignor conveyed all his property, including certain lands in Virginia, in trust for the benefit of his creditors, including plaintiffs. Before the assignment was recorded in Virginia, plaintiffs recovered judgment there against assignor for their debt, and sued, in such foreign jurisdiction, to subject such lands in satisfaction of their judgment. Defendants thereupon refused to permit plaintiffs to participate in the distribution under the assignment in question, for the alleged reason that plaintiffs had rejected the benefit thereof by electing to pursue their remedy as against such Virginia lands. *Held*, that such benefit could not be withheld from plaintiffs, in the absence of proof of the statute law relating to the proceedings of which defendants complain.

Douglas, J., dissenting.

Appeal from superior court, Forsyth county; Coble, Judge.

Controversy without action, submitted under Code, § 567, on facts agreed, between Isaac Davenport, Jr., deceased, and others, doing business under the firm name of Dav-

enport & Morris, as plaintiffs, and J. W. Gannon and another, trustees of H. H. Reynolds, as defendants. From a judgment authorizing plaintiffs to prove their entire claim, as set out in the deed of assignment of said Reynolds, against the assets in the hands of defendants for distribution among the creditors of the fourth class, and adjudging that in case of recovery by plaintiffs, out of certain lands in the state of Virginia, of a sum more than sufficient to pay the remainder of their debt and costs, plaintiffs account with and to defendants for such excess, defendants appeal. Affirmed.

Glenn & Manly and Jones & Patterson, for appellants. Watson, Buxton & Watson, for appellees.

FAIRCLOTH, C. J. Controversy without action upon the following agreed facts: On May 26, 1893, H. H. Reynolds made an assignment in North Carolina, to J. W. Gannon, in trust for his creditors, conveying all his real and personal property, including all his land in Patrick county, Va. By consent, another was admitted as co-trustee with Gannon. The trust deed provided for certain creditors in the fourth class, of which the plaintiffs were preferred for \$1,500. The deed of assignment was recorded in the clerk's office of Patrick county, Va., on June 16, 1893. The plaintiffs, on May 29, 1893, recovered a judgment by confession in Virginia against Reynolds for their debt (the same debt referred to in the assignment), and had their judgment docketed in Patrick county, Va., on May 30, 1893, which it is stated became a lien on his land in Virginia. At that time, the plaintiffs knew that Reynolds had made an assignment, but did not think that it conveyed the Virginia lands. The plaintiffs have a suit pending in the court of chancery in Virginia to sell said lands. They have not received anything on their judgment, but expect to receive \$700 or \$800 from that source when a final sale is made. The defendants have in hand funds enough to pay about 50 per cent. on the claims of the fourth-class creditors. The plaintiffs, as fourth-class creditors, claim the right to file their whole claim, and receive from the trustees their proportion of the fund now in hand, and satisfy the balance out of the sale of the Virginia lands, if they can, and pay any balance of the said land proceeds to the said trustees. The defendants refuse to pay the plaintiffs any part of the fund now in their hands. The fourth-class creditors are not parties to this controversy, the trustees being the only defendants. The defendants' contention is that the plaintiffs, having taken judgment and levied on the Virginia lands, have not the right now to receive any part of the fund in hand, held for the fourth-class creditors.

It is a general rule in law and in equity that a person cannot reject and accept the

same instrument,—he cannot claim under and against it; and the rule applies to every instrument, whether a deed or a will. The doctrine of election does not apply to the agreed state of facts in this case, and the first call of the law is that it shall fit the facts. This is not, however, the point of difficulty in the case. We are without jurisdiction over the Virginia lands, because they lie beyond the territorial line of our jurisdiction. Every court must have jurisdiction of the subject, at least, before it can adjudge anything. But it is argued that we can withhold from the plaintiffs any benefit out of the fund now in the hands of the defendants, upon the agreed fact that the plaintiffs have acquired a lien on the Virginia lands. But, to do that, we must assume to know the status of the lands; the nature and effect of the lien, which is a question of law; and the disposition of the proceeds of the sale that will be made by the courts of that state having jurisdiction thereof,—in other words, the statute law of Virginia. As to these matters we are not informed. We do presume that the common law prevails in Virginia, in the absence of proof to the contrary; but, according to that law, the lands of a debtor were not liable to the satisfaction of a judgment against him, and no lien was acquired thereon by a judgment. A judgment creditor has no *jus in re*, but only the power to make his judgment effectual by following up the steps of the law, by an execution and levy on the lands. The alleged lien in this case was not obtained in this way, but by a docketed judgment; and that is a statutory regulation in each state, and what that regulation is in Virginia we are not informed. The law of another state must be proved like any other matter of fact. When the defendants accepted the trust created by the assignment, they agreed to administer the proceeds of the property according to the provisions and in the manner directed by the deed, and we do not see any reason why they should not perform their contract. While we cannot and do not undertake to make any order affecting the rights of the fourth-class creditors in the Virginia lands, we do not see any reason why they may not litigate with each other, in respect thereto, in any court having authority to act, if they are so disposed. The only exception is to the judgment entered by his honor, and we see no error therein, and it is affirmed. No error.

DOUGLAS, J. (dissenting). I cannot concur either in the opinion or the judgment of the court. It finds no support in the case of *Winston v. Biggs*, 117 N. C. 208, 23 S. E. 316, for the decision in that case is expressly and repeatedly put upon the ground that the mortgage to Winston was prior to the deed of assignment to Biggs. Therefore Winston could not be required to elect between his prior lien and his pro rata share, because the two were not inconsistent. It is only be-

tween inconsistent benefits that the doctrine of election can be made to apply. As Winston's mortgage was prior to the assignment, all that the latter deed could convey was the equity of redemption in the property covered by the mortgage. As the assignor is presumed to have known this, it may also be presumed that he intended to give to Winston, by the deed of assignment, an additional security to his mortgage. Winston, by insisting upon his prior security, did not abstract anything from the assignment. The property covered by his lien had already been specifically appropriated by the debtor to the payment of his debt; and the subsequent assignee, taking in subordination thereto, had no right to complain at its enforcement. The case at bar is diametrically the opposite. The assignor, Reynolds, cannot by any possibility be presumed to have intended a duplicate security to the plaintiffs. His expressed intention is to the contrary. In his assignment he expressly conveyed all his land in Virginia to his trustee, for the purposes of the assignment. At that time the plaintiffs had no lien upon the Virginia land, and their subsequent levy was in derogation of the assignment, by diverting a large and valuable part of the assets therein conveyed. After defeating the assignment to the utmost extent of their ability, they now claim their full pro rata share under that repudiated conveyance. I do not think this can be done; certainly not if equity is equality, or if clean hands mean anything but full hands. I think they should be put to their election, and required either to surrender to the trustee the property which they have taken from him, or keep that property and relinquish all claim under the assignment. In the words of my old Scottish ancestors, I do not think they should be permitted to "approbate and reprobate" the same deed; or, in the homely Anglo-Saxon of a great English judge, to "blow hot and cold with the same breath." In *Sigmon v. Hawn*, 87 N. C. 450, 453, this court, in speaking of the doctrine of election, says: "The foundation of the rule is that no one can be permitted to accept and reject the same instrument." This rule, originally invoked chiefly in relation to wills, has become practically of universal application to all written instruments in any way operating as conveyances. In fact, the rule appears to me to rest on greater justice where the grantor deeds away his own property than where the devisor disposes of property that is not his own. There are many cases in our Reports, in my opinion, sustaining the views I have herein expressed; and, as far as I can find, none to the contrary. It seems so clearly enunciated by Pearson, C. J., in *Rankin v. Jones*, 55 N. C. 169, 172, that I can find no better conclusion than the following quotation: "These two prayers are clearly inconsistent. By the one, the plaintiffs seek to set up an equity adverse and against the deed of trust, on the ground that W. F. Jones had

no right to make it because of their prior equity or quasi lien; by the other, they seek to set up an equity under the deed of trust. This cannot be allowed."

(53 S. C. 151.)

MCMILLAN v. BULLOCK.

(Supreme Court of South Carolina. Sept. 14, 1898.)

OFFICERS—SUSPENSION—CONSTITUTIONAL GROUNDS —RECOVERY OF RECORDS—PRACTICE.

1. Under Const. art. 4, § 22, providing that whenever any officer, who has the custody of public or trust funds, is probably guilty of embezzlement thereof, the governor shall direct his prosecution, and, on true bill found, shall suspend him and appoint a successor, the governor has no power to appoint a successor to an officer indicted for forgery.

2. Under Const. art. 4, § 22, providing for the appointment of successors to public officers indicted for embezzlement, the appointee is entitled to immediate possession of the books, papers, etc., belonging to the office. He is not bound to await a judgment in his favor in an action to recover the office.

3. To confer jurisdiction in summary proceedings to recover possession of books, papers, etc., belonging to an office by an appointee of the governor, under Const. art. 4, § 22, giving the governor power to suspend a public officer under indictment for embezzlement of public funds and appoint a successor, the application must disclose the existence of all the constitutional facts giving the governor jurisdiction to suspend the officer.

Appeal from common pleas circuit court of Abbeville county; J. C. Klugh, Judge.

Proceeding by James L. McMillan against W. R. Bullock for possession of public records. Order denied, and plaintiff appeals. Affirmed.

Wm. A. Barber, Atty. Gen., and Wm. N. Graydon, for appellant. Ellis G. Graydon and Frank B. Gary, for respondent.

POPE, J. The appeal will be better understood by a reproduction of the pleadings, with a statement of the case:

This was a summary proceeding instituted by James L. McMillan against W. R. Bullock to recover from his possession the books, records, seal, etc., belonging to the office of the clerk of the court of common pleas and general sessions for Abbeville county. The proceeding was commenced before his honor, Judge J. O. Klugh, judge of the Eighth judicial circuit of South Carolina, under the provisions of section 434 of the Code of Civil Procedure.

The following affidavit was presented to Judge Klugh, viz.: "The State of South Carolina, County of Abbeville. Personally appeared before me J. L. McMillan, who, being duly sworn, says: (1) That, at the last term of the court of general sessions for Abbeville county, the grand jury of said county presented W. R. Bullock to the court for various misdemeanors in office, and, among other things, for forgery. (2) That

thereupon a bill of indictment was handed to the grand jury by the acting solicitor, charging the said W. R. Bullock with forging certain pay certificates therein named, and said grand jury found a true bill on said indictment. That thereafter, to wit, on the 5th day of March, 1898, as deponent is informed by the governor of the state and believes, the Honorable W. H. Ellerbe, governor of the state of South Carolina, issued an order suspending the said W. R. Bullock from the office of the clerk of the court for Abbeville county until his acquittal of the charges brought against him. That thereafter, to wit, on the 9th day of March, 1898, the Honorable W. H. Ellerbe, governor as aforesaid, appointed this deponent to the office of clerk of the court for Abbeville county until the said W. R. Bullock was acquitted of the charges brought against him. That deponent filed his bond, as required by law, and took the oaths provided by the constitution, and made formal demand upon the said W. R. Bullock for the possession of said office, books, papers, seal, etc. That said W. R. Bullock refused to surrender said office, books, papers, seal, etc., denying the right of the governor to suspend him or to appoint deponent. That the said W. R. Bullock is still in possession of the books, papers, records, and seal of said office, and still refuses to deliver them to this deponent, although he, the said Bullock, has been suspended from the office by the governor, and this deponent appointed to said office. J. L. McMillan. Sworn to and subscribed before me this March 16, 1898. J. C. Klugh, Circuit Judge."

Upon hearing this affidavit, his honor, Judge Klugh, signed the following order, viz.: "Upon hearing the affidavit of J. L. McMillan, stating that he has been appointed clerk of the court for Abbeville, in the place and stead of W. R. Bullock, suspended by the governor, and that the said W. R. Bullock has, upon demand, refused to turn over to the said J. L. McMillan the books, records, papers, and seal of said office. On motion of Wm. A. Barber, attorney general, and Wm. N. Graydon, attorney for J. L. McMillan, it is ordered that the said W. R. Bullock do show cause before me at my chambers, at Abbeville C. H., S. C., on Saturday, the 19th day of March, 1898, at eleven o'clock a. m., why he should not be ordered to deliver the books, papers, records, seal, and office appurtenances of the office of clerk of the court of Abbeville county, which are now withheld by the said W. R. Bullock from said J. L. McMillan, as clerk of the court for Abbeville county. Let a copy of this order be forthwith served upon said W. R. Bullock by exhibiting to him the original, and leaving with him a copy of the same."

The following return was made by W. R. Bullock to said order: "Your respondent, W. R. Bullock, for cause why he should not be ordered to deliver to James L. McMillan the

books, papers, records, seal, and office appurtenances of the office of clerk of the court for Abbeville county, respectfully shows unto your honor as follows: That at a regular election held in Abbeville county and in the whole state of South Carolina, on Tuesday, the 3d day of November, 1896, in pursuance of the constitution and statutes of the said state, your respondent was duly elected clerk of the court of common pleas and general sessions for Abbeville county for a full term of four years from the said 3d day of November, 1896, to wit, until the general election to be held on the first Tuesday after the first Monday in November, 1900. That thereafter, to wit, on the 13th day of January, 1897, the then governor of the said state, Honorable John Gary Evans, issued to your respondent, under his hand and the great seal of the said state, duly attested by Honorable D. H. Tompkins, secretary of state, a commission authorizing your respondent to have, hold, exercise, and enjoy the said office of clerk of the said court for the term of four years. That your respondent had ever since the said election been exercising the duties of the said office, and is now the lawful clerk of the said court. That section 22 of article 4 of the constitution of this state reads as follows: 'Sec. 22. Whenever it shall be brought to the notice of the governor by affidavit that any officer who has the custody of public or trust funds is probably guilty of embezzlement, or the appropriation of public or trust funds to private use, the governor shall direct his immediate prosecution by the proper officer, and upon true bill found the governor shall suspend such officer and appoint one in his stead, until he shall have been acquitted by the verdict of a jury. In case of conviction, the office shall be declared vacant and the vacancy filled as may be provided by law.' That your respondent is advised by his counsel, and verily believes, that the governor had no right to suspend an officer until three things occur, to wit: (1) It must be brought to the notice of the governor by affidavit that an officer having the custody of public or trust funds is probably guilty of embezzlement or the appropriation of such public or trust funds to private use. (2) That the governor must have directed his immediate prosecution by the proper officer. (3) True bill must have been found upon such charge of embezzlement or appropriation of public funds to private use. That your respondent is further informed and believes that the governor had not directed any officer to prosecute your respondent on any such charge. That no true bill has been found against your respondent on the charge of embezzlement or the appropriation of public or trust funds to private use, nor has any such prosecution been instituted against your respondent in any shape or form. That your respondent received some time ago from the Honorable

W. H. Ellerbe, governor of the state, a letter informing your respondent that he, the said governor, had suspended him from the office of clerk of the court for Abbeville county, and your respondent has been informed that the said governor wrote a letter to the said James L. McMillan informing him that he had appointed him to the office of clerk of the court for Abbeville county. That your respondent is informed and advised by his counsel, and in good faith is acting upon that advice, that the attempt of the said governor to suspend your respondent, and to appoint the said James L. McMillan to the office of clerk of the court for Abbeville county, is contrary to the constitution and laws of this state, is in excess of any power conferred upon him by the said constitution and laws, and is therefore null and void. That no judgment had ever been rendered by any court or tribunal holding either that the said James L. McMillan is the clerk of the court for said county, or that your respondent is not such clerk, nor has any action or proceeding ever been instituted against your respondent to test such right. That your respondent requested his attorneys, Messrs. Frank B. Gary and Ellis G. Graydon, to go to Columbia, and try to get the governor to recall his said letter to your respondent, as your respondent, while feeling sure that he was entitled to hold his said office, wished to treat the governor with proper respect, and also to avoid any complications; but your respondent's said attorneys informed him that the said governor refused to reverse his said action, while admitting that he was in doubt as to his right to suspend your respondent in the absence of an indictment specifically charging your respondent with embezzlement or the appropriation of public or trust funds to private use. That your respondent is further informed by his said attorneys that Honorable C. P. Townsend, assistant attorney general, was called into consultation with them and the governor, and that the said C. P. Townsend suggested that the proper course for your respondent was to refuse to surrender the said office, and let an action be brought to test his right, and that your respondent's attorneys then stated to the governor and the said C. P. Townsend that they would be compelled to advise your respondent to take that course. That your respondent has been informed, by statements in the newspapers and by others, that the said James L. McMillan has applied to your honor for leave to bring an action against your respondent to test his right to said office, and that your honor has granted him such leave, but no such action has been commenced against your respondent. That your respondent is perfectly willing for his right to hold said office to be tested by such an action. Your respondent respectfully submits that having been duly elected to the office which he now holds by the vote of the

people, and duly commissioned for the term of four years, of which only a little more than one year has expired, and being in possession of said office under a bona fide claim of right, acting in good faith under the advice of his counsel, he should not be ordered to deliver to the said James L. McMillan the books, papers, records, seal, and appurtenances of his said office until and except the said James L. McMillan shall produce before your honor a formal judgment rendered by a court or tribunal of competent jurisdiction, holding that the said James L. McMillan is the clerk of the court for Abbeville county, and as such is entitled to have, hold, exercise, and enjoy said office. Wherefore your respondent, having fully answered the said order to show cause, and having, as he respectfully submits, shown good and sufficient reasons why he should not be ordered to turn over the books, papers, records, seal, and appurtenances of the office of clerk of the court of common pleas and general sessions for Abbeville county to the said James L. McMillan, prays the said order to show cause may be vacated and set aside, and that he may be allowed to go hence without delay."

The commission of J. L. McMillan was produced and shown to the judge, appointing him to succeed W. R. Bullock until the said Bullock was acquitted by a jury, as were also the papers upon which the governor acted in making the appointment, which are as follows:

"South Carolina, County of Abbeville. To Hon. James Aldrich, Presiding Judge: The grand jury beg to mak the following special presentment: The former grand jury investigated the office of the clerk of the court, and have taken testimony as to certain alleged misconduct on the part of said clerk, and which testimony has been submitted to our body. It appears that the said clerk, W. R. Bullock, has forged the name of Judge O. W. Buchanan to the following witness tickets: Emma Tench, 5 days' attendance upon the court in the case of the state, and upon which the said clerk collected the sum of \$2.50; M. Childs, 5 days, and upon which the said Bullock collected the sum of \$3.40. He also forged the name of Judge Buchanan to the following constable tickets: Geo. Marshall, 1 day, \$1.50; G. H. Moore, 1 day, \$1.50. We hereby present the said W. R. Bullock for the forgery above mentioned, and give the names of Emma Tench, M. Childs, Geo. Marshall, G. H. Moore, J. R. Blake, Jr., John Lyon, Frank Nickels, W. A. Calvert, Walter Miller, and B. S. Barnwell as material witnesses. We further beg your honor to instruct the solicitor to make out bills of indictment against the said W. R. Bullock at this term of the court, for the reason that this matter has been standing for quite a while, and the public demands that some action immediately be taken. We will have other matters to present in our general pre-

sentment, which has not yet been prepared, and make this special presentment so that some immediate action can be taken in the matter of the clerk of this court. J. N. Knox, Foreman."

"Abbeville County, S. C. January Term. To Hon. James Aldrich, Presiding Judge: The grand jury beg leave to make the following presentment: That they have examined and passed on all bills of indictment handed them by the solicitor. By committee, we have visited the county poor house, and find the inmates well cared for, the buildings in good condition. Also visited the county jail, and found everything in good shape. All magistrates except J. L. Covin have made their reports, and we find them correct, with all money turned over to treasurer, and taken receipts for same. All county officials have filed certified copies of all moneys received in their respective offices for the past year, except W. R. Bullock, clerk of the court. We recommend that he be required to do so at once. We find the clerk of court to be due the county the following amounts: \$25.00, balance on circus license; \$35.00, rent for court house; \$30.00, fine of Ed. Turner; \$50.00, fine of Ed. Simkins. We recommend that in future the court room be not used for theatricals or shows. We have been unable at this time to make a thorough investigation of all the offices, but, with the aid of an expert, we hope to make a thorough examination, and report at June term of court, if your honor will grant us the privilege of deferring the matter until that time. The attention of the grand jury had been called to certain certificates being paid without the signature of the judge, certified to by W. R. Bullock, paid by J. R. Blake, accepted by John Lyon, and canceled. We recommend that these irregularities be stopped at once. Respectfully submitted. J. N. Knox, Foreman."

Also an order passed by Judge James Aldrich, by and with the consent of the attorney of W. R. Bullock, turning over the indictment and presentment of the grand jury, where the same affect the said W. R. Bullock, to M. F. Ansell, Esq., as solicitor. Also the correspondence had by the solicitor, M. F. Ansell, Esq., with his excellency, Gov. W. H. Ellerbe, touching the indictment for forgery found against W. R. Bullock by the grand jury for Abbeville. Also a report made by the committee appointed by the grand jury from their own body to M. F. Ansell, Esq., as to their examination of the office of auditor for Abbeville county, in connection with W. R. Bullock as clerk, and also the supervisor's office. They reported that they "find that the clerk has made no report to that office of fines and licenses collected by him, nor filed any report of the January term at all, and not until December of the previous court. We find on the treasurer's books that since the report of the grand jury to the June term of the court, in 1896, when a bal-

ance of his books was made up to the last of May, that he has paid, up to the present time, \$83 for licenses, and \$343 for fines, collected by him since the balancing of the books at that time. From receipts and other evidences, we find that he has collected since that time \$108 for licenses, \$430 for fines, and \$30 for rent of court room, showing a balance of \$134 not accounted for at all, and of the sum paid at least \$150 was not paid until 8 months after it was collected. In the clerk's office we could find no record or book of any description in which is kept the amounts received and paid out by him, and we are not sure but there may be other fines, licenses, or rents unaccounted for. We found his office in some respects not properly kept, and books and papers hard to find, and he himself was unable to produce some of the books and papers requested by us in our examination of his office, and we judge from his conduct while we were making this examination that he is not qualified to perform the duties of his office, and while we were in his office he was evidently under the influence of whisky, and absented himself so as to disappoint us in our investigations, and left his office and the city while we were looking up his matters, without giving us the proper information. There is now pending against him a preliminary examination for obtaining money under false pretenses from the supervisor, which he is trying to settle by assigning his court account to the trial justice. It is the concurrent opinion of the county officers and the public at large that he should be removed from office, and some competent person appointed to take charge of it. Respectfully submitted. J. N. Knox. T. N. Tolbert. G. W. Sharp."

After argument of counsel, and after considering the merits of this application, in so far as they were involved in the conclusion reached, his honor, Judge Klugh, granted the following order: "This is an application to me for an order requiring W. R. Bullock to deliver to James L. McMillan the books, papers, records, seal, and office appurtenances of the office of clerk of court for Abbeville county. On the 16th day of March, 1898, I issued an order requiring the said W. R. Bullock to show cause before me, on the 19th day of March, 1898, why the said order should not be granted. The respondent made return to said order before me to-day. After hearing argument of Frank B. Gary and Ellis G. Graydon, attorneys for the respondent, and of Honorable C. P. Townsend, assistant attorney general, and William N. Graydon, attorneys for the relator, I am of opinion that the application for such order, which is based on subdivision 2 of section 434 of the Code of Civil Procedure, is premature, and cannot be considered until there has been a judicial determination that the person making such application is entitled to the office, the books, papers, etc., of which he seeks to obtain. It is therefore, on mo-

tion of Frank B. Gary and Ellis G. Graydon, attorneys for respondent, ordered that the application for an order requiring the said W. R. Bullock to deliver to the said James L. McMillan the paper, books, records, seal, and office appurtenances of the office of the clerk of the court for Abbeville county be, and the same is hereby, refused. This order is made without prejudice to the right of the said James L. McMillan to bring such action against the said W. R. Bullock as he may be advised."

Within 10 days from the date of this order the plaintiff gave notice of his intention to appeal to the supreme court, and within the time allowed by law served this case and exceptions:

"Exceptions: (1) Because it was error in Judge Klugh to hold that the application was premature. (2) Because it was error in Judge Klugh to hold that the application could not be considered until there had been a judicial determination that the person making such application was entitled to the office. (3) Because it was error in Judge Klugh not to consider the application on its merits. (4) Because it was error in Judge Klugh to dismiss the proceeding on the ground of want of jurisdiction. Wm. A. Barber, Wm. N. Graydon, Appellant's Attorneys."

"Take notice that, upon the hearing of the appeal in the said case in the supreme court, the respondent's attorneys will move to sustain the order of his honor, Judge Klugh, on the following additional grounds, to wit: First. Because the said James L. McMillan did not establish a clear prima facie right to the office, and therefore an order directing the said Bullock to turn over the books, etc., of the said office, to the said McMillan, would have been improper. Second. Because the papers and the return upon said application showed that W. R. Bullock was and is in possession of the office of clerk of court for Abbeville county under and by virtue of an unexpired commission from the governor of the state, that no indictment for embezzlement has been given out against him, and no true bill upon such charge has been found by the grand jury; that it was therefore beyond the power of the governor to suspend the said Bullock, and it would have been improper for his honor to have directed him to turn over the said books, etc., to the said McMillan. Ellis G. Graydon, Frank B. Gary, Respondent's Attorneys. April 24, 1898."

We do not regret the trouble taken by us to see that the pleadings and other facts in this proceeding are set forth, for it is quite important that any step taken in court relating to a public office should be clearly set forth. Was the circuit judge in error when he held that the application was premature?

We do not think so, for, if the section of the constitution of 1895 controlling the method by which the governor of this state may suspend an officer and appoint his temporary successor is looked at, it prescribes three requisites: (1) That the officer to be removed must be an officer who has the custody of trust or public funds. (2) He must be probably guilty of the crime of embezzlement or the appropriation to his own use of public or trust funds. (3) There must be a true bill on the charge of embezzlement against the officer to be removed.

The clerk of the circuit court for Abbeville is an officer who has charge of trust or public funds, but where is there any allegation in this proceeding that he is guilty of the crime of embezzlement? The crime with which he is charged is forgery. So, too, the indictment preferred against him, and made a part of this proceeding, is for the crime of forgery, and not embezzlement. Therefore, apart from the position of the circuit judge as to the sections of the Code of Procedure of this state adopted instead of quo warranto (section 424 et seq.), the circuit judge was right in holding that the application was premature. It need not be enlarged upon that, when the constitution of the state provides a plan for proceeding to get rid of an unworthy officer, that plan supersedes all others for that purpose; and not only so, but the requirements the constitution provides must be strictly complied with. Whenever the constitution provides that one certain criminal offense shall be held to forfeit an office, it is tantamount to the declaration that another offense or crime shall not fall within the remedy prescribed in the section of the constitution under consideration.

We do not agree that the circuit judge was right in holding that an application to compel Bullock to turn over his books, papers, etc., must await judgment in an action to recover the office. We think that when the constitution speaks and declares what shall be done it is a part of Bullock's oath of office to obey. This is harmless error in this case, however.

As to the fourth ground of appeal, we think Judge Klugh was right in holding that the application failed to disclose the existence of facts essential to confer jurisdiction upon him to hear it. We hold that the application must disclose the existence of every requirement of the constitution, as we have herein pointed them out.

If Judge Klugh was without jurisdiction to hear the application, it is needless for us to consider appellant's third ground of appeal as well as those submitted by the respondent. It is the judgment of this court that the judgment of the circuit court be affirmed.

(54 S. C. 1)

SEGARS et al. v. PARROTT et al.

(Supreme Court of South Carolina. Jan. 8, 1899.)

ACT ESTABLISHING COUNTY — CONSTITUTIONALITY.

Under Const. art. 7, § 2, providing, *inter alia*, that no section of a county proposed to be dismembered shall be cut off without consent of two-thirds of those voting in such section, where it does not appear, in the manner prescribed by law, that before the act of February 19, 1898 (22 St. at Large, pp. 908-913), establishing Lee county, was enacted, the voters in that part of Darlington county embraced therein had signified their consent thereto by the vote required by the constitution, the act is void.

On report of referee. Judgment for petitioners.

For former opinion, see 31 S. E. 677.

R. W. Shand, E. Keith Dargan, and Boyd & Brown, for petitioners. Le Roy F. Youmans, Thos. S. Moorman, and R. O. Purdy, for respondents.

McIVER, O. J. The real object of these proceedings is to determine the validity of the legislation providing for the establishment of Lee county, formulated in an act entitled "An act to establish Lee county," approved February 19, 1898 (22 St. at Large, pp. 908-913). The mode of proceeding adopted for the purpose of attaining this object was by an application to this court, in the exercise of its original jurisdiction, for an injunction to restrain the respondents from performing any of the duties, or doing any of the acts, required of them as commissioners, imposed upon and required of them by the terms of said act. This application is based upon the ground that the said act is unconstitutional, and therefore null and void. We do not propose to consider any of the grounds upon which it is claimed that said act is unconstitutional, except one, to wit, that section 2, art. 7, of the present constitution, was not complied with. In that article the general assembly is invested with power to establish new counties in the manner therein prescribed; and section 2 of that article provides, among other things, that "no section of the county proposed to be dismembered shall be thus cut off without consent by a two-thirds vote of those voting in such section"; and it is alleged that in Darlington county—one of the counties proposed to be dismembered for the purpose of forming Lee county—such consent was not obtained by a two-thirds vote of those voting in the section proposed to be cut off from Darlington county. This allegation being denied by the respondents, an issue of fact was thus presented, and hence it became necessary to determine whether the law made any provision, and, if so, what, by which such issue of fact should be determined. The supreme court, as organized in its ordinary form, not being able to agree as to this matter, all of the circuit judges were called to the assistance of

the supreme court, under the provisions of section 12 of article 5 of the constitution; and the supreme court, as thus organized, sitting en banc, heard and determined the question by the opinion of a majority of that tribunal filed 3d of December, 1898. 31 S. E. 677. By reference to that opinion, it will be seen that the judgment of a majority of the supreme court en banc was that the question whether two-thirds of those voting at the election in that section of Darlington county proposed to be cut off for the purpose of forming Lee county had voted in favor of such new county could only be properly ascertained in the mode prescribed by the fourth section of an act entitled "An act to provide for the formation of new counties and the changing of county lines and county seats and consolidation of counties," approved March 9, 1896 (22 St. at Large, pp. 64-67), which reads as follows: "The commissioners of elections for each old county proposed to be cut shall canvass the returns of the managers of each precinct in their county at which such election has been held as such returns in general elections in this state are canvassed, and shall certify the result thereof in tabulated statement of the vote at each precinct to the secretary of state, who shall transmit a tabulated statement of the vote at each precinct of an old county proposed to be cut off to both branches of the general assembly at its next session." After this judgment of the supreme court sitting en banc was rendered, this court, as at present organized, passed an order referring it to a referee to inquire and report as to the issues of fact as settled by the judgment of the supreme court sitting en banc. In obedience to this order, the referee has made his report, from which it is very obvious that it does not appear, in the manner prescribed by law, that two-thirds of those voting in that section of Darlington county which was proposed to be cut off for the purpose of forming Lee county voted in favor of the proposed new county of Lee. Inasmuch, therefore, as it was not made to appear, in the manner prescribed by law, that the constitutional requirement that "no section of the county proposed to be dismembered shall be thus cut off without the consent by a two-thirds vote of those voting in such section" (article 7, § 2), so far, at least, as Darlington county is concerned, it follows necessarily that the general assembly had no constitutional authority to establish Lee county, embracing, as it does, a part of Darlington county, the voters in which had not signified their consent thereto by the majority required by the constitution. The judgment of this court is that the act entitled "An act to establish Lee county," approved February 19, 1898, was passed without constitutional authority, and is therefore null and void; and it is further adjudged that the respondents herein, to wit, J. L. Parrott, John C. Shaw, J. P. Kilgo, E. E. Tiller, A. E. Skinner, A. M. Lee, R. E. Carns, W. W. Her-

on, J. W. Gardner, J. E. McCutchen, S. F. Moore, and William Kelly, named as commissioners in said act, and charged with the performance of certain duties and the doing of certain acts prescribed in said act, be, and they and each of them are, hereby perpetually enjoined from performing any of said duties or doing any of said acts.

JONES, J. While still entertaining the opinion that the act in question is constitutional, yet, in view of the decision of the supreme court en banc, by which I am bound, I concur in the judgment herein as the logical result of that decision.

(54 S. C. 162)

STATE v. COLEMAN.

(Supreme Court of South Carolina. Jan. 4, 1899.)

CARNAL KNOWLEDGE OF CHILD—AGE OF ACCUSED.

The question whether a boy less than 14 years old is capable of carnally knowing a female under 14 years of age is one of fact, to be established by the evidence, in spite of Cr. Code, § 115, punishing such offense as a rape.

Appeal from general sessions circuit court of Richland county; D. A. Townsend, Judge.

Charles Coleman was convicted of carnally knowing a female under 14 years of age, and he appeals. Affirmed.

John McMaster, for appellant. J. W. Thurmond and U. X. Gunter, Asst. Atty. Gen., for the State.

GARY, A. J. The appellant was convicted under section 115 of the Criminal Code, which is as follows: "If any person shall unlawfully and carnally know any woman child under the age of fourteen years, every such unlawful and carnal knowledge shall be felony, and the offender thereof shall suffer as for rape. * * * " The defendant appealed upon the following exceptions: "(1) Because his honor refused to charge the jury the following request submitted by the defendant, 'That, if the jury believe from the evidence that the defendant is under the age of fourteen years, he cannot be found guilty of the charge preferred in the indictment,' but, on the contrary, charged as follows: 'I cannot charge that. That would be the same as to say he is incapable, under fourteen, of committing this crime. I cannot say that.' (2) Because his honor erred in his charge to the jury that if defendant was under fourteen years of age, even if physical capacity to accomplish his purpose was shown, defendant could be convicted of rape."

The appellant contends that at common law a person under 14 years of age cannot commit the crime of rape. It is not necessary in this case to decide the question whether the doctrine for which the appellant contends is of force in this state as to rape, because he was not indicted for that crime, but for the carnal knowledge of an unmarried

woman under 14 years of age, which is a statutory offense. State v. Haddon, 49 S. C. 308, 27 S. E. 194, shows that, while the two crimes are similar in some respects, they are separate and distinct. This case, therefore, falls under the general principle that a person under 7 years of age is incapable of committing crime, while between that age and 14 years he may be convicted, if capacity to commit crime is established by the testimony. Judgment affirmed.

(54 S. C. 159)

STATE v. GILCHRIST.

(Supreme Court of South Carolina. Jan. 4, 1899.)

CRIMINAL LAW—INDICTMENT—MOTION TO QUASH—ELECTION—WAIVER—INSTRUCTION.

Where accused did not move to require the state to elect under which of two sections of the Code it would proceed, some of the allegations of the indictment applying to one, and some to the other, and did not object to the indictment for this defect by demurrer or motion to quash before jury sworn, as required by Cr. Code, § 56, he cannot complain after conviction of the court's charge, which was good as to one section, since the charge would be considered with reference to that section which would support a conviction.

Appeal from general sessions circuit court of Edgefield county; D. A. Townsend, Judge.

Moody Gilchrist was convicted of assault with intent to ravish, and he appeals. Affirmed.

Sheppard Bros., for appellant. J. Wm. Thurmond and U. X. Gunter, Asst. Atty. Gen., for the State.

GARY, A. J. The appellant was convicted of an assault on Mary Pearlina Quarles, "a woman child under the age of fourteen years, * * * with intent her, the said Mary Pearlina Quarles, violently and against her will, then and there, feloniously to ravish, carnally know, and other wrongs to the said Mary Pearlina Quarles then and there did." The presiding judge charged the jury that "it makes no difference whether she consented or not if you find she was under fourteen years of age"; and this is made the basis for the sole ground of appeal in this case. Section 114 of the Criminal Code is as follows: "Whosoever shall ravish a woman, married, maid or other, where she did not consent either before or after, and likewise where a man ravished a woman with force, although she consent after, he shall be deemed guilty of rape, and shall, upon conviction, suffer death by hanging in the same form and manner as is now provided by law for willful murder. * * * " Section 33, art. 3, of the constitution provides as follows: "No unmarried woman shall legally consent to sexual intercourse who shall not have attained the age of fourteen years." Section 115 of the Criminal Code, as amended by Acts 1896, p. 223 reads as follows: "If any person shall un-

lawfully and carnally know and abuse any woman child under the age of fourteen years, every such unlawful and carnal knowledge shall be felony; and the offender thereof, being duly convicted, shall suffer as for a rape: provided, however, that in any such case, where the woman or child is over the age of ten years, and the prisoner is found guilty, the jury may find a special verdict recommending him to the mercy of the court, whereupon the punishment shall be reduced to imprisonment in the penitentiary for a term not exceeding fourteen years, at the discretion of the court." When the foregoing provision of the constitution and the two sections of the Criminal Code are construed together, it is apparent that section 114 has reference to rape at common law, and that section 115 refers to carnal knowledge of an unmarried woman who has not attained the age of 14 years, and who, by reason of her tender years, cannot legally consent to sexual intercourse. The appellant's attorneys correctly admit that, if the defendant was indicted under section 115, the charge of his honor, the presiding judge, was free from error; but they contend that he was indicted under section 114, as there are allegations in the indictment applicable to that section, and not to section 115. The defendant did not make a motion that the solicitor be required to elect under which section he would proceed, nor did he raise any objection to the indictment for any defect apparent upon the face thereof, in the manner provided by section 56 of the Criminal Code, which is as follows: "Every objection to any indictment for any defect apparent upon the face thereof shall be taken by demurrer or on motion to quash such indictment before the jury shall be sworn, and not afterwards." If the indictment contains unnecessary allegations, and no objection is raised as aforesaid to the indictment, they will be regarded as merely surplusage. When an indictment contains allegations, some of which are applicable to one section and some to another, the charge of the presiding judge will be considered with reference to that section which will support the conviction; otherwise, the defendant himself would practically have the right to make the election, and that, too, after conviction, which has never been allowed. It is the judgment of this court that the judgment of the circuit court be affirmed.

(54 S. C. 155)

HOLLIDAY v. HUGHES et al.

(Supreme Court of South Carolina. Jan. 4, 1899.)

MORTGAGES—JURY—EQUITABLE ISSUES—ERROR—FINDING—DECREE—LEGAL ISSUES.

1. It is error to submit to a jury the question whether a mortgage is void, this being an equitable issue for the court.

2. Error in submitting an equitable issue to the jury is not cured by the court's decree concurring in the finding, where a legal issue was

also submitted, and the general verdict might have been based on either.

Appeal from common pleas circuit court of Horry county; D. A. Townsend, Judge.

Foreclosure by J. W. Holliday against O. A. Hughes and others. There was a decree for defendant W. H. Howell, and plaintiff appeals. Reversed.

Johnsons & Quattlebaum, for appellant. Robt. B. Scarborough, for respondents.

McIVER, C. J. This was an action to foreclose a mortgage on real estate given by the defendants C. A. Hughes and F. D. Hughes to the plaintiff on the 16th of June, 1886, to secure the payment of a bond of same date to said plaintiff for the sum of \$544.85, with interest from date at the rate of 10 per cent. per annum. The complaint is in the usual form, with the additional allegation "that the defendant W. H. Howell claims to have acquired an interest in the mortgaged land subsequent to the date of the mortgage." The defendants C. A. Hughes and F. D. Hughes neither answered nor demurred, but made default. The defendant Howell filed an answer, in which he sets up two defenses: (1) That since the date of the alleged mortgage he has acquired the legal title to the mortgaged premises by a purchase thereof at a tax sale, whereby the lien of said mortgage was devested, by operation of law, "and this defendant holds the said lands and premises as legal owner in fee, free and discharged of any and all incumbrance, right, or claim of the plaintiff under or by virtue of said pretended mortgage, and said lands are not subject to a decree of foreclosure." (2) That the debt which the alleged mortgage was given to secure was not the debt of the defendant C. A. Hughes, who is a married woman, the wife of the defendant F. D. Hughes, and the sole owner of the mortgaged premises, but, on the contrary, was the debt of her husband, F. D. Hughes, and she, being his wife at the date of the mortgage, had no power to bind her separate estate for the payment of his debt. It is stated in the "case" that the case was "heard before his honor, Judge Townsend, and a jury, fall term, 1897. Plaintiff moves for judgment pro confesso against C. A. Hughes and F. D. Hughes, who have not answered. Defendant objects. Objection sustained. Plaintiff excepts." After several instructions as to the effect of the tax title set up by the defendant Howell, the jury were instructed that if they find, as matter of fact, "that the land covered by the mortgage was the property of the defendant C. A. Hughes; that she is a married woman; was such when the mortgage was executed; and that the mortgage was given to secure the debt of her husband,—then the mortgage is void, and their verdict should be for defendant Howell." The jury returned a verdict in the following form: "For defendant. H. L. Buck, Fore-

man." After this verdict was rendered, the circuit judge rendered his decree, in which, among other things, he says: "The two questions raised by the pleadings were thus fairly before the jury. They found for the defendant Howell. I take that the verdict is responsive to the whole issue, both as to the invalidity of the mortgage and the validity of the tax title of Howell. I concur in the finding." Accordingly he "ordered, adjudged, and decreed that the complaint be dismissed; that the said papers called a mortgage be delivered to the clerk of this court to be canceled; that the clerk of this court cancel said mortgage by entering thereon, 'Adjudged null and void by court on verdict of jury in J. W. Holliday against C. A. Hughes, F. D. Hughes, and W. H. Howell, rendered 7th October, 1897,' and enter said cancellation on the record of said mortgage; that J. W. Holliday, his executors, administrators, and assigns, be perpetually enjoined from disturbing the defendant Howell in the possession of said premises, by reason of said alleged mortgage; and that the plaintiff pay the costs and disbursements of this action." From this judgment plaintiff appeals on numerous grounds, which are set out in the record. But, under the view which we take of this case, we do not deem it necessary to allude to but one of them, the twenty-fifth,—"because his honor erred in leaving it to the jury to say whether there was a mortgage or not."

Ever since the case of *Adickes v. Lowry*, 12 S. C. 97, recognized and followed in numerous subsequent cases, it has been the settled rule that while, under the Code of Procedure, both legal and equitable issues may be tried in the same case, yet, "at the trial, the legal and the equitable issues must be distinguished and decided by the court in the exercise of its distinct functions as a court of law and a court of equity, and only those should be determined by a jury which are properly triable by a jury, while those which would formerly have been triable in equity must be determined by the judge in the exercise of his chancery power." Now, in this case, it is very manifest that the pleadings presented two issues, as between the plaintiff and the defendant Howell,—the other two defendants having made default, and therefore presenting no issues,—one equitable, and the other legal; the former of which was triable by the court and the latter by the jury. It was therefore error to submit both of these issues to the jury, and the twenty-fifth exception must be sustained. It is true that the circuit judge, after the verdict was rendered, proceeded to render his decree, in which he says he concurred in the finding of the jury, which, if the case had simply depended upon an equitable issue, might possibly have cured the error. But in this case both of the issues, legal and equitable, were submitted to the jury; and as they were explicitly instructed that, if they found

as matter of fact that the mortgage was void for lack of power in the married woman to execute it, then they must find for the defendant Howell, we are unable to conceive how it would be possible, either for the circuit court, or this court, to ascertain upon which of the two issues their general verdict was based. If it was based upon the equitable issue alone, then it would amount to nothing, as that was an issue which they had no authority to try. Suppose, for example, that the jury had reached the conclusion that the defendant Howell had failed to establish his legal title, yet, under the instructions given them by the circuit judge, they would have been bound to find for the defendant, if they had also reached the conclusion that the mortgage was void for the reason above indicated. This only serves to illustrate the wisdom of the rule which requires that, in cases of this kind, the legal and equitable issues should be separated, and each tried by the appropriate branch of the court. After a careful consideration of the whole case, we are satisfied that this wise and salutary rule must be applied, and that the judgment of the circuit court should be set aside, and the case remanded to that court for trial in accordance with the requirements of the rule, without prejudice to either party as to any of the other questions presented by the exceptions, which, under the view we have taken, it is not proper to consider now. The judgment of this court is that the judgment of the circuit court be set aside, and that the case be remanded to that court for a new trial without prejudice.

(54 S. C. 147)

STATE v. ROBERTSON.

(Supreme Court of South Carolina. Jan. 4, 1899.)

CRIMINAL LAW — NEW TRIAL — INSTRUCTIONS — HARMLESS ERROR — JURORS — DISQUALIFICATION — AFFIDAVITS — REVIEW.

1. Where the jury renders a verdict of manslaughter, error predicated on an alleged erroneous charge as to presumption of malice cannot be sustained.

2. Where a juror is examined on a voir dire, and after such examination the circuit judge determines that he is a competent juror, such determination, being on a question of fact, cannot be reviewed.

3. Where a defendant fails to use the means afforded by law to ascertain the qualifications of jurors, it is not error to refuse a new trial based on the alleged ground that a juror had served on a former trial of the case, which fact was unknown to defendant or his counsel until after the trial.

4. The court will not consider a motion for a new trial based on an affidavit of a juror who sat as a juror in a former trial of the case, showing how he voted on such former trial.

Appeal from general sessions circuit court of Greenville county; Ernest Gary, Judge.

W. W. Robertson was convicted of manslaughter, and he appeals. Affirmed.

J. A. Mooney, for appellant. W. X. Gunter, Asst. Atty. Gen., for the State.

McIVER, C. J. The defendant was indicted for murder, and was convicted of manslaughter, with a recommendation to mercy; and from the judgment rendered upon such verdict the defendant appeals, upon the following grounds: "(1) That his honor, the presiding judge, erred in charging the jury as follows: 'Now, when the killing is in a quarrel and encounter if the facts show that it arose out of the misconduct of the defendant, the law says that malice on the part of the defendant is inferred.' (2) That the presiding judge erred in not granting defendant's motion for a new trial: (a) It having been shown and admitted that the juror Cunningham had served as a petit juror in the former trial of his case, and which fact was unknown to the defendant and his counsel until after the trial therein; (b) it appearing by affidavit that the said juror voted at the former trial of said case for a verdict of manslaughter." In the 'case' we find the following statement: "It is admitted that at the term of the court preceding that at which the defendant was tried and convicted of manslaughter, and from which this appeal is taken, the said defendant was tried under said indictment, and a mistrial was had; that at said trial the above-named juror, H. B. Cunningham, was a member of the panel, and voted for a verdict of manslaughter; that, when said juror was called and examined upon his voir dire at the last trial of said cause, neither the defendant nor his counsel knew that he had served on the jury at the former trial, and did not ascertain that fact until after the trial and verdict, when the defendant's counsel was informed of it by an officer of the court; that the above facts were made to appear by affidavit, and a motion for a new trial was duly made before the presiding judge upon that ground, among others, and said motion was refused, and the defendant sentenced to two years in the state penitentiary at hard labor. The evidence was the same at both trials." It also appears from the "case" that when the juror Cunningham was examined on his voir dire the following occurred: "Q. Have you formed or expressed an opinion as to the guilt or innocence of the defendant, Robertson? A. Yes, sir. Q. Upon what was the opinion based? A. From what I heard of the evidence. Q. Notwithstanding that opinion, do you think you can give the prisoner a fair and impartial trial according to the law and the evidence as you may hear here? A. Yes, sir; I think so. Q. Have you any bias or prejudice against the prisoner at the bar? A. No, sir." Whereupon the juror was sworn. It does not appear that the prisoner had exhausted his peremptory challenges before reaching this juror, nor does it appear that he challenged the said juror.

Inasmuch as the appellant was convicted of manslaughter only, which wholly excludes the idea of malice, it is very manifest that the first ground of appeal cannot be sustained; for, even if the proposition of law ex-

cepted to be erroneous, it is quite certain that such error was entirely harmless, as the verdict demonstrated that the jury did not believe that the killing was actuated by malice. Hence any inquiry into the correctness of the proposition of law in the judge's charge to which error is imputed would be purely speculative, and cannot, therefore, be properly pursued in this case.

The second ground of appeal presents questions of an important character, which demand the serious consideration of this court. It must be remembered that in the present constitution, unlike that of 1868, it has been declared, in mandatory terms, as follows, "The petit jury of the circuit courts shall consist of twelve men, all of whom must agree to a verdict in order to render the same," and further that "each juror must be a qualified elector under the provisions of this constitution, between the ages of twenty-one and sixty-five years, and of good moral character." Const. art. 5, § 22. Hence, when the fact has been ascertained by the proper authority, invested with jurisdiction to determine, that some one or more of the body of persons organized as a jury did not possess the qualifications required by the constitution, their verdict must be set aside, upon the ground that it was not the verdict of a constitutional jury. *Garrett v. Weinberg* (S. C.) 31 S. E. 341. But in the case now under consideration the objection to the juror Cunningham was not based upon the ground of lack of any one of the qualifications prescribed by the constitution, and hence the decision in the case just cited does not conclude the inquiry. Here the objection to the juror in question was based upon the ground, not that he was disqualified from serving as a juror in any cause, but that he was disqualified from serving as such in this particular case, because of the fact that he was not "indifferent" (as it is termed in the statute) as between the parties to this case, by reason of the fact that he had served as a member of the jury to which this case had been committed at the preceding term of the court, when the jury failed to agree, and a mistrial was ordered, and had then formed and expressed an opinion as to the guilt or innocence of the defendant. Every fair-minded person will readily recognize the importance of having the jury to whom a case is submitted for trial composed of persons who, as far as practicable, are free from any bias or prejudice, either for or against one or the other of the parties, whether the same arises from interest, by reason of relationship or otherwise, or from having previously formed or expressed an opinion as to the merits of the controversy. The lawmaking power, recognizing the importance of this matter, has made ample provision for attaining the desired end; for it is provided in section 2403 of the Revised Statutes of 1893, that "the court shall, on motion of either party in suit, examine, on oath, any person

who is called as a juror therein, to know whether he is related to either party, or has any interest in the cause, or has expressed or formed any opinion, or is sensible of any bias or prejudice therein, and the party objecting to the juror may introduce any other competent evidence in support of the objection. If it appears to the court that the juror is not indifferent in the cause, he shall be placed aside as to the trial of that cause, and another shall be called." This statute has been construed by the late Chief Justice Simpson, in the case of *State v. Williams*, 31 S. C. 238, 9 S. E. 853, as investing the circuit judge with exclusive power to determine whether a given juror, after examination on his voir dire, is indifferent in the cause; and that construction has been adopted in the following subsequent cases: *State v. Merriman*, 34 S. C. 16, 12 S. E. 619; *State v. James*, 34 S. C. 49, 12 S. E. 657; *State v. Haines*, 36 S. C. 504, 15 S. E. 555; and *Sims v. Jones*, 43 S. C. 91, 20 S. E. 905. It is true that the writer of this opinion, in *Council v. Fowler*, 48 S. C., at pages 18, 19, 26 S. E. 900, made some passing remarks which possibly may be regarded as calculated to throw some doubt upon the construction given to section 2261 of the General Statutes of 1882, now incorporated in the Revised Statutes of 1893, as section 2403, by the late Chief Justice Simpson in *State v. Williams*, supra; but the writer, in making those remarks, evidently overlooked the fact that such construction had been recognized and followed in at least four subsequent cases,—a number quite sufficient to settle the question. Besides, this case differs materially from the case of *Council v. Fowler*, supra; for there the juror in question had not been examined on his voir dire, and the question as to whether he was indifferent in the cause had not been determined by any competent authority, while here the juror in question was examined upon his voir dire, and after such examination the circuit judge, who was invested with authority to determine the question as to whether he was indifferent in the cause, has determined that he was a competent juror, and his determination of this question of fact cannot be reviewed by this court. Besides, the law makes other provision to enable the accused to scan the list of those who are presented to him as jurors in a case like this, and thus to ascertain whether there is the name of any person upon the list who is objectionable as a juror. In *State v. Fisher*, 2 Nott & McC. 261, it was held that the prisoner had a right to a copy of the indictment and a list of the persons impaneled as jurors for the trial of cases during the term; and, as was said in that case, "the end and design of which was to enable him to ascertain the character and qualification of the jurors who were to sit on his trial; and, if he would not do so, he should not be permitted to take advantage of his own negligence." The point made by counsel for appellant, that "since the case of *State v.*

Merriman, 34 S. C. 16, 12 S. E. 619, the defendant is not entitled to demand a list of the jurors," is based upon a misapprehension of that case. There the point decided was that the jury commissioners were not bound to furnish a copy of the list of persons drawn by the jury commissioners at the beginning of the year, whose names are to be placed in the jury box, from which jurors are to be drawn to serve as such at the several terms of the court during the year, to any person who chooses to ask for it, or to submit the same for his inspection. But that does not refer to, or in any way interfere with, the right of the accused, in a capital case, to demand from the clerk of the court a copy of the indictment, and a list of jurors drawn, summoned, and impaneled for service as such during the term of the court at which the case is tried. It is true that it is stated in the "case" that it was made to appear on the hearing of the motion for a new trial that the juror Cunningham had served as a juror "in a former trial of this case," and that this fact "was unknown to the defendant and his counsel until after the trial herein." But while it is not difficult to believe that the fact might have been unknown to his counsel in this trial, as the appellant may have had other counsel at the previous term, when there was a mistrial, or that counsel, in the multiplicity of other engagements, might have overlooked the fact, yet we find it very difficult, if not impossible, to conceive how the appellant could have overlooked such a fact; for when we remember the solemn formalities always observed in organizing a jury for the trial of a capital case, by which the attention of the prisoner is called specially to each juror as he is presented, it is almost incredible that a person on trial for his life should overlook the fact that one of the persons presented to him as a juror had served as a juror at the preceding term of the court upon the trial of his case. But waiving this, and accepting as true the fact stated in the "case," that neither the appellant nor his counsel knew that the juror Cunningham had served as a juror at the preceding term of the court in the same case, until after the trial herein, we still think that there was no error on the part of the circuit judge in refusing the motion for a new trial upon this ground; for, while it is true that in the cases of *Kennedy v. Williams*, 2 Nott & McC. 79, and *Garrett v. Weinberg*, supra, some stress is laid—and, in a proper case, properly laid—on the fact that the disqualification of the juror was not known to the party or his counsel until after the trial, yet we think this should be qualified by the proviso that such ignorance is not due to the want of diligence, for, where the disqualification relied on might have been discovered by the exercise of ordinary diligence, it affords no excuse for failing to make the objection in due season, for, as was said in *State v. Fisher*, supra, a party "should not be permitted to take advantage of his own

negligence." In this case, as we have seen, the appellant failed to make use of the means afforded by the law to enable him to ascertain the qualifications of each juror presented, and he must take the consequences of his own default.

The second subdivision of exception 2, based upon the ground that it appeared by affidavit "that the said juror voted at the former trial of said case for a verdict of manslaughter," not only cannot be sustained, but calls for reprobation. The practice of invading the privacy of the jury room for the purpose of ascertaining the views of any one or more of the jurors as to the case has never been sanctioned in this state, and has in some of the cases been severely condemned. Indeed, it has been held that affidavits tending to show the views presented by any juror, or the reasons which influenced the verdict, will not be heard by the court, except for the purpose of showing misconduct so gross on the part of a juror as to call for his punishment. *Sheppard v. Lark*, 2 Bailey, 576; *Smith v. Culbertson*, 9 Rich. Law, 106, recognized and followed in *Reaves v. Moody*, 15 Rich. Law, 312. We do not think, therefore, that the affidavit referred to should have been received, and the statement therein made should be disregarded. The court has no right to know, and no legal means of ascertaining, how the juror voted at the former trial.

Upon what grounds the circuit judge based his refusal of the motion for a new trial is not disclosed by the "case," and we are without any means of ascertaining what were the reasons for his action. We have, therefore, been compelled to consider the question on all of its aspects; and, so considering it, we see no ground for reversing the judgment below. The judgment of this court is that the judgment of the circuit court be affirmed.

54 S. C. 83)

CLEVELAND v. CALVERT et al.

(Supreme Court of South Carolina. Jan. 4, 1899.)

MUNICIPAL BONDS—REQUIREMENTS OF ISSUANCE—POWERS OF CITY COUNCIL—PETITION FOR ELECTION—RECITALS—PUBLICATION OF NOTICE—PRESUMPTIONS—LIMITATIONS—EXCESSIVE ISSUE—DETERMINATION.

1. Const. 1895, art. 2, § 13, and acts pursuant thereto, prescribing different requirements or the issuance of municipal bonds than those required by Sp. Act Dec. 24, 1890 (20 St. at Large, p. 976), relating to the issuance of sewerage bonds by the city of S., do not nullify the whole of the latter act, but the conflicting sections thereof are regarded as amended so as to conform to the constitution and acts passed in pursuance thereof.

2. Sp. Act Dec. 24, 1890 (20 St. at Large, p. 76), providing for the establishment of a sewerage system in the city of S., and the issuance of bonds therefor, authorizes the city council to issue \$50,000 of 6 per cent. bonds, or so much thereof as, in their judgment, may be necessary, provided a majority of the qualified city electors vote in favor thereof at an election, on

petition of real estate owners; and Act March 9, 1896 (22 St. at Large, p. 88), entitled "An act to authorize special elections in any incorporated city or town of this state for the purpose of issuing bonds for corporate purposes," by section 2 thereof, provides that, "should a majority of those voting in said election vote in favor of said bond issue," then the municipal authorities shall be authorized to issue said bonds of such denomination, and for such length of time, and such rate of interest, not exceeding 7 per centum per annum, as the said municipal authorities shall prescribe. *Held*, that the city council might issue 5 per cent. bonds, though all the proceedings prior thereto contemplated 6 per cent. bonds only.

3. Sp. Act Dec. 24, 1890 (20 St. at Large, p. 976), provides for the establishment of a sewerage system in the city of S., and the issuance of municipal bonds therefor by the city council, provided a majority of the qualified city voters vote in favor thereof at an election on petition of a majority of the freeholders of the city. *Held*, that the petition need not recite that it is signed by a majority of the freeholders, since that fact could not be determined by the recital, but must be ascertained with reference to the tax books.

4. Sp. Act Dec. 24, 1890, § 5 (20 St. at Large, p. 977), provides, in relation to an election on the question of the issuance of sewerage bonds, authorized by said act, that the city council of the city of S. shall give "at least three weeks' notice by advertisement in one of the papers of said city of the time and of the names of managers appointed by them to conduct the election." *Held*, that a single publication appearing three weeks previous to the election is sufficient.

5. It will be presumed that the officers in charge of a municipal election on the question of the issuance of bonds for certain municipal purposes did their duty, and that only those entitled to vote were allowed to do so, and hence a recital to that effect is unnecessary in the election return.

6. It is unnecessary to the validity of municipal bonds that the ordinance and other proceedings in reference to their issue recite that the issue did not exceed the constitutional limit on the city's bonded indebtedness.

7. An issue of municipal bonds beyond the constitutional limit can be determined only by comparison of the existing and proposed bonded debt with the records showing the assessed value of taxable municipality property.

8. That an ordinance providing for the issue of municipal bonds does not definitely provide for levying taxes to pay the interest thereon, and to provide a sinking fund for a payment of the principal, is no ground for restraining the issue, since provisions may thereafter be made for such purposes.

Application by Henry Cleveland for an injunction against Arch B. Calvert and others, constituting the city council of the city of Spartanburg. Refused and dismissed.

Ralph K. Casson, for petitioner. Bomar & Simpson, for respondents.

JONES, J. This is an application in the original jurisdiction of this court for an injunction to restrain the city council of Spartanburg from issuing \$50,000 of bonds for sewerage purposes. The city council claim authority to issue said bonds under a special act for that purpose, approved December 24, 1890 (20 St. at Large, p. 976), entitled "An act to authorize the city council of Spartanburg to ordain the necessary ordinances for the establishment, construction and maintenance

of a system of sewerage in the city of Spartanburg and to issue bonds for the purpose of the establishment, construction and maintenance of such system." By this act the city council were authorized to issue \$50,000 of 6 per cent. coupon bonds, or so much thereof as, in their judgment, may be necessary, provided a majority of the qualified electors of said city shall vote in favor of such issue at an election held for that purpose, upon the petition of one-third of the real estate owners of said city.

1. Petitioner contends that this act is void, and all proceedings thereunder illegal, because the same was repealed and nullified by section 13 of article 2 of the constitution of 1895, and laws subsequently passed in pursuance thereof, prescribing different qualifications for electors than those which existed at the time of the passage of the said special act, and prescribing as a condition precedent to the holding of an election for the purpose of issuing bonds a petition from a majority of the freeholders of said city as shown by its tax books. It appears from the return of respondents, to which petitioner demurs, and thereby admits it to be true, that on August 23, 1897, a petition for an election on the question of issuing such bonds was filed with the city council, and that it was ascertained and determined by the city council that the petition was signed by more than a majority of the freeholders of the city of Spartanburg. It further appears that a large majority of those who voted at the election voted in favor of issuing said bonds, and that those who voted were qualified electors under the constitution of 1895. The effect of the new constitution and acts pursuant thereto is not to wholly nullify the said special act, but merely to nullify so much of said act as is inconsistent with the new constitution; or, rather, the special act must be read as if amended so as to prescribe for electors thereunder the qualifications required under the new constitution, and to require a petition by a majority of the freeholders, instead of one-third. As these conditions were admittedly complied with, the proceedings were not void. *McWhirter v. Town of Newberry*, 47 S. C. 418, 25 S. E. 216.

2. It appears that the city council contemplate the issue of 5 per cent. instead of 6 per cent. coupon bonds. Petitioner claims that the city council have no power to so do, because the petition and other proceedings preliminary to the election upon the question of issuing bonds and of proceedings in relation thereto contemplated and provided for 6 per cent. bonds only. The act of 1890 permitted and authorized the issue of \$50,000 of 6 per cent. coupon bonds, or so much thereof as in their judgment may be necessary. The act of March 9, 1896 (22 St. at Large, p. 88), entitled "An act to authorize special elections in any incorporated city or town of this state for the purpose of issuing bonds for corporate purposes," in section 2 provided that, "should a majority of those voting in said election vote

in favor of said bond issue, then the municipal authorities of said city or town shall be authorized to issue said bonds which shall be of such denomination and run for such length of time and bear such rate of interest, not exceeding seven per centum per annum, as the said municipal authorities shall prescribe." It is therefore clearly within the power of the city council, if it is found in their judgment, advisable so to do, to issue bonds bearing a rate of interest less than that permitted by the legislature on the subject, and authorized by the vote of the electors. It would seem that petitioner, as well as all other taxpayers of the city, would be benefited, rather than injured, by the proposed act of the city council.

3. Petitioner's contention that the proceedings are invalid because the petitions presented to the city council did not set forth upon their face that they were signed by freeholders of the said city is not tenable. It is not necessary that the petition shall recite that it is signed by a majority of the freeholders. That fact cannot be determined by the mere recital of the petition, but must be ascertained by reference to the tax books.

4. It is contended as a ground for injunction that the election held on the question of issuing said bonds was illegal, because the notice of the election was not given as required by the act. The language of the act is: "The city council of said city are hereby required to give at least three weeks' notice, by advertisement in one or more of the papers of said city, of the time, and of the names of managers appointed by them to conduct the election." Act Dec. 24, 1890, § 5 (20 St. at Large, p. 977). It appears that notice of the time and place of election and of the names of managers was published in the *Spartanburg Herald* in its daily editions on August 25th and 26th and on September 14th and in the semiweekly issue of August 27, 1897. The time fixed for the election was September 15, 1897. Excluding August 25th and including September 15th, under the rule prescribed in section 421 of the Code of Civil Procedure, the first publication appeared 21 days, or 3 weeks, before the election. Is this a compliance with the requirement of the statute to give "at least three weeks' notice by advertisement," etc.? We are of opinion that it is. It will be observed that the words used to describe the time of publication are not like those used in reference to the publication of summons against a nonresident, as in section 156 of the Code, where the language is, "not less than once a week for six weeks," nor like those used in reference to the sale of real estate under execution, etc., as in section 2543, Rev. St., where the language is, "once a week for at least three weeks," which could only be met by a publication at least once a week for the specified time. The statute in question does not require a publication "once a week," nor does it require advertisement for three weeks.

Since it merely requires notice to be advertised at least three weeks before the election, a single publication appearing three weeks previous is a compliance. To hold otherwise would be to interpolate words which the legislature did not see fit to employ, and which, in reference to other matters, it is accustomed to employ when the intention is to require publication at least once a week.

5. Petitioner further alleges that the election was invalid, because it does not appear affirmatively upon the returns of such election that the persons who were allowed to vote thereat possessed the constitutional qualifications of electors, to wit, that they were at a proper age, and had paid all their taxes. The point is not well taken. The presumption is that the officers in charge of the election did their duty, and that only those were allowed to vote who were entitled to vote; and a recital to that effect by the managers in their return is not necessary. It appears by the admitted facts in this case that those who voted were qualified voters.

7. It is alleged that the ordinances and other proceedings under which said issue of bonds is proposed to be made were irregular and insufficient for not showing upon their face that the issue of said bonds will not exceed the constitutional limit for bonded indebtedness for said city. It is not contended that the proposed issue of bonds would, in fact, exceed the constitutional limit; indeed, the facts set out in respondents' return, admitted to be true, showing the assessed value of the taxable property of the city and county of Spartanburg, and the bonded debt already existing, show clearly that the proposed issue would not exceed the constitutional limit. The point here made is simply that the fact that the proposed issue is not excessive should appear affirmatively in the ordinance and other proceedings in reference to the proposed issue. Recitals in the ordinance or elsewhere to the effect that the issue does not exceed the constitutional limit, not being required, are not necessary. Such a recital would be wholly unavailing in determining the question of excessive issue, unless the officers making the recital are, by some valid law, charged with the duty of ascertaining and determining that fact. The question of excessive issue can be determined only by a comparison of the existing and proposed bonded debt with the record showing the assessed value of the taxable property. *Dixon Co. v. Field*, 111 U. S. 95, 4 Sup. Ct. 315; *Sutliff v. Commissioners*, 147 U. S. 236, 13 Sup. Ct. 318; *State v. Cornwell*, 40 S. C. 80, 18 S. E. 184.

8. We do not think that the fact—even conceding it to be a fact—that the ordinance providing for the issue of the bonds does not definitely provide for levying taxes to pay the interest thereon, and to provide a sinking fund for the payment of the principal, is any reason for restraining the issue of the bonds,

since all due provisions may be hereafter made for such purposes. Finding nothing in the record to justify the granting of the injunction prayed for, the application therefor is refused and dismissed.

(123 N. C. 582)

STATE ex rel. SOMERS, Deputy Sheriff, et al. v. THOMPSON et al., County Com'rs.
(Supreme Court of North Carolina. Dec. 20, 1898.)

SHERIFFS—DEPUTIES—SURETIES—TAX COLLECTORS
—VACANCIES—INSANITY.

Neither the sheriff's deputy nor the sureties on his bond can sue to compel the county commissioners to give them the tax list for the ensuing year for collection, where such office has become vacant by reason of the insanity of such officer, and of a failure to renew his bonds and to produce receipts for moneys collected, as required by Code, § 2070, as amended by Laws 1897, c. 169, § 35, and where the commissioners elected a tax collector after the appointment of guardians for such sheriff.

Appeal from superior court, Burke county; Coble, Judge.

Action in the name of the state, on the relation of A. F. Somers, deputy sheriff, and agent of the bondsmen of T. M. Webb, sheriff of Burke county; of T. M. Webb, by Hannah I. Webb and A. F. Somers, guardians and representatives of T. M. Webb; and of Joseph A. Dale, coroner and temporary ex officio sheriff of said county,—against W. N. Thompson and others, constituting the board of commissioners of said county, and J. W. Garrison, in the nature of quo warranto to try title to the office of tax collector of said county, and to oust defendant Garrison, the incumbent of said office. In the year 1896, T. M. Webb was elected and qualified as sheriff of Burke county for the term of two years, and until December, 1898. In May, 1898, his wife, Hannah I. Webb, and A. F. Somers were appointed and qualified as guardians of said T. M. Webb on the petition of the former, and on the certificate of the superintendent of the state hospital for the insane, showing that said T. M. Webb was then undergoing treatment for insanity in said hospital, where he was confined, under treatment, at the time of the filing of the complaint herein. During the period referred to, and until September 6, 1898, said Somers, as the deputy or agent of said sheriff, continued to collect the taxes of said county, and Joseph A. Dale, coroner and ex officio sheriff, for the time attended to the duty of executing process directed to said sheriff. On September 5, 1898, demand was made of the defendant board of commissioners, on behalf of said Somers, for the tax books for the year 1898, on the alleged ground that Sheriff Webb had a vested right therein, as part of the emoluments of his said office, and on the following day said board, by resolution reciting that said sheriff was then insane, and that he had not

made settlement of the taxes for the years 1895, 1896, and 1897, and was delinquent thereon in a certain sum, which had been demanded, and payment refused, appointed defendant J. W. Garrison tax collector for the year 1898. The foregoing facts were shown in evidence on the trial, whereupon judgment was rendered for defendants, and plaintiffs appeal. Affirmed.

J. T. Perkins and E. J. Justice, for appellants. A. C. Avery, W. S. Pearson, and J. M. Mull, for appellees.

CLARK, J. Upon the insanity of the sheriff his right to exercise the office ceased; and his committal to the asylum for the insane, and the appointment of a guardian for him, upon the certificate of the superintendent of the asylum, as provided by Code, § 1673, was certainly at least prima facie evidence of such insanity. There was no evidence offered to contradict such insanity. Upon the declaration of insanity the sureties of the sheriff had no more rights than would have gone to them upon his death, i. e. to collect the tax list then in his hands. Code, § 3687; Laws 1897, c. 169, § 117; Perry v. Campbell, 63 N. C. 257; McNeill v. Somers, 96 N. C. 467. The commissioners, on the first Monday in September, were vested with the power of electing a tax collector for the ensuing year, unless and until the sheriff should be restored to reason. The failure to exhibit the tax receipts on said first Monday in September would have been an additional ground justifying the county commissioners in refusing to give him the new tax books, even if he had been sane, and the sureties would have no right to collect taxes on such new list after his failure to renew his bond, whether such failure was caused by failure to exhibit the required receipts or by his insanity (Colvard v. Commissioners, 95 N. C. 515; Code, § 2070); the time (December) being changed to September (Laws 1897, c. 169, § 35). In North Carolina, a sheriff's deputy is merely his agent (Railroad Co. v. Fisher, 109 N. C. 1, 13 S. E. 698), and such agency terminated upon the official ascertainment of the insanity. Neither Somers, therefore, nor the sureties on the sheriff's bond, have a right of action to compel the commissioners to give them the tax list. The agency could not have been one coupled with an interest, as that is prohibited. Code, § 2084; Basket v. Moss, 115 N. C. 448, 20 S. E. 733. Upon the prima facie ascertainment of the insanity of the sheriff under section 1673, or by inquisition of lunacy, the commissioners might have declared the office vacant under section 2071 of the Code, but their failure to do so merely authorized the coroner to perform the duties of sheriff proper till such declaration (Greer v. City of Asheville, 114 N. C. 678, 19 S. E. 635), and did not cast upon him the right to collect the tax-

es, which went to the sheriff's bondsmen for the current list, and after that the duty devolved upon a tax collector chosen by the county commissioners. Indeed, the election of a tax collector at the meeting of the county commissioners, supervening upon the appointment of a guardian for the sheriff, under section 1673 of the Code, was pro tanto a declaration of a vacancy in the sheriff's office, under section 2071, to the extent of his duties as tax collector; and their failure to elect a sheriff to serve process merely left that matter open for future action. Greer v. City of Asheville, supra. No error.

(123 N. C. 515)

WRIGHT v. KINNEY, Treasurer, et al.
(Supreme Court of North Carolina. Dec. 23, 1898.)

SCHOOLS AND SCHOOL DISTRICTS—ORDERS—NEGOTIABILITY—AUTHENTICATION—POWERS OF COUNTY BOARD—JUSTICE OF THE PEACE—JURISDICTION—APPEAL—MISJOINDER—REVIEW.

1. Sup. Ct. Rule 27 (27 S. E. viii), providing that no exceptions shall be considered other than those set out or filed and made part of the case on record, precludes consideration of objections for misjoinder of parties or causes of action without exceptions reserved from rulings below.

2. The remedy against a county treasurer for refusal to pay a school order is either by mandamus or action on the treasurer's official bond, of which a justice has no jurisdiction.

3. A school order being nonnegotiable, in the sense of the law merchant, is open, in the hands of assignees by indorsement, to defenses against the original holder.

4. Under Laws 1897, c. 108, § 15, requiring school orders to be signed first by at least three members of the district committee, and then by the county supervisor of schools, who shall place his seal upon it, without which no order shall be a valid voucher in the hands of the county treasurer, a person who, without authority, indorsed such an order, which had been signed by only two members of the committee, "Approved and countersigned. E. L. G., Chairman of Board of County Commissioners," is not personally liable to one who bought the order on the faith of such indorsement, because, even if it were authorized, the order would still be invalid.

5. Under Laws 1897, c. 108, § 15, requiring school orders to be signed first by at least three members of the district committee, and then by the county supervisor of schools, who shall place his seal upon it, without which no order shall be a valid voucher in the hands of the county treasurer, an order of the county board of education to the county treasurer to pay an order drawn by a district is a nullity, that board having no control over such orders.

Appeal from superior court, Davidson county; Allen, Judge.

Action by R. L. Wright against W. N. Kinney, treasurer, and others. There was a judgment for defendants, and plaintiff appeals. Affirmed.

Walser & Walser and R. L. Wright, for appellant. E. E. Raper, for appellees.

CLARK, J. This action was begun before a justice of the peace against Kinney, as

treasurer of Davidson county, and Ed. L. Greene, upon an order for \$22.50, dated May 28, 1897, and signed by Amos Smith and Joe Miller, as committee of district No. 23 (colored) of that county, reciting therein that it was for the purchase of school charts. It was payable to W. W. Tutwiler, or bearer, who sold it to plaintiff, and indorsed it. Before the order was indorsed to plaintiff, the following was written thereon: "Approved and countersigned. Ed. L. Greene, Chairman of Board of County Commissioners;" but the board of county commissioners never approved the order, nor did it authorize Greene to do so. On January 3, 1898, the board of education ordered the county treasurer to pay, out of the funds apportioned to the several districts, the orders held by the Lexington and Salisbury banks, of which number this check was one, with a proviso that no district pay for more than one chart. This order was presented to defendant Kinney, as treasurer, and he refused to pay it, or recognize it in any way as valid.

No exception on the ground of misjoinder of causes of action or misjoinder of parties was made below, and, of course, cannot be considered here. Rule 27 of this court (27 S. E. viii.). As to the defendant Kinney, treasurer, the plaintiff had two remedies,—either to sue him on his bond, or to apply for a mandamus; and of neither of these actions did the justice of the peace have jurisdiction. *Robinson v. Howard*, 84 N. C. 151; *Taylor v. School Committee*, 50 N. C. 98.

Orders or warrants issued by a municipal corporation are not negotiable, and carry with them none of the privileges of negotiable paper, except to pass by delivery upon indorsement. *Daniel, Neg. Inst.* § 427; 1 Dill. Mun. Corp. § 487. In *Wall v. Monroe Co.*, 103 U. S. 74, Field, J., says: "The warrants, being in form negotiable, are transferable by delivery so far as to authorize the holder to demand payment of them, and to maintain in his own name an action upon them. But they are not negotiable instruments in the sense of the law merchant, so that, where held by a bona fide purchaser, evidence of their invalidity or defenses available against the original payee would be excluded. The transferee takes them subject to all legal and equitable defenses which existed as to them in the hands of such payee. There has been a great number of decisions in the courts of the several states upon instruments of this kind, and there is little diversity of opinion respecting their character. All the courts agree that the instruments are mere prima facie, and not conclusive, evidence of the validity of the allowed claims against the county by which they were issued. The county is not estopped from questioning the legality of the claims." This has been fol-

lowed in *Ouachita Co. v. Wolcott*, 103 U. S. 559, and *Merrill v. Monticello*, 138 U. S. 673, 11 Sup. Ct. 441, and cases therein cited. So that if this action had been brought in the proper forum, and against the proper parties, it would be open to set up any defense, as fraud, misrepresentation, and the like, which would have been good against the original holder, and, if the claim was improperly allowed, the order may be canceled. *Abernathy v. Phifer*, 84 N. C. 711. *Indiana v. Glover*, 155 U. S. 513, 15 Sup. Ct. 186, is a very recent decision (1894) of the supreme court of the United States affirming the invalidity of a township warrant for school supplies, even in the hands of subsequent holders, when the "supplies are not suitable and reasonably necessary."

The plaintiff further seeks to hold Ed. L. Greene liable individually, because, he alleges, he bought the paper relying on its validity, as being guarantied by Greene's indorsement, as chairman, of the claim, "Approved," which indorsement, it has since appeared, he had no authority to make, not having been authorized by the board of commissioners. There are circumstances under which an officer would make himself personally liable to one misled by his unauthorized action (*Throop*, Pub. Off. § 774; *Mechem*, Pub. Off. §§ 811, 812, 816); but whatever force there would have been in this proposition if the order had been valid by the authorized attachment of the approval of Greene as chairman, we need not consider, because, by section 15, c. 108, Laws 1897, ratified March 6, 1897 (and therefore in force at the date of this order, given May 28, 1897), all such orders are required to be "signed first by at least three members of the committee, and then by the county supervisor who shall place his seal upon it," and without this no order "shall be a valid voucher in the hands of the county treasurer." Therefore, on its face, the order was invalid, and the approval of "Greene, Chairman," could not have made it good. In the absence of evidence of fraud and misrepresentation, Greene cannot therefore be held liable for his unauthorized signature, which could not have misled the plaintiff to his hurt. The order would have been invalid even if the signature had been duly authorized by the county commissioners, and the plaintiff is no worse off because it was unauthorized. The action of the county board of education, January 3, 1898, was a nullity, as that board had nothing to do with orders on the treasurer issued by the districts. Acts 1897, c. 108, § 15. Upon the facts found by the court by consent of parties, the plaintiff could not recover, and the court properly so held; but we see no ground for the nonsuit ordered under chapter 109, Laws 1897. The judgment against the plaintiff is affirmed.

(123 N. C. 651)

McPEETERS et al. v. BLANKENSHIP.
(Supreme Court of North Carolina. Dec. 23, 1898.)

BRIDGES—IN TWO COUNTIES—AUTHORITY TO CONSTRUCT—COSTS—COUNTY WARRANTS—NEGOTIABILITY.

1. Code, § 2014, giving county commissioners power "to appoint where bridges shall be made," is to be construed in connection with section 707, subsec. 10, as amended by Laws 1895, c. 135, § 2, providing that county commissioners may construct bridges in the county, and, when a bridge is necessary over a stream which divides one county from another, the commissioners of each county shall join in its construction, and the charge thereof shall be divided between the counties; and therefore the statutes do not authorize county commissioners to build a bridge over a boundary stream without the joining of the commissioners of the other county, or at the sole expense of the first county, though the refusal to join is for the reason that the bridge is of no benefit to the adjoining county, because it accommodates only a small strip of its territory.

2. County warrants are not negotiable, in the sense of the law merchant, so as to protect purchasers for value and without notice of defenses.

Appeal from superior court, Yancey county; Starbuck, Judge.

Action by C. L. McPeeters and others against M. H. Blankenship. There was a judgment for defendant, and plaintiffs appeal. Reversed.

J. M. Gudger, Jr., for appellants. Hudgins & Watson, for appellee.

CLARK, J. Code, § 707, subsec. 10, amended by Laws 1895, c. 135, § 2 (which strikes out the proviso), gives county commissioners power "to construct and repair bridges in the county and to raise by tax the money necessary therefor; and when a bridge is necessary over a stream which divides one county from another, the board of commissioners of each county shall join in the construction or repairing of such bridge, and the charge thereof shall be defrayed by the counties concerned in proportion to the number of taxable polls in each." Code, § 2014, giving the county commissioners power "to appoint where bridges shall be made," is to be construed in connection with section 707, subsec. 10, and is not in conflict with it. The commissioners of Yancey county deemed that a bridge was necessary over the Toe (or Estatoe) river at the point where the public road from Burnsville, the county seat, to Johnson City, Tenn., crosses it, as that road is much used by citizens of the county, and rises of water in the river are not infrequent. The river at that place is the dividing line between Yancey and Mitchell counties, but as the road in question passes through a very narrow strip of Mitchell county, lying between the river and the Tennessee line, the commissioners of the latter county refused the application of the commissioners of Yancey to join in building the bridge, upon the ground that the interest of Mitchell county in having a bridge at that point was too slight

to justify them in sharing the expense. Thereupon the commissioners of Yancey assumed the entire expense, and caused an iron bridge to be constructed, at a cost of \$4,000, payable in five annual installments. The bridge has been completed, and has been accepted by the commissioners, and five warrants for \$800 issued to the contractor, the first of which falls due this year. This is an action by sundry taxpayers to restrain the county treasurer from paying the warrants, on the ground that the erection of the bridge was ultra vires, and the warrants are not a valid indebtedness of the county.

It would have been more seemly and just if some taxpayer had enjoined the erection of the bridge in the beginning, but there is no estoppel in matters of this kind. The county commissioners have only such powers as are conferred by statute, or plainly incident thereto; and, in this matter of building bridges over a stream dividing one county from another, their powers are plainly prescribed and restricted. The commissioners of Yancey had no power to build the bridge across such boundary stream, and throw the entire expense upon Yancey county, nor to build it at all, in the absence of the joining of the commissioners of Mitchell, in which county half of the bridge is situated. It was held in *Greenleaf v. Board* (at this term) 31 S. E. 284, that the county commissioners could not accept a bridge as a gift to the county, to be maintained at its expense, when at one end of the bridge the road was a private road, and not under county control. Clearly, therefore, the county commissioners cannot build a bridge at county expense when half of it will be in another county, and the road at the other end will not be under their control, except in the manner prescribed by statute, unless a special statute is procured to authorize it. If the bridge is a necessity to Mitchell county also, and the refusal of its commissioners is arbitrary, possibly a mandamus might have issued to compel them to join in the erection of the bridge; but that point is not before us. If the bridge is a necessity to Yancey county alone, the commissioners of that county, upon the refusal of the commissioners of Mitchell to join in its construction, should have applied to the legislature for a special act authorizing the county of Yancey to construct the bridge at its sole expense. Certainly, in the absence of such legislative authority, the warrants are invalid, and their payment must be restrained. *Washer v. Bullitt Co.*, 110 U. S. 558, 4 Sup. Ct. 249, and *Bullitt Co. v. Washer*, 130 U. S. 142, 9 Sup. Ct. 499, relied on by defendant, differ from this case, in that there the necessity for the bridge was adjudged and the contract ordered by the county court, presided over by the county judge, and the justices of the county, and afterwards ratified by judicial decree. But the county commissioners of this state have not been held invested with any common-

law power to exceed a restricted authority conferred on them by statute; and in *Washer v. Bullitt Co.*, supra, the court is careful to add: "We find nothing in the decisions of the court of appeals of Kentucky contrary to this,"—in recognition of the right of the highest court of the state to construe the powers conferred by its statute upon its own officers. *Wilson v. North Carolina*, 169 U. S. 586, 18 Sup. Ct. 435, reprinted in 122 N. C. 1108a, at page 1108c.

Whatever hardship there is on the contractors, we cannot recognize any power in public officers to bind the public by contracts not authorized by law. If the warrants have passed for value and without notice to subsequent holders, they are equally invalid and unenforceable in their hands, as the warrants, orders, and bonds of municipal corporations are not entitled to the protection that attaches to mercantile paper, even when negotiable in form. *Wright v. Kinney* (at this term) 81 S. E. 874. Whether the legislature (which will shortly be in session) may not, with or without a popular vote of the county, validate the warrants, is a matter which the holders may consider, but it is not now before us. The injunction will issue as prayed. Reversed.

(123 N. C. 419)

HARRIS v. BROWN.

(Supreme Court of North Carolina. Dec. 28, 1898.)

MINORS' LAND—JUDICIAL SALE—ACTION FOR PRICE—DEFENSE—PRESUMPTION—IRREGULAR CONFIRMATION OF SALE—LAGGERS—TENDER.

1. It is no defense to an action for the price of land belonging to minors, sold by order of court, that their guardian was appointed commissioner to make the sale, though it is an irregularity.

2. Pending an ex parte application to sell land of heirs, one of the adult heirs, after an order of sale, to which he does not appear to have objected, died, leaving minor children, and the sale was afterwards confirmed. *Held*, that it would be presumed that, before the judge confirmed the sale, the minors were represented by guardian or next friend, and that any order of the clerk on the merits capable of prejudicing the infants was submitted to and approved by the judge of the court, as required by Code, § 286, as a condition to its validity.

3. An irregular judgment confirming a sale of an infant's land will not be set aside where the infant suffered no substantial injustice.

4. A purchaser at a judicial sale of land belonging to minors, if he does not believe the record will protect his title, should not wait 15 years before objecting.

5. After a purchaser at a judicial sale received the rents and profits for several years, and paid a part of the price, he was sued for the price. *Held*, that he could not defend on the ground that he did not get a good title, where he made no tender of the amount he really owed after the allowance of a counterclaim which he pleaded.

Appeal from superior court, Mecklenburg county; Starbuck, Judge.

Action by H. W. Harris, administrator, against J. D. Brown. From a judgment for plaintiff, defendant appeals. Affirmed.

Burwell, Walker & Cansler, for appellant. Jones & Tillett and Osborne, Maxwell & Keerans, for appellee.

FAIRCLOTH, C. J. This proceeding is for the purpose of collecting the balance of the purchase price of certain land bought by the defendant, under an order of the clerk to sell said land for assets in an ex parte petition by the administrator and the heirs, entitled "M. Williams and Others, Ex parte." One of the heirs was a minor, and appeared by his guardian and next friend, who was the administrator of the intestate, and was appointed commissioner to sell the land. The sale was made, and approved and confirmed by the judge of the superior court, and a deed ordered to be made as soon as the purchase price was paid by the defendant, who was the purchaser. The sale was in 1883, and the defendant has been in possession ever since, receiving the profits, paying taxes, and has paid a part of the purchase price. Before the petition was filed, the administrator, guardian of his minor son, the other heirs at law, and the defendant, entered into an agreement (1) that the father would surrender his rights as tenant by the curtesy; (2) that the defendant would purchase the land at the stipulated price; (3) that the defendant's debt against the estate should be a credit on the price bid for the land; (4) that the land should be sold for assets. After this notice to defendant of a motion in the proceeding for a judgment for the balance, a reference was had, to ascertain the balance due, charging the defendant with the purchase price, and crediting him with all he had paid out, and with the amount of his claim against the estate according to agreement, and, for the balance thus ascertained, judgment was entered, and the defendant appealed to this court. The plaintiff succeeded the original administrator, and A. B. Withers, one of the adult petitioners, died, leaving minor heirs, after the sale was ordered, but before it was confirmed. There was no objection made by any one to the sale and its confirmation.

In apt time, the defendant objected to the rendition of judgment against him, on the ground that he could not get a good title because of irregularities in the proceeding; that is to say, that the administrator was also commissioner to sell, and guardian of the minor, and because the minor heirs of A. B. Withers were not made parties before the confirmation of the sale. There is no force whatever in the objection that the administrator was also commissioner to make sale. It was irregular that he should represent the minor as guardian, but irregularities do not always render the judgment void.

It does not appear that A. B. Withers during his lifetime made any objection to the order of sale, and it is to be presumed that he was content therewith. In adversary proceedings, the parties are at arm's length, and each one fights for victory. In such cases, if minors are parties without guardian, general or special, it is irregular, and, on arriving at maturity, they may reject or accept, at their option. But in *ex parte* proceedings they must be represented by a guardian or next friend; and the law has wisely provided further protection by requiring that no order or judgment of the clerk on the merits of the case, capable of being prejudicial to the infant, shall be valid "unless submitted to and approved by the judge of the court, in or out of term." Code, § 286. This is an important duty on the part of the circuit judges. *Id.* § 1439. These duties must be presumed to have been performed before the judge approved and confirmed the sale. After fully considering the record, we are not moved to disturb the judgment.

There is no suggestion or contention that any unfair advantage, in the sale, confirmation, or elsewhere in the course of the proceeding, was taken. The petitioners performed their agreement in all respects, and now demand that the defendant shall do the same. "Even an irregular judgment, where it appears from the record or otherwise that the infant suffered no substantial injustice, will not be set aside." *Syme v. Trice*, 96 N. C. 246, 1 S. E. 480. Where there is no suggestion that the sale was unfair, or that the land did not bring its full value, or that the parties were prejudiced, the court will not set aside the sale, where the defendant died before confirmation, and his heirs were not made parties to the action. *Everett v. Reynolds*, 114 N. C. 367, 19 S. E. 233. The sale was made 15 years ago, and, if the defendant believed the record would not protect him, he should have made his fears known at an earlier day. Affirmed.

MONTGOMERY, J. I concur in the opinion of the court that the judgment ought to be affirmed; and this, for the reason that the defendant sought to relieve himself entirely of his purchase of the land, and without tendering the amount he really owed after the allowance of his counterclaim set up in his answer. The case of *Everett v. Reynolds*, 114 N. C. 367, 19 S. E. 233, does not apply in this case, in my opinion, for the reason that the heirs at law themselves in that case, who were not parties to the proceedings at the time of the confirmation of the sale, made the motion after becoming parties to set aside the decree of confirmation for irregularity. The court held that, as they had not shown that they had been injured, the decree of confirmation would not be disturbed. In the case before us, the heirs at law of Withers, one of the own-

ers of the land, who were infants at the time of the decree of confirmation, have not been heard from. They may yet claim injury growing out of the decree of confirmation. The decision of the court in this case binds them before a hearing.

DOUGLAS, J. I concur in the concurring opinion.

(122 N. C. 400)

KISER et al. v. BLANTON.

(Supreme Court of North Carolina. Dec. 23, 1898.)

REVIEW.—PLAINTIFF'S APPEAL.—EXCEPTION BY DEFENDANT.—ACTIONS.—CHattel MORTGAGE.—SPLITTING CAUSE OF ACTION.

1. An exception by defendant will not be considered on plaintiff's appeal.
2. Where a chattel mortgagee sues for possession of the property after default and a refusal to deliver, it is an action for possession of the property, and not an action in contract.
3. A chattel mortgagee, after default and a refusal to deliver the mortgaged property, may sue for a part of the articles included in the mortgage.

Appeal from superior court, Lincoln county; Greene, Judge.

Action by W. C. Kiser & Co. against G. Blanton. There was a judgment for defendant, and plaintiff's appeal. Error, and new trial ordered.

S. G. Finley, for appellants.

FURCHES, J. This action was commenced before a justice of the peace by the plaintiff mortgagee against the defendant mortgagor for the possession of a horse and a cow conveyed in the mortgage. The debt secured was \$21, and the property sued for was found by the jury to be worth \$17. The plaintiff gave bond under the statute (Code, § 322 et seq.), upon which he obtained an order for possession, and the property was taken thereunder and delivered to the plaintiff. On the return day of the summons the defendant appeared before the justice of the peace who issued the summons, and filed an affidavit, under the statute, alleging that he did not believe he could obtain justice before the magistrate who issued the summons, and the case was removed for trial to another magistrate. The defendant entered a special appearance before the justice to whom the case had been removed, and there moved to dismiss for the reason that service had not been properly made. The court overruled this motion, and proceeded to trial and judgment, from which the defendant appealed to the superior court. In this court the defendant again entered a special appearance and again moved to dismiss for the same reason that he had moved to dismiss before the justice of the peace. The motion was overruled by the judge upon the ground that any want of proper service had been waived by defendant's appearing

and filing an affidavit, and having moved for trial, and the defendant excepted. During the progress of the trial it appeared that other property was included in the mortgage, besides the horse and the cow sued for in this action, and that the whole of the property conveyed in the mortgage was worth more than \$50. Upon this fact being made to appear to the court, the defendant again moved to dismiss the action, for this reason, alleging that it was splitting up the plaintiff's claim for the purpose of acquiring jurisdiction, and for that reason was a fraud upon the jurisdiction of the court. The court allowed this motion, dismissed the plaintiff's action, and the plaintiff excepted and appealed, but the defendant did not appeal.

As the defendant did not appeal, his exception to the court's refusing to dismiss the action upon his first motion (for want of proper service) cannot be considered on this appeal. But his second motion, and the ruling of the court thereon, from which the plaintiff appealed, it is contended, raise the question of jurisdiction; and, to determine this question, it is necessary to consider the character of the action,—whether it is upon contract or in tort. If it is an action on contract (the note) which is for \$21, and the proceeding in claim and delivery is ancillary to that, it is held that the justice would have jurisdiction of the action on the note, whether he had jurisdiction of the claim and delivery proceeding or not, and that the action should not have been dismissed. *Hargrove v. Harris*, 116 N. C. 418, 21 S. E. 918. But this would not give the plaintiff the relief he wanted,—the possession of the property. He would be no better off with a personal judgment against the defendant, and nothing more, than he would be if he had no mortgage. It is therefore manifest that it is an action for the possession of the property, which the defendant had refused to deliver to the plaintiff, that he might foreclose the mortgage by a sale of the same, and that it was not an action of debt on the note. *McGehee v. Breedlove*, 122 N. C. 277, 30 S. E. 311.

It is said that this is an action to foreclose the mortgage, and that a justice of the peace has no equitable jurisdiction. And it is true that a magistrate has no equitable jurisdiction. *Dougherty v. Sprinkle*, 88 N. C. 300; *Wilson Cotton Mills v. C. C. Randleman Cotton Mills*, 116 N. C. 647, 21 S. E. 431. But it is not true that this is an action to foreclose the mortgage. It is a legal action for the possession of property, and is what would have been an action of replevin under the old practice. It would have been a common-law action of detinue, if the plaintiff had not taken out claim and delivery proceedings. *Jones, Chat. Mortg.* §§ 705, 706. After default and refusal to surrender possession to the mortgagee, the mortgagee becomes, in law, the absolute owner of the mortgaged property, though the mortgagor had the right to re-

deem, until the property is sold; and the mortgagee is entitled to the same remedy against him for the possession that he would have against any other person who had the possession of his property. *Id.* And in this action he may have the balance due ascertained and redeemed, if he will. *Id.* The same doctrine is held by this court in *Jarman v. Ward*, 67 N. C. 32, and in *Hopper v. Miller*, 76 N. C. 402. It is true that these cases were not brought by mortgagees. But as a mortgagee, after default and refusal to deliver the property, occupies the same position as a stranger, they apply with equal force to this case, as if the mortgagor had been a stranger. The right of the mortgagee to the possession continues as long as any part of the mortgaged debt remained due. *Jordan v. Farthing*, 117 N. C. 181, 23 S. E. 244; *Jones, Chat. Mortg.* § 707. This being an action for the possession of the property and not on contract, the justice's jurisdiction is limited to \$50 in amount. The property sued for in this action was found by the jury to be worth only \$17. So there is no want of jurisdiction, unless the plaintiff was compelled to bring his action for all the property named in the mortgage. The fact that plaintiff brought his action for a part of the property conveyed in the mortgage does not fall within the rule against splitting up a debt on contract to acquire jurisdiction, for the reason that it is not brought on contract. But if you apply the principle of that rule, by way of analogy, it will not sustain the defendant's contention and the ruling of the court. This rule only applies to the splitting up of a single contract, as a note for \$400 split into two actions of \$200 each. But if it were an unsettled account, consisting of a dozen items, and amounting to \$400, it might be split up into several accounts, and more than one action brought, or they might all be included in one action. *Caldwell v. Beatty*, 69 N. C. 385. But it seems to have been settled by this court that the plaintiff, if he chooses to do so, can bring an action for a part of the articles only, included in the mortgage. *Boone v. Darden*, 109 N. C. 74, 13 S. E. 728; *Smith v. Tindall*, 107 N. C. 88, 12 S. E. 121. Therefore, upon principle and authority, we are of the opinion that there is error. New trial.

(123 N. C. 656)

CHARLOTTE OIL & FERTILIZER CO. v. RIPPY.

(Supreme Court of North Carolina. Dec. 23, 1898.)

WITNESSES—COMPETENCY—PERSONAL REPRESENTATIVES—LAYING A FOUNDATION—FORM OF QUESTIONS.

1. Code, § 590, providing that, in an action against an administrator, the party in interest shall not testify as to transactions with the deceased, disqualifies a surviving partner from testifying who composed the firm of which he was a member, in an action against the admin-

istrator of the deceased partner on the firm note.

2. A question to a surviving partner, in an action against a deceased partner's administrator on an alleged firm note, whether, outside of any transaction or communication with the deceased, he knew whether or not deceased was a member of the firm, is proper to show whether witness had knowledge of that fact from sources extraneous to his personal communications or relations with deceased.

3. A question whether witness had any conversation with the administrator of deceased in regard to deceased's having been a partner of a firm which made a note, which was the subject of the action, is improper, as tending to elicit declarations of the administrator for the purpose of binding his intestate.

Appeal from superior court, Cleveland county; Green, Judge.

Action by the Charlotte Oil & Fertilizer Company against J. P. Rippy, administrator. There was a judgment for defendant, and plaintiff appealed. Reversed.

Burwell, Walker & Cansler, for appellant. D. W. Robinson, for appellee.

MONTGOMERY, J. A note in the sum of \$430, signed "D. F. Bridgers & Co.," payable to the plaintiff, was executed and delivered, the signature having been written by D. F. Bridgers. This action is brought to recover of the defendant the amount of the note, the allegation in the complaint being that William Rippy, the intestate of the defendant, was one of the partners in the firm of D. F. Bridgers & Co. On the trial, the plaintiff introduced D. F. Bridgers himself, who said that he was a member of the firm. The witness was then asked who composed the firm of D. F. Bridgers & Co., the object of the question being to show that the intestate of the defendant was a member of the firm. An objection by the defendant was sustained, and the plaintiff excepted. His honor's ruling was correct. The precise point was decided in *Lyon v. Pender*, 118 N. C. 150, 24 S. E. 744.

The same witness was then asked this question, "Outside of any transaction or communication with the deceased, do you know whether or not William Rippy was a member of the firm of D. F. Bridgers & Co.?" to which an objection was interposed by the defendant, and the objection sustained, and the plaintiff excepted. There was error in that ruling of his honor. In *Sikes v. Parker*, 95 N. C. 232, the plaintiff sought by his own testimony to prove a partnership between himself and the intestate of the defendant. The conclusion of the court there was that, ordinarily and naturally, it would be supposed that the witness got his information from a transaction or communication with the deceased,

but that the contrary might be shown. The court in that case said: "This would be in the usual order of things. It might perhaps be possible that the plaintiff could have answered the question thus put to him without testifying to such a transaction or communication; but, if he could, it ought to have appeared that he could, in order to render his answers competent. He might have been interrogated as to the source of the information he had, pertinent to the matter inquired about, with a view to determine the question of the competency of such answers as he might make. He was competent to testify that he did not derive his information from a transaction or communication between himself and the intestate." The same principle of evidence is declared in *Armfield v. Colvert*, 103 N. C. 147, 9 S. E. 461. The question ought to have been allowed as a preliminary one to the further statement of the witness of any facts which tended to prove the partnership, outside of personal communications or transactions with the intestate. And, if such evidence was found competent by the court, then it should have been submitted to the jury. The refusal of his honor to allow the question cut off such inquiry, and was equivalent to a ruling that the witness under no circumstances could testify as to the intestate's being a partner, even though he might have information about the same outside of any personal communications or transactions with the intestate.

The same witness was further asked: "Did you have any conversation with the administrator of the deceased in regard to the deceased's being a partner of the firm of D. F. Bridgers & Co., if so give it?" The defendant objected, and the objection was sustained. In general terms, it is stated in *Greenl. Ev. § 179*, that the admissions of executors and administrators can be introduced against themselves as the representatives of the heirs, devisees, and creditors. But in our researches we have found no case where the admissions or declarations of an executor or administrator, disconnected with the settlement of the estate,—some matter of administration,—were introduced against him as such representative; and we think, therefore, that the question was too broad in its scope. The witness might have been asked if he had heard the administrator, in connection with the settlement of his intestate's estate, and in relation to its indebtedness, say anything in connection with the intestate's liability for the debts of the partnership, and what was said. We will not consider the charge of the court, for it is not necessary. It is erroneous in some material respects. New trial.

(54 S. C. 100)

HARMAN et al. v. HARMAN.

(Supreme Court of South Carolina. Jan. 6, 1899.)

**EJECTMENT—DEFENSES—PLEADING—IMPROVEMENTS
—LISEL—OBJECTION WAIVED—
HARMLESS ERROR.**

1. The allegations of a defense, being insufficient in themselves, and containing no express reference to, and adoption of, matters in another defense, are properly stricken out as irrelevant.

2. While defendant in an action for recovery of land can claim the amount the land has been increased in value by improvements, he cannot claim the amount paid for the improvements.

3. One in possession of land at the time it was sold cannot set up against an action by the purchaser a claim against the vendor for services in making improvements; he having no lien therefor.

4. The words in a deed, "And whereas, my property consists almost wholly of the real estate hereinafter described, which I have lived upon for many years past with my son J., who has made use of said lands * * * for his sole advantage, receiving during said years all the rents, issues, and profits therefrom arising, and not rendering to me an account for one farthing of the same," are not actionable.

5. Error cannot be predicated of the striking out of a counterclaim, on motion, on the ground that demurrer was the proper remedy; it not appearing by the record that such point was made on the hearing of the motion.

6. Though the proper remedy was demurrer to a counterclaim, rather than motion to strike it out, error in striking it out is harmless; the matter alleged not being actionable.

Appeal from common pleas circuit court of Lexington county; G. W. Gage, Judge.

Action by Godfrey Harman and others against James Harman. From an order granting a motion to strike out parts of the answer; defendant appeals. Affirmed.

The counterclaim containing the defamatory words referred to in the opinion is as follows: "For a counterclaim against the plaintiffs, the defendant alleges: (1) That on or about the 13th day of May, 1897, the plaintiffs, who had full knowledge of the defendant's rights and interest in the premises mentioned and described in the complaint, wrongfully and wantonly induced one Harriet Harman, of the county of Lexington and state aforesaid, to execute and deliver to them an instrument of writing purporting to be a deed from said Harriet Harman to said plaintiffs to the premises mentioned and described in said complaint, and wrongfully and wantonly caused her to recite in said instrument of writing the following defamatory words, for the purpose of injuring this defendant, under which instrument of writing they now seek to oppress defendant, to wit: 'And whereas, my property consists almost wholly of the real estate hereinafter described, which I have lived upon for many years past with my son James Harman, who has made use of said lands from 1879 to the present time for his sole advantage, receiving during said years all the rents, issues, and profits therefrom arising, and not rendering to me an account for one farthing of the same.'"

G. T. Graham and P. H. Nelson, for appellant. Andrew Crawford and Eard & Dreher, for respondents.

GARY, A. J. The above-named plaintiffs brought this action to recover possession of the tract of land described in the complaint, and for rents and profits, of the alleged value of \$1,000. The defendant admitted that he was in possession of said land, but denied each and every other allegation of the complaint. The defendant also set up in his answer seven defenses and a counterclaim. The plaintiffs made a motion to have the answer made definite and certain by striking out the counterclaim and certain allegations of the defenses, on the ground that they were irrelevant. The presiding judge granted an order that the answer be made definite and certain by striking out the counterclaim, and the allegations of the answer contained in said order.

The defendant appealed upon exceptions, the first and second of which are as follows: "(1) Because his honor erred in holding that the allegations of paragraph 3 of the defendant's answer 'cannot affect the issue in this cause, to wit, who is the legal owner of the land described in the complaint?' and in holding that said paragraph 3 was irrelevant; and it is respectfully submitted that his honor erred, as a matter of law, in striking out paragraph 3 of the defendant's answer, which paragraph reads as follows: 'That he is owner in fee of a certain tract of land near the lands described in the complaint herein, which he was about to sell on or about the — day of —, 1884, but which he did not sell, on account of the request of his mother not to do so, as she did not wish him to leave her, and the said land was convenient to the lands which he would receive from her.' (2) That his honor erred in not holding that the allegations of paragraph 3 of the defendant's answer were relevant to the issue in said case, and that, plaintiffs having taken a deed of the land in controversy knowing that the defendant was in possession thereof, and having full knowledge and notice of the rights of defendant when they took the deed, which is manifest from the deed itself, said plaintiffs took subject to all equities of the defendant; and he erred, as a matter of law, in not holding that paragraph 3 of said answer was relevant and responsive to the issues in said case." The foregoing words constitute the entire allegations of the defendant's third defense. In Pom. Code Rem. § 716, it is said: "The rule, as stated in its general form, is that each defense must be sufficient in itself, in its material allegations or its denials, to constitute an answer to the cause or causes of action against which it is directed, and thus to defeat a recovery thereon. This proposition refers to the substance of the defense. In reference to the form and manner of stating this substance, it must either, by actual statement in full, or by a proper reference to.

and adoption of, matter in another defense found in the same answer, contain averments of all the material facts or denials which together make up the defense. Each must, in its composition, be complete, sufficient, and full. It must stand on its own allegations. It cannot be aided, or its imperfect and partial statement helped out, by matter found in another defense, unless such matter is expressly referred to, and in an express manner adopted or borrowed from that other, and made a part of itself. The reference, however, to the former defense, and the adoption of its matter, if permitted at all, must be express; for otherwise the allegations of one cannot be treated as incorporated in, or helping out, those of another. This rule is well settled by the authorities, although often disregarded in practice." See, also, *Hammond v. Railroad Co.*, 15 S. C. 10. The allegations of the third defense are insufficient within themselves, and it was not error on the part of the circuit judge to strike them out as irrelevant.

The third exception is as follows: "(3) Because his honor erred in not holding that 'so much of paragraph 5 of the defendant's answer as alleges, 'Amount paid T. B. Gable, three hundred dollars (\$300),' can have no relation to the issues for trial here, is not a proper matter to prove, and is not a proper matter to allege,' when the pleadings show that at the time the plaintiffs took title to the property in controversy they knew the defendant was in possession of same, claiming it as his own, knowing of all the rights and claims that defendant has in the premises." The case does not show why the defendant paid Gable the \$300. But, even if it was paid for work performed by him in erecting the alleged improvements, it was not a proper charge against these plaintiffs. While a defendant may set up in his answer a claim for so much money as the land has been increased in value in consequence of improvements made thereon, he cannot set up as a defense the amount paid in erecting the improvements.

The fourth exception is as follows: "(4) That his honor erred in holding that counsel for defendant 'conceded at the hearing the objection to including in one charge of five hundred dollars three distinct items, to wit, labor, terracing, and filling washes'; and it is submitted that his honor erred in not holding that the words, 'for labor, terracing, and filling in washes, five hundred dollars,' were sufficiently definite for the plaintiffs to understand the nature of the defense." There is nothing in the "case" even tending to show that the presiding judge was in error in making this statement. Consequently the exception must be overruled.

The fifth exception is as follows: "(5) Because his honor erred in sustaining the fourth ground of the motion, and in holding that the sixth paragraph of the defendant's answer, which alleges 'that his services in looking after

the care and comfort of his said mother, performing actual manual labor, managing, controlling, and improving the said property, is reasonably worth the sum of three hundred dollars per annum from the — day of —, 1879, up to and including the 10th day of May, 1897, and he avers that the plaintiffs had full knowledge of the facts set forth in the fifth and sixth defenses of the answer prior to the 13th day of May, 1897,' was wholly irrelevant and not responsive to any issue that could be raised by the pleadings; 'that it set up a debt due to the defendant by the grantor of the plaintiffs. That fact is irrelevant to the issue joined, because its truth or falsity cannot, as a matter of law, affect the issues,'—when the pleadings show that the defendant was in possession of the premises in controversy at the date of the alleged execution of the deed from Harriet Harman to plaintiffs, and that plaintiffs had full knowledge and notice of all the rights that defendant had in and to the said premises before they undertook to take a conveyance from said Harriet Harman, and that plaintiffs took said deed from Harriet Harman with full knowledge and notice of all the rights and equities of the defendant, who was in lawful possession of said premises, and had been in possession of the same for years prior to the date of said deed from said Harriet Harman to plaintiffs." Even admitting that the defendant has a legal or an equitable title to the land, he cannot set up a claim for services against his own title; or, admitting that he has no title whatever, but has the right to set up a claim for improvements, still, in the absence of such agreement as gave him a lien on the land for his services, he cannot set up a claim therefor against these plaintiffs. There are no allegations showing that he had such lien, and the circuit judge was not in error in striking out the foregoing words as irrelevant.

The sixth exception is as follows: "(6) For that his honor erred in not holding that the plaintiffs, having taken a deed from Harriet Harman to the premises in controversy while the defendant was in the peaceable and lawful possession thereof, and with full knowledge and notice of the defendant's rights and equities, were not purchasers for valuable consideration, and that the plaintiffs took the said deed subject to all the rights and equities which the defendant held against said premises, or against the said Harriet Harman, the grantor of the said plaintiffs." This exception involves the merits of the case, and its consideration at this time would be premature.

The seventh and eighth exceptions are as follows: "(7) Because his honor erred in sustaining the motion to strike out, and in striking out, the counterclaim set up by the defendant, on the ground that it was irrelevant and not responsive to any issue that could be raised by the pleadings, and that 'the connection between the land and the libel is not direct. It is indirect and remote. The connection is not with the land, but with an in

strument of writing,—the deed by which the land was conveyed to the plaintiffs,—when the complaint shows on its face that the deed from Harriet Harman to the plaintiffs, out of which the defendant's cause of action arises, is not only connected with the subject of the plaintiffs' action, but is the foundation of the plaintiffs' claim, as is manifest from the allegations of the complaint. (8) For that his honor erred in not holding that the counterclaim of the defendant was one existing in favor of the defendant and against the plaintiffs, between whom a several judgment could be had, and arose out of the transaction set forth in the complaint as the foundation of the plaintiffs' claim, and was connected with the subject of the action, and came within the provisions of subdivision 1 of section 171 of the Code." (The reporter will set out the alleged defamatory words in the report of the case.) The counterclaim shows upon its face that the alleged defamatory words are not actionable; hence the questions raised by these exceptions are purely speculative, and need not be considered, because, in any event, they would not constitute a proper counterclaim in an action of this kind.

The ninth exception is as follows: "(9) For that his honor erred in not holding that the defendant's counterclaim could not be stricken out under the notice of motion in this case, and that, if plaintiffs could have taken any advantage of the said counterclaim, that their only remedy was by demurrer." The "case" falls to show the very material fact that the appellant upon the hearing of the motion in the court below objected to the mode of proceeding on the part of the plaintiffs on the ground that the defendant's counterclaim could not be stricken out on motion, but that, if the plaintiffs could take advantage of the manner in which said counterclaim was stated, their only remedy was by demurrer. But, even if there was error on the part of the circuit judge, it was harmless, as the alleged defamatory words were not actionable, and not properly pleadable in this case. It is the judgment of this court that the order of the circuit court be affirmed.

(54 S. C. 88)

HADDON et al. v. LENHARDT.

(Supreme Court of South Carolina. Jan. 6, 1899.)

ADMINISTRATION—CLAIM OF HOMESTEAD—RES JUDICATA.

Persons having an interest in land as a homestead, who are made parties to a proceeding to sell it to pay the debts of decedent, but fail to set up therein their claim of homestead, cannot afterwards assert their claim against the purchaser at such sale.

Appeal from common pleas circuit court of Pickens county; O. W. Buchanan, Judge.

Action by Edney Haddon and others against R. Frank Lenhardt. Judgment for plaintiffs. Defendant appeals. Reversed.

J. P. Carey, for appellant. Wells, Ansel & Cothran, for respondents.

GARY, A. J. Henry Haddon died, leaving as his heirs at law his wife and children, who are the plaintiffs herein. He was possessed of a small personal estate and a small tract of land, upon which he and his family lived. His personal estate was insufficient to pay his debts, and the land was, therefore, sold by order of the probate court in aid of assets, and purchased by the defendant, who was one of his creditors. The plaintiffs were made parties to the proceeding in the probate court, but did not answer, and no homestead was set off to them in that case. Thereafter the plaintiffs filed their petition, and a homestead was assigned to them in this tract of land by the commissioners, and confirmed by the court of common pleas. This action was then brought against the defendant for the possession of the land, and damages for the alleged unlawful possession thereof. The case was submitted to a jury, but by consent was withdrawn, in order that the presiding judge might determine the issues. His honor filed his decree, in which he decided in favor of the plaintiffs, whereupon the defendant appealed.

The practical question raised by the exceptions is whether persons who have an interest in land as a homestead, and who are made parties to an action to sell the land in aid of assets, but fail to set up their claim of homestead in that proceeding, can afterwards assert such claim against the purchaser at such sale. Upon the hearing of this case on appeal, permission was given to review the case of *Ex parte Strobel*, 2 S. C. 309. In the case of *Culler v. Crim*, 52 S. C. 374, 30 S. E. 635, the court uses this language: "The order of the probate court to sell the land in aid of assets was binding upon all who were made parties to that proceeding. The necessary effect of that order was to destroy the right of the parties to that proceeding to claim the homestead in the land ordered to be sold. Henry Crim purchased the land freed from the claims of the parties to this action, except Lena Hines, who was not made a party to the proceedings in the probate court." This is the latest judicial utterance upon this subject, and is conclusive of this question. These views are in harmony with the dissenting opinion of Mr. Chief Justice McIver in *McMaster v. Arthur*, 33 S. C. 512, 12 S. E. 308. We are unable to see why persons who are made parties to an action are not as fully concluded by a judgment, the necessary effect of which is to destroy their right of homestead, as they would be in any other case. This conclusion is antagonistic to the case of *Ex parte Strobel*, and it is hereby overruled. It is the judgment of this court that the judgment of the circuit court be reversed.

(54 S. C. 90)

ZIMMERMAN v. DEAN, Sheriff.

(Supreme Court of South Carolina. Jan. 6, 1899.)

LEVY OF EXECUTION AGAINST HUSBAND—REPLEVIN BY WIFE—INSTRUCTIONS—HUSBAND'S SERVICES—GIFT TO WIFE—VALIDITY.

1. Defendant, a sheriff, levied on certain cotton as the property of plaintiff's husband, contending that it was raised by him on plaintiff's land. In replevin by the wife, the court charged that, where a crop is raised on another's land by a cropper, or a person working for a share, the crop belongs to the landlord alone until partition, if it is divided in kind; that when one rents land from another, and raises a crop on it, he is the landlord, and will be the owner of the crop; that an execution could not be levied on the renter's share prior to division; that one claiming a debt from the real owner of the land could not levy on the crop of the renter, though he might against the land itself; that among the questions are: Was there a crop raised? Who made it? Who owns the land? Did the persons who made it, make it as renters or croppers, or how? *Held*, that the charge, as a whole, was not erroneous.

2. Creditors cannot object to a debtor donating to his wife his personal services, or those of his children, where he does so before the services are rendered.

Appeal from common pleas circuit court of Spartanburg county; James Aldrich, Judge.

Action by Rosa Zimmerman against George B. Dean, sheriff. From a judgment for plaintiff, defendant appeals. Affirmed.

Bomar & Simpson, for appellant. Duncan & Sanders, for respondent.

GARY, A. J. The defendant, as sheriff, levied upon certain cotton as the property of L. O. Zimmerman. The plaintiff, wife of the said L. O. Zimmerman, brought this action for claim and delivery of the cotton, and recovered a verdict for the possession of the cotton and for \$195.46 damages. The cotton was raised on plaintiff's land. The defendant contended that it was raised by L. O. Zimmerman. One of the circumstances relied upon to establish this fact was that the cotton was marked in his name. The appellant's attorneys, in their argument, say: "The questions of fact in the case were whether he had raised the cotton under an implied contract of rental, or by permission of his wife, she suffering him to make and own it, using her land and stock, or whether he had given her his services and all the crop belonging to her."

The defendant appealed upon exceptions, the first and second of which are as follows: "(1) In charging the jury as follows: 'When a crop is raised upon the lands of another by some one who acts as a cropper or farm hand, or a person working for a part of the crop, then, in law, that crop belongs to the landlord alone. It is true the cropper or renter, or person working for a portion of the crop, has, under the statutory enactment, a right whereby he can recover from the crop his proportion of his hire out of it; but up to the time of the partition of the crop, if it is to be divided in kind, the crop belongs to the landowner;—the error in such charge being (a)

that there is no such principle of law that in such cases the crop, until divided, belongs to the landlord; and (b) that it was erroneous to use the words 'cropper,' 'farm hand,' 'person working for part of the crop,' and 'renter' as synonymous, and as occupying the same relation to the crop raised and to the landlord. (2) In charging the jury as follows: 'Now, an execution under a judgment could not be levied upon the property of the renter in the share of the crop prior to the division of that crop and the setting off to the renter his part, because the legal title to the crop prior to that division of it is in the landlord,'—the error being in charging that, in law, the title of the crop made by one who rents lands is in the landlord before a division, and not in the renter, who has rented the land, and has it in his charge, with exclusive dominion over it."

That part of his honor's charge relating to the questions raised by these exceptions is as follows: "Now, gentlemen, in regard to the facts in this case, I can be of very little assistance to you, as I am not allowed to charge upon the facts or to intimate an opinion. But, speaking generally, where a crop is raised upon the lands of another by some one who acts as a cropper or a farm hand, or a person working for a part of the crop, then, in law, that crop belongs to the landlord and the landlord alone. It is true the cropper or renter, or person working for a portion of the crop, has, under the statutory enactments, a right whereby he can recover from the crop his proportion or his hire out of it; but up to the time of the partition of the crop, if it is to be divided in kind, the crop belongs to the landowner. Now, when one rents land, or hires land, or gets land from another, and that person goes and makes a crop upon it, he exercising dominion over this land, using it as his own, for his own purposes and by his own means, then he is the landlord, because the rental of land or the hire of land for a year is equivalent to a conveyance for that length of time of the premises rented, and the renter would be the owner of the crop. Now, an execution under a judgment could not be levied upon the property of the renter in the share of the crop prior to the division of that crop and the setting off to the renter of his part, because the legal title to the crop prior to that division of it is in the landlord. So, one claiming rent, for instance, or labor,—claiming labor or a debt due,—from the real owner of the land, could not go upon the crop of the person who has rented the land,—acquired the right to the use of that land for a given time,—and levy an execution against the owner of that land. He might do it against the land itself, but not against the crop, because the legal title to that crop is in the renter of that land for the time being. * * * Now, therefore, among the questions you must determine, are: Was there a crop raised? Who made the crop? Who owned the land? Did the persons who made the

crop, make it as renters or as croppers, or how? As you determine these questions, apply the principles of law which I have endeavored to explain to you, and your duty will be manifest." While there are expressions which tend to mislead if they stood alone, still, when these are considered in connection with the entire charge, there was no room for the jury to misunderstand what was meant, and these exceptions are overruled.

The third exception is as follows: "(3) In charging the jury that a man has a right to give his services to his wife if he sees fit, and also the services of his children, when, as it is respectfully submitted, a man who is in debt has no more right, as against the claims of his creditors, to give his own services, or those of his minor children, to his wife, than he would have to give away his property to her." In his charge the presiding judge says: "The plaintiff's counsel in their argument requested me verbally to charge that a husband has a right to give his services to his wife, if he sees fit, and that is correct law; and he may also, as he has control and dominion over it, give the services of his children." If the husband gave to the plaintiff his and his children's services, all the testimony tends to show that it was before the services were rendered. This question is settled by the case of *Hodges v. Cobb*, 8 Rich. 56, in which the court says: "All must agree that if Mosley had been so unmindful of the duties of life as to work not at all, or for half price, or for nothing, his creditors could not have picked him up with their executions. That he should have left his family to starve would have brought neither consolation nor profit to them. What stimulated his exertions? What produced the fruits that made the subject of this litigation? The answer is that a beneficence of White, a stranger to Mosley's creditors, towards Mrs. Mosley, his sister-in-law, set in motion the debtor's industry and the use of White's capital. Mrs. Mosley, being the meritorious cause and object, produced the fruits now in contest. These have been created by a cause and a means over which the creditors had no control, and from whose liens they were wholly free, and, when they were in posse merely, were devoted, by agreement, to an object most worthy, in the eye of all sound morality. It is very true, on the other hand, that this debtor could not have set apart the fruits of his labor, after they had been earned, in trust for his wife and children. But if he had agreed to sell his labor to White, on terms the most improvident, as for his mere maintenance or for less, how could his creditors have rectified that?" There is no constitutional provision against this construction of the law, as it was not a gift of something in esse, nor of anything that would become in esse, except by the labor of the husband. Sound morality and public policy sustain this view. The exception raising this question is overruled.

The fourth and fifth exceptions allege error on the part of the presiding judge in refusing to grant a new trial, but, as they only involve questions of fact, they cannot, under the well-settled rule of this court, be considered. Judgment affirmed.

(54 S. C. 115)

BARNES v. RODGERS.

(Supreme Court of South Carolina. Jan. 6, 1899.)

PARTITION—NONSUIT—EVIDENCE—QUESTION FOR JURY—JUDGMENT NON OBSTANTE VEREDICTO—LIMITATION ON JURY'S FINDING—RIGHT TO PARTITION—ORDER FOR WRIT—REQUIREMENTS.

1. Where, in partition, defendant claims as sole owner, and the question thus presented was submitted to a jury, the court properly refused to order a nonsuit at the close of plaintiff's evidence, as it would not be a determination of the issue.

2. In partition, defendant claimed to be the sole owner. Plaintiff's testimony tended to show that the land belonged formerly to D., and that she and those claiming under her were in undisputed possession thereof for more than 20 years; that in 1871 a tract of 217 acres belonging to D. became vested in five of her children; that by subsequent proceedings her son P. acquired two-fifths thereof, which, by a subsequent parol partition, was laid off to him, leaving 130 acres vested in S. and E., children of D., two-thirds in S., and one-third in E.; that the interest of S. was sold to defendant under foreclosure of a mortgage executed by a son of S., with her consent, and which purported to cover the whole 130 acres. It did not appear that S. ever acquired E.'s interest, and after E.'s death her heirs conveyed it to plaintiff. *Held* sufficient to go to the jury.

3. A judgment non obstante veredicto can be rendered only for plaintiff.

4. Where plaintiff in partition claimed only an undivided third, the court properly limited the jury to a finding for plaintiff to that extent only.

5. Where plaintiff in partition sued only to recover an undivided third, and not for any specific number of acres, and the verdict on that issue is in his favor for "one-third interest in the land," his right to partition necessarily follows.

6. The provisions required by Rev. St. 1893, § 1950, to be inserted in a writ of partition, that, if the commissioners should decide that the land could not be fairly divided, they should make a special return, appraising its value, and certifying whether it would be most for the benefit of all parties to deliver to one the whole property on payment of a sum assessed by the commissioners, or to sell the same, and divide the proceeds, need not be inserted in the order for the writ.

7. An order for a writ of partition directing a master to take an account of rents and profits should provide that on such accounting defendant should be allowed credit for taxes paid by him on the land.

Appeal from common pleas circuit court of Sumter county; W. O. Benet, Judge.

Action by Henry N. Barnes against Francis S. Rodgers. From a judgment for plaintiff, defendant appeals. Affirmed.

The following is the charge:

"This is a suit in equity, brought on the equity side of the court. The defendant's

answer denies that the plaintiff had title. You remember that the complaint of the plaintiff alleges that he is the owner of one-third interest in the tract of land described in the complaint. (I believe it is said to contain 130 acres.) He asks that it be partitioned; in other words, that his one-third of the 130 acres be set off to him. But the defendant denies that he is the owner of the one-third interest in the land. That makes the issue of title. The law says that where issues as to title to real estate are found in an equity case, that title must be tried by a jury, and for that reason this issue as to title is submitted to you. So your inquiry will be, is the plaintiff entitled to one-third interest in that tract of land, which is said to contain 130 acres, more or less? If you find that he is, then we take it on the equity side of the court, and see what the respective rights of the parties are in reference to it. If you find that he is not, that ends the case right there. The suit is bottomed on the fact that he claims to be the owner of one-third interest in this real estate. That issue is for you to determine. It is proper that I should charge you that in determining this question the law lays down certain rules by which title to real estate can be tested. If you find that the defendant is in quiet, peaceable possession of this land, before he can be ousted, the party claiming to be the owner of it must show one of the following states of fact: First, that he traces his title to a grant from the state of South Carolina, or that he traces his title back to certain parties or certain persons who have been in adverse possession of it for twenty years or more; and the law will presume a grant, under that state of facts. To presume a grant from the state of South Carolina, the law says he must prove that he has been in possession or claim under a possession of ten years or more. The law would say that he had legal title. Or he must go back to a common source. That he can trace his title from some one from whom the defendant traces his title, and when he gets to a common source, the question is then, who has the better title? In other words, if two parties claim a tract of land from A.,—each claim from A.,—in adjusting that title you need not go further back than A., both claiming their title from A. In going back to a grant from the state or the presumption of twenty years or ten years, the question is, who has the better deed? Who had the older deed or prior deed? That is the general rule to be laid down. In presuming a grant, the law is that uninterrupted possession in any one, or if he held for the whole period of twenty years, or if he held for a certain period, and he claims from some one else, and he from some one else, for a certain period, that by reason of these periods of possession, taken together, if it be a possession of twenty years or more, the law presumes that these parties have a grant from the state of South Carolina. The object is to quiet title to real estate; that, after a

certain length of time, the law presumes a man who has been in possession of real estate for a certain length of time,—twenty years or more,—the law presumes that he has a grant to it. If a party holds adversely for ten years, he secures a legal title; that is, such title as would give him the right to occupy and possess that land. He must show that it was adverse and continued. He can't show that he held it for five years, and the party from whom he bought held it for five years. He must show that he himself has held it for ten years, to get legal title. That is the general rule in adjusting title to real estate. The plaintiff in this case contends that he claims title from Eadie Dunn, and it is contended that Eadie Dunn and her brothers and sisters and nephews have been in possession of her share and of their portion of the land uninterrupted for a period of twenty years or more. The rule is that he who asserts title to real estate must not only show that he has a strong title, but he must show that he has perfect title, and must recover on the strength of his title, and not on the weakness of the party in possession. The burden is upon the plaintiff to show a perfect title, either by adverse possession for ten years continued, or twenty years' prescription, or a grant from the state or common source, and that it is a better and superior title. If you find that the plaintiff made his case, that he is entitled to one-third of the land described in the complaint, the form of your verdict will be: 'We find for the plaintiff one-third. We find that the plaintiff is entitled to one-third of the land described in the complaint.' If you find that he has failed to make out his case by the preponderance of the evidence, then you simply say: 'We find for the defendant. We find for the plaintiff one-third of the land described in the complaint,'—or, then, 'We find for the defendant.' Take the record, and write out your finding, and sign your name as foreman. You can write out your verdict on a separate piece of paper or upon that complaint, and after you find your verdict we will take the case on the equity side of the court, and determine the rights of the parties."

The following are the exceptions:

"(1) Because his honor, the presiding judge, erred in not granting the defendant's motion for a nonsuit, and erred in not withdrawing the case from the jury and giving judgment for the defendant, when it appeared at the close of the plaintiff's case that the defendant held the deed from one W. S. Barnes (by the master), which not only did not show common source, but pointed to a different source of title; and upon this showing by the plaintiff he should have been nonsuited, or judgment given for the defendant.

"(2) Because his honor, the presiding judge, committed error in his charge to the jury as a whole, in that: First. In the beginning of his charge his honor stated to the jury: 'You remember that the complaint of the plaintiff

alleges that he is the owner of one-third interest in the tract of land described in the complaint. (I believe it is said to contain 130 acres.) He asks that it be partitioned; in other words, that his one-third of the 130 acres be set off to him.' In referring to the claim set up by the plaintiff, his honor erred in saying, 'In other words, that his one-third of the 130 acres be set off to him,' for by so referring to the claim of the plaintiff his honor erred in using the words, 'his one-third,' charged upon the facts, and gave in that expression the conclusion to the jury that the plaintiff should have one-third of the land set off to him. Second. His honor erred in charging the jury: 'So your inquiry will be, is the plaintiff entitled to one-third interest in the tract of land, which is said to contain 130 acres, more or less? If you find that he is, then we take it on the equity side of the court, and see what the respective rights of the parties are in reference to it. If you find that he is not, that ends the case right there. The suit is bottomed on the fact that he claims to be the owner of one-third interest in this real estate. That issue is for you to determine,'—because: (a) Such charge limited the jury to finding for the plaintiff one-third part of the land, and they could not do otherwise if they found any interest at all for the plaintiff, and the defendant was thereby deprived of the benefit of all proof in the case tending to show that the plaintiff's rights, if any at all, embraced less than one-third of the land. (b) Such charge was a charge upon the facts, and was equivalent to his honor saying to the jury that, if the plaintiff was entitled to anything, he was entitled to one-third of the land, and embodied in it the expression of his honor's opinion of the weight to be given to the evidence, and was contrary to the constitution and laws of this state.

"(3) His honor erred in charging the jury: 'If you find that the plaintiff has made his case,—that he is entitled to one-third of the land described in the complaint,—the form of your verdict will be, 'We find for the plaintiff one-third. We find that the plaintiff is entitled to one-third of the land described in the complaint.' If you find that he has failed to make out his case by the preponderance of the evidence, then you simply say: 'We find for the defendant. We find for the plaintiff one-third of the land described in the complaint,'—or, then, 'We find for the defendant,'—in that: (a) If the jury found any interest at all for the plaintiff, they had no other alternative than to find one-third part of the land for him, whereas it should have been submitted to them to find a one-third, or less, interest for the plaintiff, if they found for him at all. (b) Such charge was contrary to the constitution of this state, prohibiting a charge upon the facts. Directing the jury to find for the plaintiff one-third of the land, or else to find for the defendant, was summing up and giving the

jury the judge's conclusion as to, and his opinion upon, the facts of the case.

"(4) Because his honor erred in allowing the jury to find one-third of the 130 acres described in the complaint, when the deed of A. M. Dunn and others to the plaintiff, put in evidence by him, showed that if the plaintiff had any claim at all it was one-fifth of 217 acres, less Mrs. Barnes' share as heir at law of Eadie Dunn.

"(5) Because his honor erred in allowing the jury to find any part of 86 acres of the land in dispute for the plaintiff, when the proof was that there had been a parol partition, and Eadie Dunn's share claimed by the plaintiff was between the lands of Susan Barnes, 86 acres—admitted to be owned by the defendant—and one Phillip Dunn's share, and the plaintiff could not recover any part of the 86 acres so set apart.

"(6) Because his honor erred in refusing to grant a new trial, and erred in not giving judgment for the defendant, in that: (a) The plaintiff claimed under a deed from A. M. Dunn and others, purporting to convey one-fifth of 217 acres, and his contention was that he was entitled to one-third of 130 acres described in the complaint. (b) The proof in behalf of the plaintiff was that Eadie Dunn's share had been set apart to her in kind,—two-fifths to Susan Barnes (of the 217 acres) on the one side and two-fifths to Dunn on the other, and Eadie's in the center.

"(7) Because his honor erred in granting the order for partition: First. Because the verdict is for one-third part of the land, and, not being for an undivided one-third part thereof, did not warrant an order of partition to issue; and, if the verdict was intended to conform to the plaintiff's contention,—i. e. to give the plaintiff 44 acres of the 130 acres,—then it does not sufficiently describe the 44 acres, nor could a writ of partition locate the part so found, nor would the court of equity have any jurisdiction, in such case, to order a writ of partition to issue. Second. The order of partition is erroneous in that it directs the clerk of the court to issue a writ directed to fit and suitable persons, 'directing them to go upon said premises, and admeasure and lay out unto the plaintiff one-third part thereof, and to the defendant two-thirds part thereof, their respective interests, according to law and the practice of this court,' in that under such direction the commissioners who may be appointed to make partition have no other alternative than to lay out the land in kind, one-third to the plaintiff and two-thirds to the defendant; and the order should have been in conformity with the statute of this state, which commands the commissioners, if they cannot make partition in kind, to assess the value of the whole property, and make a special return of the whole property to the court. Third. Because the proof is conclusive that the defendant owned 86 acres of the land

by metes and bounds, and in no event could an order issue to divide this 86 acres in any proportions between the plaintiff and the defendant.

"(8) Because his honor erred in not providing in his decree for the master to take an account of the taxes paid by the defendant, when the same was claimed by him."

H. L. B. Wells, for appellant. Purdy & Reynolds, for respondent.

McIVER, C. J. The plaintiff brought this action for the partition of a tract of land containing about 130 acres, alleging that he was entitled to one undivided third interest therein, the defendant being the owner of the remaining two-thirds, and claiming an account for the rents and profits received by the defendant. The defendant answered, denying that plaintiff had any interest in the land, and claiming that he was the sole owner of the same. The case was heard by his honor, Judge Ernest Gary, who referred the issue of title raised by the pleadings to the jury for trial. The jury rendered a verdict in favor of the plaintiff for one-third interest in the land described in the complaint. Thereupon the defendant moved for a new trial, and for judgment notwithstanding the verdict, both of which motions were refused, and the circuit judge granted an order in the following form: "That a writ of partition do forthwith issue by the clerk of this court, directed to fit and suitable persons, directing them to go upon said premises and admeasure and lay out unto the plaintiff one-third part thereof, and to the defendant two-thirds thereof, their respective interests in said premises, according to law and the practice of this court. Further ordered, that it be referred to the master of Sumter county to take the testimony, and determine the rents and profits, and report the same to this court with all convenient speed." From this judgment the defendant appeals upon the several grounds set out in the record, which, together with the charge of the circuit judge to the jury, should be incorporated in the report of this case.

These exceptions or grounds of appeal present the following questions for the decision of this court: (1) Whether there was error in refusing the motion for a nonsuit; (2) whether there was error in refusing the motion for judgment, non obstante veredicto, in favor of defendant; (3) whether the circuit judge erred in invading the province of the jury by charging on the facts; (4) whether the circuit judge, in his charge, limited the jury to finding for the plaintiff a one-third interest in the land; and, if so, whether he erred in so doing; (5) whether the seventh exception can be sustained; (6) whether there was error in the form and scope of the order for the writ of partition; (7) whether there was error in that portion of the order directing the master to take

an account of the rents and profits, in not providing that the defendant should have credit for the taxes paid on the land.

First, as to the motion for a nonsuit. It does not seem to us that a motion for a nonsuit is appropriate in a case like this. Where, in an action for partition, one or more of the defendants sets up an independent title in himself, claiming the sole ownership of the premises sought to be partitioned, the question of title thus presented must first be determined, and that can be done only by the verdict of a jury, unless that mode of trial is waived. A judgment of nonsuit is not a final determination of the issue of title, and, as that is the object sought to be attained, it does not seem to us that a motion for nonsuit can, properly, be entertained in a case like this. If the actor in the issue of title offers no testimony tending to establish his claim, the verdict of the jury against him would necessarily follow; and that would finally determine the issue of title, unless it was set aside by proper authority. So that no harm can come from refusing to entertain a motion for nonsuit in a case like this. In support of these views, see separate opinion in *McClenaghan v. McEachern*, 47 S. C., at page 451, 25 S. E. 296, and the case of *Woolfolk v. Manufacturing Co.*, 22 S. C. 332, therein cited. The case of *Brock v. Nelson*, 29 S. C. 49, 6 S. E. 890, cited by counsel for appellant, is not in conflict with our view, for in that case the defendants, *Sullivan & Bro.*, who raised the issue of title, waived their right to have such issue tried by a jury, and hence the whole case was before the circuit judge for trial of all the issues presented therein; and he, being satisfied that the plaintiffs had failed to show that the tract of land in question ever constituted any part of the estate of the intestate of which the plaintiffs, as his heirs, demanded partition, granted an order which, though in form sustaining the motion for a nonsuit, was in fact a judgment in favor of the defendants, *Sullivan & Bro.*, and was so treated by the supreme court. Besides, we are of opinion that some testimony was offered by the plaintiff tending to show that he was entitled to a one-third interest in the land in question, and therefore, upon that ground also, there was no error in refusing the motion for a nonsuit, even if such a motion is appropriate in a case like this. There was testimony tending to show that the land in question constituted a part of the real estate of one *Tempe Dunn*, of which she and those claiming under her were in the undisputed possession for a period exceeding 20 years; that as far back as the year 1871 a tract of land containing 217 acres, which was a part of the real estate of the said *Tempe Dunn*, became vested in five of her children; that by subsequent transfers *Phillip Dunn*, one of said children, acquired two-fifths of said tract, and of the remainder one-fifth remained vested in *Eadie*

Dunn, another of said children; that subsequently, by a parol partition, the two-fifths interest of said Phillip Dunn was laid off to him, leaving the remaining 130 acres, in round numbers, disregarding fractions, vested in Susan Barnes and Eadie Dunn, in the proportion of two-thirds to Susan Barnes and one-third to the said Eadie Dunn,—one-third of 130 acres being substantially equivalent to one-fifth of 217 acres; that subsequently the interest of Susan Barnes was sold and conveyed to the defendant, Rodgers, under proceedings to foreclose a mortgage executed by one W. S. Barnes, a son of said Susan Barnes, with her consent and approval, to Hearon Bros., and by them transferred to the Atlantic Phosphate Company,—for, while it is true that said mortgage purported to cover the whole of the 130 acres, yet as it did not appear that Susan Barnes had ever acquired the interest of her sister, Eadie Dunn, therein, nothing but the interest of the said Susan Barnes could be sold under said mortgage; and that after the death of the said Eadie Dunn her heirs conveyed such interest to the plaintiff, which, as we have seen, was practically an undivided third part of the 130 acres remaining after the two-fifths interest in the 217 acres of Phillip Dunn had been laid off to him by the parol partition. So that it is very clear that there was testimony sufficient to carry the case to the jury, and which, if viewed by the jury in the light in which we have presented it, was quite sufficient to sustain their verdict.

To dispose of the second question it is only necessary to refer to the case of *Bowdre v. Hampton*, 6 Rich. (S. C.) 208, in which it was held that judgment non obstante verdicto can be rendered only for a plaintiff; and hence there was no error in refusing defendant's motion for such a judgment.

As to the third question, we do not see anything in the judge's charge violative of the constitutional provision forbidding a charge upon the facts. In the first place, the jury were distinctly instructed, in the outset of the case, that they were to inquire: "Is the plaintiff entitled to one-third or any interest in that land described in the complaint? You try the question whether the plaintiff is entitled to any interest in this land. If you find that he is the owner, what part?" And when, after the close of the testimony and the arguments, the circuit judge, in his charge, used the expressions quoted in the exceptions upon which this question is raised, it is very manifest that the circuit judge was not expressing, or even intimating, his own opinion as to the extent of plaintiff's right, but only explaining to them what was plaintiff's claim. Indeed, we are of opinion that an examination of the charge will afford a complete vindication from the charge of error in invading the province of the jury.

The fourth question is disposed of by what we have said in regard to the third question, for we do not think that the circuit judge

limited the jury in any way in regard to the extent of their finding, if they should conclude to find anything for the plaintiff. He simply explained to the jury what was the plaintiff's claim, and left it to them to say whether such claim was established in whole or in part. And, even if he had, we do not see that there was any error in so doing, for the only claim that the plaintiff made was for an undivided one-third of the 130 acres, and, in our judgment, the only question for the jury was whether such claim had been established by the testimony.

As to the fifth question, we do not see that the seventh exception is tenable. The plaintiff was not suing for the recovery of any specific number of acres of land, but, on the contrary, his action was for partition of a tract of land described in the complaint, containing 130 acres, in which he claimed a one-third interest; and when the jury returned a verdict in his favor for "one-third interest in the land," his right to have partition of the same necessarily followed.

The sixth question is as to the sufficiency of the form and scope of the order for the writ of partition, the defect claimed being that it did not provide, in terms, that, if the commissioners in partition should be of opinion that the land could not be fairly and equally divided between the parties without manifest injury to one or the other of them, then that they should make a special return, appraising the value of the property, and certifying their opinion whether it would be most for the benefit of all parties to deliver to one of the parties the whole property, upon the payment of a sum of money to be assessed by the commissioners, or to sell the same, and divide the proceeds between the parties according to their respective rights. While the statute (Rev. St. 1893, § 1950) does provide that these provisions shall be inserted in the writ of partition for the guidance of the commissioners in the performance of their duties, we know of no law or practice requiring such provisions to be inserted in the order for the writ of partition to issue, and we are unable to perceive any necessity to incumber the order,—as, in this case, to require the writ to be issued "according to law and the practice of this court." It is clear, therefore, that the exception raising this point cannot be sustained.

The only remaining inquiry is the seventh, which raises the point that in the order directing the master to take the account of rents and profits there was error in omitting to provide that upon such accounting the defendant should be allowed credit for any taxes which may have been paid by him on the land. While the order, liberally construed, may possibly be regarded as sufficient to allow such credit on the accounting, yet, to avoid any misapprehension, it may, perhaps, be best to modify the order in this respect, so as to require the master, in taking the account of rents and profits, to allow the de-

defendant credit for the amount of any taxes on the land which he may have paid. The judgment of this court is that the judgment of the circuit court, as modified herein, be affirmed.

(96 Va. 435)

CITIZENS' NAT. BANK v. WALTON.

(Supreme Court of Appeals of Virginia. Nov. 17, 1898.)

**NEGOTIABLE NOTES—JOINT PAYEES—INDORSEMENT
—REVIEW—MOTION FOR NEW TRIAL.**

1. Writing on back of negotiable note, signed by one of its two payees, "For value received, I hereby assign and transfer to F. all right, title, and interest that I may have in the within note," renders him liable to an innocent holder as an indorser, and not as an assignor, and without regard to the equities between him and the other payee, though F. be such payee.

2. No motion for new trial is necessary, to have exceptions to rulings on evidence reviewed, where the case is tried by the court.

Error to circuit court, Page county.

Action by the Citizens' National Bank against S. A. Walton. Judgment for defendant. Plaintiff brings error. Reversed.

Francis L. Smith and Slipe & Harris, for plaintiff in error. Barton & Boyd and Walton & Walton, for defendant in error.

KEITH, P. L. H. Baldwin on October 15, 1890, made and signed the following note: "\$1,333.33. Roanoke, Va., Oct. 15, 1890.

"Two years after date, for value received, I promise to pay to Wm. M. Fielding and S. A. Walton, or order, without offset, the sum of thirteen hundred and thirty-three ³³/₁₀₀ dollars, with interest from date at the rate of six per cent. per annum, negotiable and payable at the Commercial Bank of Roanoke, at Roanoke, Virginia. Homestead and all other exemptions waived by the maker and each indorser of this note.

"[Signed] L. H. Baldwin."

This note is indorsed as follows: "For value received, I hereby assign and transfer unto W. M. Fielding all right, title, and interest that I may have in the within note.

"Witness my hand this 29th day of December, 1890. S. A. Walton.

"[Signed] W. M. Fielding."

The plaintiff in error, the Citizens' National Bank of Alexandria, became the owner of this note, for value, in due course of business; and, not being paid at maturity, it was protested, and notice thereof given to the indorsers, Walton and Fielding. The bank in July, 1897, instituted suit on said note against S. A. Walton, who presented two grounds of defense: First, that he was not liable as indorser on said note, and did not indorse it; secondly, that he was not liable as assignor on the note, because the bank did not use due diligence to make the money out of the drawer thereof, or out of the person to whom the defendant assigned the same. The court rendered judgment for the defendant, and, the bank having during the prog-

ress of the trial taken two bills of exceptions, the cause is now before us upon a writ of error.

The defendant, Walton, offered himself as a witness in his own behalf, and he was permitted to testify notwithstanding the objection interposed by the bank; and this ruling of the court constitutes the subject-matter of the first bill of exceptions.

Walton's testimony is as follows: "Mr. Fielding and myself made sale of our property, which was real estate held jointly at Roanoke, Va., in October, 1890. The cash payment was divided equally between us. The purchaser (Mr. Baldwin) executed six notes to us, for the sum of \$1,333.33 each, for the deferred payments, and these notes were also equally divided between us. I assigned and transferred all right, title, and interest that I had in the three notes which Mr. Fielding got, to him, as appears on the back of the note sued on. Mr. Fielding made identically the same assignment and transfer of his interest in the notes which I got, to me. Subsequently Mr. Fielding had the plaintiff to discount the note sued upon, for himself, and received the proceeds. I had nothing whatsoever to do with that transaction, nor did I receive any of the proceeds thereof. I have never heard of any legal proceedings being instituted against the maker (Baldwin) of the note, nor against Mr. Fielding, by the plaintiff in this suit."

This testimony was improperly admitted. The legal import of the indorsement made by L. H. Baldwin of the note in question is that he transferred it to the plaintiff, and assumed upon himself the ordinary liability of an indorser of such bills.

As was said in *Woodward v. Foster*, 18 Grat., at page 205: "When the legal import of a contract is clear and definite, the intention of the parties is, for all substantial purposes, as distinctly and as fully expressed as if they had written out in words what the law implies. It is immaterial how much or how little is expressed in words, if the law attaches to what is expressed a clear and definite import. Though the writing consists only of a signature, as in the case of an indorsement in blank, yet where the law attaches to it a clear, unequivocal, and definite import, the contract imported by it can no more be varied or contradicted by evidence of a contemporaneous parol agreement, than if the whole contract had been fully written out in words. The mischiefs of admitting parol evidence would be the same, in such cases, as if the terms implied by law had been expressed."

And the learned judge who delivered the opinion in that case says: "These general principles are of the utmost importance in the administration of justice. Without them, there would be no certainty in written contracts, and no safety in the most formal transactions. They ought not to be frittered away by nice distinctions to meet the hardships.

real or supposed, of particular cases. See, also, *Martin's Ex'r v. Lewis' Ex'r*, 30 Grat. 682.

The indorsement in the case cited from 18 Grat. 200, was in blank. Here the assignment is written at large in terms almost identical with those used in *Banking Co. v. Butler* (Minn.) 48 N. W. 333, where the indorser was held liable as upon an ordinary indorsement; the court saying: "The appellant in this case, with much care, indicated his purpose to sell and transfer the note; but he failed to limit and qualify his indorsement by words which would clearly indicate such intent, if in fact it existed. It was incumbent upon him to do so, if he intended or expected to escape the liability of the ordinary indorser. * * * To relieve one who puts his name on the back of a negotiable promissory note from liability as indorser, he must insert in the contract itself words clearly expressing such intention."

The note in this case being made payable to two payees, it was, of course, necessary for both of them to indorse it, in order to pass title. It is a negotiable note. The title to it was in Walton and Fielding. Neither could negotiate it without the assent of the other. In order, therefore, that the exclusive right to it might be vested in Fielding, it became necessary for Walton to indorse it. This he could have done in terms which would have restricted and limited his liability, had he seen fit to do so; but indorsing it in the terms used by him is equivalent to a blank indorsement, and is presumed to have been made by him in order to give credit to it by his name. By that indorsement he clothed Fielding with power to negotiate that note and receive its proceeds, and an innocent purchaser for value took it freed from any equity between Walton and Fielding. The indorsement of Walton is the legal equivalent of a blank indorsement, and carries with it the consequences of an indorsement without restriction or limitation. This view seems not only consonant to reason, but is essential to the credit of negotiable paper and to the convenience of commercial transactions. It is also sustained by authority of the greatest weight and respectability.

In *Daniel on Negotiable Instruments* (section 684) it is said: "If several persons, not partners, are payees or indorsees of a bill or note, it should be indorsed by all of them, unless it be expressed to be payable to the order of either of them, or to the order of certain ones of them, in which cases their indorsement would suffice. Either one of the joint payees may authorize the other to indorse for him, and an assignment of his interest in the paper from one to the other carries with it such authority." See, also, *Para. Notes & B.*, at page 5.

The learned counsel for defendant in error argues with earnestness and ability that the meaning of the language just quoted is that a joint payee may authorize his co-payee to indorse for him, "and that one of

two payees, by assigning to the other all of his interest in the notes, puts it in the power of the assignee payee to be an indorser of the whole note; that is, being then the owner of the whole note, he may by his own act indorse it to another, and thereby assume all the liability of an indorser."

This argument, if sound, would make Walton liable as assignor upon his indorsement to Fielding, who, being thus invested with the whole interest and title to the note, would by his indorsement become liable as an indorser, and not as an assignor. As we have seen, the language used by Walton would, standing alone, without doubt, and, as we understand, without controversy, have rendered him liable as an indorser; and, while the argument presented by counsel for defendant in error is ingenious, we cannot assent to it as sound, for we are unable to perceive how an instrument confessedly negotiable, indorsed in language which standing alone would render him who used it liable as an indorser, is made to import a liability as assignor by reason of the fact that Walton was one of two payees, instead of being the sole payee. If Fielding, instead of indorsing the note in blank, had employed terms identical with those used by Walton, it is not denied that he would have been liable as indorser. Can we, interpreting the contracts of Walton and Fielding written upon the same paper,—the one being the legal equivalent of the other,—construe Walton's as making him liable as assignor, while the liability of Fielding is that of an indorser? To do so would indeed be, in the language of Judge Joynes, to indulge in "nice distinctions to meet the hardship, real or supposed, of a particular case."

It is claimed by the defendant in error that, no motion having been made for a new trial in the circuit court, the plaintiff in error is to be considered as having waived its exceptions to the ruling of that court.

The principle invoked by the defendant in error has no application here. The reason for the rule requiring a motion for a new trial to be made before the trial court is thus stated by Judge Roane in *Guerrant v. Tinder, Gilmer*, 36: "The same judge may, upon a deliberate motion for a new trial, supported by argument and authority, retract a hasty opinion expressed by him in the progress of the trial." See, also, *Newberry v. Williams*, 89 Va. 299, 15 S. E. 865; *Town of Bridgewater v. Allemon*, 93 Va. 542, 25 S. E. 595.

In the case before us the rule should not operate, because the reason upon which it rests does not exist. Here a trial by jury was waived, and the whole matter of law and fact was submitted to the judge of the court, who rendered judgment thereon; and it would have been but an idle form to call upon the court to grant a new trial upon the same law and evidence upon which it had just rendered judgment.

In *Railroad Co. v. Dunnaway's Adm'r*, 93 Va. 34, 24 S. E. 698, there was a writ of er-

ror to the judgment on a demurrer to evidence. Defendant in error moved to dismiss the writ, but the court denied the motion; Judge Buchanan saying in his opinion that "there is no necessity to move for a new trial in the trial court in order to have a judgment on a demurrer to evidence reviewed in this court."

We are of opinion that the case is properly before us, and that there is error in the judgment of the circuit court, which is accordingly reversed, and this court will enter such judgment as the circuit court should have rendered.

CARDWELL and RIELEY, JJ., absent.

(98 Va. 561)

ROBERTSON et al. v. BRECKINBRIDGE et al.

(Supreme Court of Appeals of Virginia. Sept. 22, 1898.)

EXECUTORS—ACCOUNTING—WILLS—PRESUMPTIONS.

1. Where testator gave his property to his wife for life, with direction that, in her discretion, she should make suitable advancements to their children as they became of age, or married, and provision that on her death the property then in her possession should be equally divided among said children, account be taken of advancements, and that, if any one of said children died before his mother, leaving issue, such issue should take his share, advancements to such a child dying before the mother intercept to that extent any right of his issue.

2. The executor of one who gives his property to his wife for life, with power to make advancements to their children, the property in her possession at her death to be equally divided among them, is entitled to credit for payment of taxes on the life estate, and debts contracted by her, they having been paid by him with the acquiescence of the children.

3. Where testator gave his property to his wife for life, with power to make advancements to their children, the property in her possession at her death to be equally divided among them, payments by the executor, one of the children, or taxes on the life estate, and debts contracted by the life tenants in the management of the estate, not having been objected to by any of the others for years, will be presumed to have been the result of a family agreement.

Appeal from circuit court, Botetourt county.

Suit by Nannie B. Robertson and another against Cary Breckinbridge and others. From a decree, complainants appeal. Reversed.

William A. Glasgow, Jr., for appellants. W. B. Simmons and Benjamin Haden, for appellees.

KEITH, P. J. This case is before us upon an appeal from the circuit court of Botetourt county rendered in a chancery suit brought by Nannie B. Robertson and J. Gilmer Breckinbridge, the only heirs at law of Gilmer Breckinbridge, deceased, a son of Cary Breckinbridge, Sr. The object of the suit is to construe the will of Cary Breckinbridge, to have a settlement of the accounts of his per-

sonal representatives, and a division of his estate.

Cary Breckinbridge died in 1867, having first made his will, by which he disposed of a large estate, real and personal. By the first clause of his will he directs his debts to be paid, and to that end he charges certain mill property, a tract of land known as "Keon's Place," and "Thompson's Ridge," as the primary fund for their payment, instead of his personal estate.

By the second clause of the will he gives the residue of his estate, real and personal, to his wife, Emma W. Breckinbridge, during her life, and then says: "It is my wish that she shall, at her discretion, make suitable advancements to my children, as they arrive at the age of twenty-one, or marry, charging such one with such advancements as he or she may receive at valuation to be made at the time in such manner as my executors may direct. After the death of my wife, I wish all my estate, real and personal, that may be in her possession at the time of her death, equally divided among my children, each one accounting for any advancements received, either from me or from my wife. If any of my children should die during the lifetime of my wife without leaving a child or lineal descendant, I wish the portion of my estate to which such decedent would have been entitled divided, as before mentioned, among my surviving children and the children or lineal descendants of such as may have died leaving any; the representatives (as above mentioned) of any of my children who may die taking such part of my estate as my said children would have been entitled to if living."

He appoints his wife, Emma W. Breckinbridge, executrix, and his sons, Peachy G., James, and Cary Breckinbridge, as they respectively attain lawful age, his executors. The widow and Cary Breckinbridge qualified, and the latter assumed the actual burden of executing the will.

A motion was made in the county court of Botetourt county to have commissioners appointed to divide the lands of Cary Breckinbridge among his devisees, and at the June term, 1868, the commissioners appointed for that purpose made their report. This proceeding, however, was never perfected, and was subsequently dismissed, but those interested appear to have entered into the possession and enjoyment of the shares allotted to them, and by a deed dated the 31st of December, 1868, the devisees of Cary Breckinbridge undertook to carry into effect that report. This deed was signed by all the parties in interest except Mrs. Mary A. Woodville, a daughter of Cary Breckinbridge, who had removed to West Virginia, who, while she did not sign the deed, appears to have entered into the possession of the share allotted to her by the report of the commissioners. Cary Breckinbridge settled no account until July, 1882. When this suit was brought,

and he was called upon to settle his accounts, he says, in his answer, that he is willing to have a commissioner to examine and correct his accounts as executor so far as they need reformation, and admits that in it there are some errors and omissions; and the court entered a decree directing a commissioner to settle "an account of the personal representatives of Cary Breckinbridge, Sr., deceased, and said representatives are hereby directed to render said accounts before said commissioner, and especially to lay before him the evidences of debt and vouchers for the disbursements mentioned in the ex parte settlement heretofore made by them, and referred to in the bill." When this account came in, exceptions were taken to it, and it is from the decree of the circuit court passing upon these exceptions that this appeal was taken.

In so far as the executor paid taxes due by the testator at his death, and the debts which he then owed, there is, of course, no exception taken to his accounts. The commissioner, however, has given the executor credit for taxes paid by him upon the estate of Cary Breckinbridge which accrued after the testator's death, and for debts which it is alleged were contracted, not by the testator, but some of them by his widow in the management of the estate as life tenant, by his son O. W. Breckinbridge, and by Cary Breckinbridge, the executor. The account of the executor is made up of a great number of items. The evidence upon which the account is based, oral and written, is, chiefly, that furnished by the executor himself, and the account appears to be in conformity with that evidence. From the testimony of the executor it appears that the taxes paid by him upon the life estate in the hands of the widow were paid with the approbation of all parties in interest. Certain it is that there is no evidence of protest or objection from any quarter whatsoever; and, while not strictly within the line of his duty as executor, it would be a harsh ruling which would now hold the executor personally responsible for payments made in good faith 30 years ago, and unobjected to at the time; and which, as far as the record shows, were not only acquiesced in, but approved, by all who had any interest in the subject.

The powers of the widow under the will were extensive. It is sought to place her now in the position of a mere life tenant of an estate held solely for her own benefit, and occupying, as it were, an attitude of antagonism to those in remainder. Such was not the fact. She was, while the life tenant in name, really a trustee under the will, holding this property for the benefit of her children. She was their mother, and took this property with the trust confided to her by her husband that she would make advancements out of it as their necessities might require, and as her discretion might approve. And so we find at an early date proceedings

instituted looking to a division of the estate among those entitled; and, while that proceeding in the county court was never perfected, it was made the basis upon which the lands were divided among the children in accordance with their respective interests. The will gives to her, subject to the payment of debts, his whole estate, real and personal, during his life, but it is charged with the trust that she should make "suitable advancements to the children as they became twenty-one years of age, or married," and at the death of his wife—the period fixed by the will at which the estate was to be finally settled—he directs that "all his estate, real and personal, that may be in her possession at the time of his death, be equally divided."

It was contended in argument that, inasmuch as Mrs. Woodville died during the lifetime of her mother, her children took a vested remainder under the will, and that they cannot be affected by any act of the life tenant; but this view leaves wholly out of consideration the power and duty of the widow to make advancements, in her discretion, of the whole estate, and of the fact that the share of Mrs. Woodville was in a large measure advanced to her during her lifetime, which, of course, intercepted any right upon the part of her children.

Parties cannot be permitted to stand by and see an executor deviate from the path prescribed to him by the will and by the law in the manner and under the peculiar circumstances disclosed by this record, and then, years afterwards, when it is impossible to restore him to the position which he would otherwise have occupied, undertake to impose upon him a liability for his acts done with their acquiescence. It will be presumed, in a case like this, that what was done was done as a result of family arrangement and agreement.

We are of opinion, therefore, that there was no error in allowing the executor credit for taxes accruing upon the estate in the hands of the widow, and upon debts contracted by her in the management of the estate prior to its practical distribution among those entitled.

Another subject of controversy in the circuit court was as to the Figgat debt, which was secured by a deed of trust. That deed of trust is a valid lien to secure that debt, binding the interests of those who united in it, but the account of the commissioner should show of what that debt really consisted,—that is to say, what part of it was for debts contracted by the testator, and what part by the widow,—and to the extent that it represents a debt contracted by the testator or by his widow the executor should be credited in his accounts with its payment. The accounts should also show what part of it represents the personal debts of Cary Breckinbridge, the executor, or George W. Breckinbridge; and to the extent that it is found that the private debt of Cary or George W. Breckinbridge entered into and

have been paid or are to be paid out of the share of Miss Breckinbridge, one of the grantors, she, as between herself and her brothers, should be treated as a surety, and be reimbursed by them, but, in so far as the Figgat debt is composed of debts due by the testator or widow, it is to be considered as a debt of the estate, and the executor credited accordingly, if he has paid it or any part of it.

It appears probable from the exceptions and from the account of the executor that his private debts and those of his brother have to some extent been allowed him as credit. If such there be, they, of course, should be stricken out. A bond, note, or account may, on its face, appear to be the personal debt of the executor or of George W. Breckinbridge, or of some other person, and may yet, in truth and in fact, be the debt of the estate. If such be the case, the executor, upon its payment, should have credit for it; but if, upon the evidence, it appears to be in truth and in fact not the debt of the testator, and not a debt contracted by the widow under circumstances as above stated, then the executor should not be so credited. The presumption, of course, is that all accounts made, and all notes given, which, on their face, charge Cary Breckinbridge, Jr., or George W. Breckinbridge, or any person other than the testator, as being the debtor, are, in the absence of evidence to the contrary, to be considered as the debts of those who, upon the face of the note or account, appear as the debtors; and in such case the burden of proof would be upon the executor to establish his right to the credit. But these are matters of detail, and our purpose now is merely to declare the principles upon which we think the account should ultimately be settled, and which, we believe, will not be found difficult of application.

There is a claim on the part of the wife of Cary Breckinbridge, Jr., which is to be considered. After the death of the testator, certain moneys belonging to the wife of the executor were used in payment of the debts of the estate. The decree complained of allows this claim for money thus advanced to the estate, and directs that it be paid out of the amount found due by the testator to the executor. So long as the claim asserted by Mrs. Virginia C. Breckinbridge, wife of Col. Cary Breckinbridge, is less than the sum which he is entitled to recover from the estate, it does not appear to be a matter of concern to the other devisees and legatees of Cary Breckinbridge, Sr. If they are to pay it, it is of no moment to them whether it is to be paid to Col. Breckinbridge or to his wife. For the present, therefore, the determination of her rights is reserved.

If, upon the settlement of the accounts of the executor when this case is again before the commissioner, the amount due the executor shall be found insufficient to satisfy

the claim of Mrs. Virginia C. Breckinbridge, the commissioner will then inquire and report upon her right to recover in the light of the evidence in the record, and of such as may be adduced before him in the contingency mentioned.

For these reasons the decree of the circuit court is reversed, and the cause remanded to be further proceeded with in accordance with the principles herein announced.

(96 Va. 469)

GARBER et al. v. SUTTON.

(Supreme Court of Appeals of Virginia. Nov. 17, 1898.)

SALE OF LAND—RESCISSION—INCUMBRANCES.

1. Sale of land will not be rescinded because of incumbrances; they all having been removed before decree in the suit to rescind, and they not having interfered with an advantageous resale by the purchaser; he not having been entitled to a deed till payment of his last installment, and all depreciation in value of the property having been before the same was due.

2. One is not entitled to rescission of his contract of purchase of a lot according to a plat because of certain streets in the plat being abolished by sales under a subsequent deed of trust; the lots previously sold being expressly reserved from the operation of the deed of trust, so that the right, appertaining to the lot, to the use of the streets, is not affected.

Appeal from circuit court, Rockingham county.

Suits by J. F. Roller against R. M. Sutton,—one on contract with Samuel Garber, and the other on contract of D. S. Roller. The suits were tried together. From decrees for R. M. Sutton on his cross bill the other parties appeal. Affirmed.

John E. Roller, for appellants. Conrad & Conrad, for appellee.

HARRISON, J. On the 27th of October, 1890, R. M. Sutton sold to D. S. Roller and Samuel Garber each a lot designated on a plat of the lands of the Valley Land & Improvement Company, in the town of Luray. Each paid one-third of the purchase money in cash, and agreed to pay the residue in equal installments at six and twelve months. The first deferred installment was also paid when it became due, the second and last installment upon both lots remaining unpaid.

On the 9th of February, 1892, D. S. Roller and Samuel Garber made the following assignment to Joseph F. Roller: "For value received, I hereby transfer, assign, and set over to Joseph F. Roller my right to look to R. M. Sutton, under my contract with him dated the 27th day of October, 1890, for the purchase money paid by me to the said Sutton thereunder." It appears that Joseph F. Roller was to pay, as the consideration for this assignment, whatever he might realize on each contract after the payment of all proper costs and expenses. Shortly after these assignments were executed, Joseph F. Roller instituted a separate suit upon each, setting up

his rights thereunder, and asking that the contract between R. M. Sutton and D. S. Roller, in the one case, and said Sutton and Samuel Garber, in the other, be wholly rescinded and annulled, that the last deferred and unpaid note due from each be declared canceled and void, and that he might have a recovery from R. M. Sutton for the amount paid by each of his assignors on their respective purchases of said lots.

The bill in both cases alleges that the deed from the Valley Land & Improvement Company to R. M. Sutton was unauthorized by any corporate act of the company, that the lots were incumbered with liens by deed of trust and judgments to an extent beyond their value, and that for these reasons the deed to R. M. Sutton was worthless and did not convey a good title.

To each of these bills R. M. Sutton filed an answer, to be treated as a cross bill, denying the allegations of the original bill in support of the prayer for a rescission of the contract, and asking for a decree in both cases for the amount due on account of the last installment of purchase money.

On the 11th January, 1897, these two causes were, by consent of parties, heard together upon the report of a commissioner, which was based upon documentary evidence and upon depositions, whereupon the court refused to rescind the contract in either case, and enforced the specific performance of both contracts by a decree in favor of appellee for the balance of purchase money due thereunder. There is no error in this decree to the prejudice of appellants.

As to the first ground of objection alleged, that the deed to R. M. Sutton from the Valley Land & Improvement Company was unauthorized by any corporate act of the company, no evidence has been adduced in its support; and the deed appears to be regular on its face, and free from objection.

The second ground of objection alleged, that incumbrances upon the lots sold appellants prevented appellee from making a good title, is not tenable. The deeds of trust given upon its property by the Valley Land & Improvement Company expressly reserve from their operation the lots theretofore sold; and it further appears that said deeds of trust, as well as all judgments against the Valley Land & Improvement Company prior to its deed to R. M. Sutton, have been paid, and released before the date of the decree complained of. There is no ground for the contention that the inability of appellee to make deeds free of incumbrance entitled appellants to a rescission of the contracts, for the reason that the lots in question at the time these suits were brought had so depreciated as to be of little or no value. An examination of the record shows that the contract of purchase provided for the execution of a deed upon the payment in full of the purchase money. The last deferred installments of purchase money were not due until October 27, 1891, so that the

assignors of Joseph F. Koller were not in a position to call for a deed until that date, and hence could not have been affected by any incumbrance upon the property prior to that time. If it were true that incumbrances delayed deeds being made after October 27, 1891, appellants were not damaged thereby; for their own evidence abundantly shows that the depreciation in value occurred between the date of the purchase and August, 1891, two months before the last notes were due, or could have been demanded by appellee.

Though not alleged in the pleadings as ground for rescission, it is contended that, because some of the streets and alleys embraced in the plat of the lands of the Valley Land & Improvement Company have been abolished by sales under deeds of trust, the appellants are entitled to a rescission of their contracts of purchase, for the reason that they are thereby deprived of the use of those streets and alleys.

All lots previously sold by the company were, as already stated, expressly reserved from the operation of these deeds of trust; and hence the rights and privileges which appertained to the lots in question by virtue of the plat of the company were not affected by said deeds of trust, and appellants still have the right, in a proper action, to assert their claim to the use and benefit of the streets and alleys in that portion of the lands sold under the same. The evidence shows that the streets and alleys abolished by these sales in no wise affect the use and enjoyment of the lots in question, and that all the streets and alleys necessary to the complete enjoyment of said lots remain as laid out on the plat of the company. This city on paper is one of the numerous speculative enterprises inaugurated about the time the transactions under consideration took place. The anticipated development utterly failed, and, before the purchase money for the lots in question was all due, the whole scheme ended in disaster, without fault of the appellee, and without prejudice to his right to recover the purchase money appellants contracted to pay.

For these reasons the decree appealed from must be affirmed.

CARDWELL and RIELY, JJ., absent.

(96 Va. 489)

HITE v. COMMONWEALTH.

(Supreme Court of Appeals of Virginia. Dec. 1, 1898.)

MURDER — DECLARATION — OBJECTION TO JUROR — ASSIGNMENT OF ERROR — CONTINUANCE.

1. Action on motion for continuance will not be reversed, unless it was plainly erroneous.

2. Statement of accused as to his reason for killing deceased is admissible; having been made, after the preliminary examination, to a justice of the peace, who was not the acting justice of the peace on that occasion, in reply to his question, without any inducement being held out.

3. Assignment of error to refusal of instruc-

tions asked, and the giving of others in lieu thereof, should point out the error.

4. It being declared by Code 1887, § 3155, and Pollard's Supp. Code, § 4048, that no exception to a juror on account of his age shall be allowed after he is sworn on the jury, objection after verdict that on that account he is incompetent, under the constitution and laws, is too late, though his age was not previously known.

5. Declaration of deceased, a negro, to defendant, that he was not afraid of defendant shooting him, is no excuse for the killing.

6. A killing is not excused by the fact that defendant had for many years been accustomed to drink heavily at times, and was drinking at the time of the offense; it not appearing that he was so under the influence of liquor that he did not know what he was doing, or right from wrong.

Error to Mecklenburg county court.

George Hite was convicted of murder, and brings error. Affirmed.

Chas. T. Reekes, for appellant. The Attorney General, for the Commonwealth.

BUCHANAN, J. A motion for a continuance is addressed to the sound discretion of the court, under all the circumstances of the case; and, while an appellate court will supervise the action of the trial court on such motion, it will not reverse, unless such action was plainly erroneous.

This is the rule as laid down in Hewitt's Case, 17 Grat. 627, and it has been uniformly adhered to by this court. *Roussell's Case*, 28 Grat. 980; *Mister's Case*, 79 Va. 9; and 4 Minor, Inst. (4th Ed.) 1077, and cases cited.

The record does not show that the action of the court in refusing to continue the case was plainly erroneous.

There is nothing in the record to show that the defendant did not have a fair and impartial trial, that he did not have all persons present as witnesses who knew anything that was favorable to him, or that his counsel did not make as good a defense for him as he could have done if his case had been continued.

Neither did the court err in permitting the witness Moody to give in evidence the statement of the accused as to his reason for killing the deceased. It is true that Moody was a justice of the peace, and that this statement was made in reply to a question from him, but it was not made under circumstances which rendered it inadmissible in evidence. It appears that, after the preliminary examination, Moody, who was not the acting justice of the peace on that occasion, asked the defendant what made him kill the deceased, and that he (the defendant), without any inducement whatever, gave the answer which was admitted in evidence over his objection. The rule is that a confession may be given in evidence, unless it appear that it was obtained from the party by some inducement of a worldly or temporal character, in the nature of a threat, or promise of benefit held out to him in respect of his escape from the consequences of the offense, or the mitiga-

tion of the punishment, by a person in authority, or with the apparent sanction of such a person. *Smith's Case*, 10 Grat. 734, 739; *Mitchell's Case*, 83 Grat. 845.

The evidence objected to was clearly admissible.

The court instructed the jury, upon the motion of the attorney for the commonwealth, that if they believed "from the evidence that William Bowers came to his death by a wound, as charged in the indictment, inflicted by George Hite with a deadly weapon previously in the possession of the said Hite, without any, or upon very slight, provocation, it is prima facie willful, deliberate, and premeditated killing, and throws upon the accused the necessity of proving extenuating circumstances." The giving of this instruction is assigned as error.

It is not claimed that that instruction does not state the law correctly, where the evidence tends to prove the facts upon which it is based, but the contention is that it was not applicable to the facts of this case. The evidence tends to show that the deceased came to his death from a wound inflicted by the defendant with a deadly weapon previously in his possession, without the slightest provocation. The instruction was, therefore, peculiarly applicable to the facts of the case, and was properly given.

The court refused the instructions asked for by the defendant, and gave other instructions in lieu thereof. The refusal to give the defendant's instructions, and the giving of its own, by the court, is assigned as error, but in what the error consisted is not pointed out. Ordinarily such an assignment of error would not be considered by the court, for it is the duty of counsel who assigns error to specifically point it out; but, as this is a case involving the life of the defendant, we have carefully examined the instructions rejected and given, and are of the opinion that the defendant was not injured by the action of the court, as the instructions given by the court in lieu of those offered by him instructed the jury upon all points covered by the instructions asked for by him, and contained no error to his prejudice.

The action of the court in overruling the defendant's motion in arrest of judgment upon the ground that one of the jurors who tried the case was under the age of 21 years, and was, therefore, incompetent, under the constitution and laws of the state, is assigned as error.

If objection had been made to that juror at the proper time, the court ought to, and doubtless would, have rejected him, as he was clearly not a competent juror. But the objection came too late.

Polindexter's Case, 33 Grat. 768, 791, is conclusive of this question. In that case two of the jurors had not paid their capitation tax, and were, therefore, incompetent jurors, under the constitution and laws of the state

as they were at that time, but no objection was made to the competency of the jurors until after verdict; and it was held in that case that the objection came too late. Moncure, P., who delivered the opinion of the court, said, in discussing the question: "If he [the defendant] did not know whether they had paid their capitation taxes of the preceding year, and cared about availing himself of any such ground of objection, if it existed, he could easily have inquired into it, of them or otherwise, before they were sworn, and then acted accordingly; but he made no such inquiry, doubtless because he cared nothing about it, or preferred to have the benefit of the objection, if he could make it, in the event of a verdict against him. By Code 1873, c. 158, § 20 (Code 1887, § 3155), it is provided that 'no exception shall be allowed against any juror after he is sworn upon the jury on account of his age, or other legal disability unless by leave of the court.' The principle of this section is applicable alike to civil and criminal cases. [Now it is so by statute. Pollard's Supp. Code, § 4048.] Certainly no exception can be allowed after verdict. It matters not whether the ground of exception be constitutional or legal. In either case it may be given up by the party entitled to the benefit thereof. And, if not made before verdict, it will be considered as having been given up."

It may be true, as counsel argue, that a party cannot be said to waive a disability which he has no knowledge of; but there is another principle of law applicable to a case like this, and that is that negligent ignorance operates against a party to the same extent as actual knowledge, and he ought not, therefore, to be permitted to have the verdict of a jury set aside by urging a ground of challenge to a juror, which but for his negligence he might have discovered and urged at the proper time.

Neither did the court err in refusing to set aside the verdict of the jury on the ground that it was contrary to the law and the evidence.

The evidence showed that the defendant shot and killed the deceased without the slightest provocation. When asked why he had killed the deceased, he replied that the deceased said "that he was not afraid of his shooting him, and I be damned if any negro shall say that to me." No one would claim that the negro's statement was any provocation at all,—much less, an excuse for taking his life. The effort to show that the defendant was not responsible for his acts wholly failed. The evidence does show that for many years he had been accustomed to drink heavily at times, and was drinking at the time the offense was committed; but it also shows that he was not under the influence of liquor on that occasion to such extent that he did not know what he was doing, or that he did not know right from wrong.

81 S.E.—57

The verdict of the jury was manifestly right, under the law and the evidence, and the judgment must be affirmed.

RIELY, J., absent.

(96 Va. 498)

ROGERS et al. v. PATTIE.

(Supreme Court of Appeals of Virginia. Dec 1, 1898.)

VENDOR AND PURCHASER—QUANTITY—MISTAKE—RESCISSION—EQUITY.

1. Where a lot was bought for speculation, and the contract of purchase is executed, the loss, through a mutual mistake of the parties as to what it contained, of a narrow strip off one side, lessening its value considerably for building purposes, will not entitle the purchaser to a rescission.

2. Notwithstanding a purchaser's right to proceed at law on his covenants for title, he may recover in equity, on the ground of mistake, compensation for a loss due to the grantor's not owning all the land conveyed.

Appeal from circuit court, Roanoke county.

Suit by one Pattie, trustee, against one Rogers and others. From a decree for complainant, defendants appeal. Reversed.

C. H. Cocke, Watts, Robertson & Robertson, and Eppa Hunton, Jr., for appellants. Scott & Staples, for appellee.

BUCHANAN, J. The record does not show that the contracts sought to be rescinded in this case were procured by fraud, but it does show that the contract for the purchase and sale of one of the parcels of land, viz. section 17, was entered into under a mutual mistake as to one of its boundary lines, that the mistake was in a matter which was a material part of the thing contracted for, and that the vendee is entitled to relief in some form or other.

Where the contract is executory, it is now well settled in this state that the mutual mistake of the parties in a matter which is part of the essence of the contract, and of the substance of the thing contracted for, will be relieved against in a court of equity, and may be a good ground for rescinding the contract, or of specifically executing it, upon equitable terms of compensation, according to circumstances. *Leas' Ex'r v. Eldson*, 9 Grat. 278, 279.

But where the contract has been executed, and rescission is asked upon that ground, the mistake must be plain and palpable, and must affect the very substance of the thing contracted for. *Thompson v. Jackson*, 8 Rand. 504; *Glassell v. Thomas*, 8 Leigh, 113.

The subject-matter of the contract and conveyance in question is described in the deed as being a parcel of land:

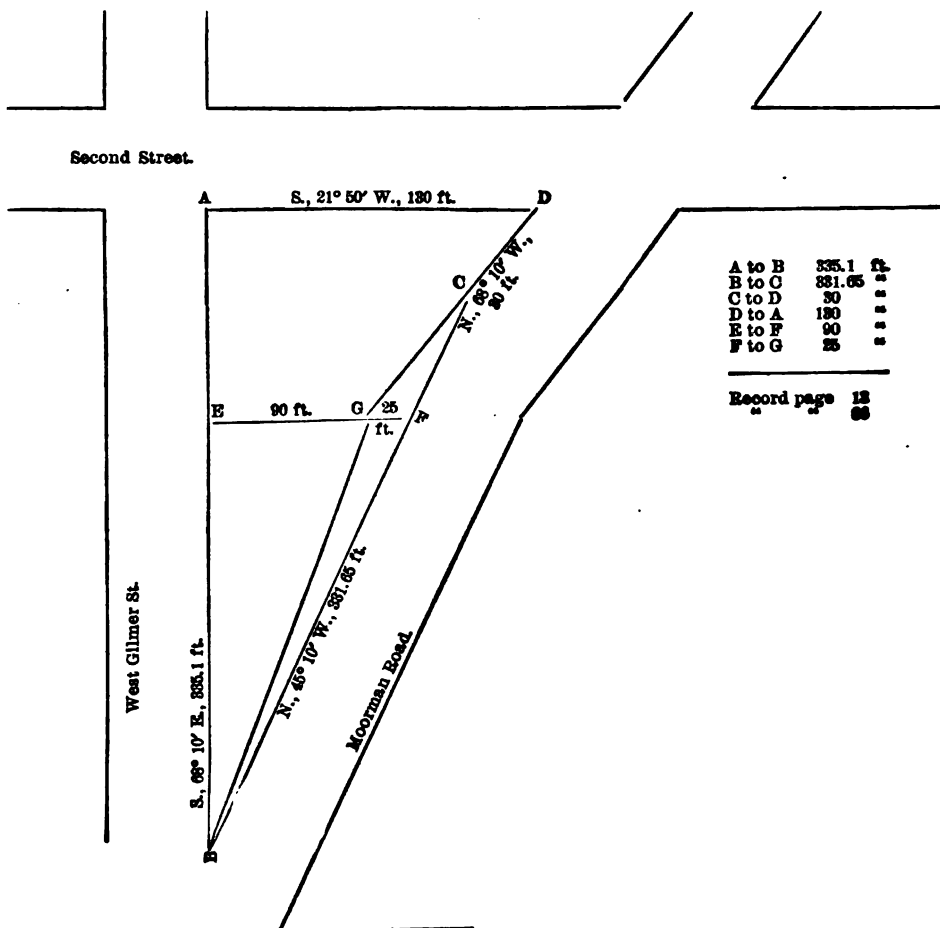
"Beginning at the northwest corner of West Gilmer and Second streets; thence, with West Gilmer street, south, 68 degrees 10 minutes east, 335.1 feet, to a point on the Moorman road; thence, with the Moorman road, north, 45 degrees 10 minutes west, 331.65 feet, to a point; thence north, 68 de-

greens 10 minutes west, 30 feet, to Second street; thence, with Second street, south, 21 degrees 50 minutes west, 130 feet, to the place of beginning,—and known as 'Section 17,' as shown by the map of the property of Rogers, Fairfax, and Houston, on file at the office of the clerk of the hustings court of the city of Roanoke, Virginia."

The following map or diagram, which is the one used in argument by counsel, shows substantially the shape and location of the lot as the parties understood them to be when the sale and conveyance were made, and also its true shape and location:

lot for building purposes, but the evidence shows that it was purchased at auction in the year 1890,—a period of wild speculation in town lots; that it was low, much of it swampy, and not desirable for building purposes; that he held it more than three years without any intention, so far as the record shows, of building upon it, and was making an effort to sell it when he first learned of the mistake now complained of. Under these circumstances, it can hardly be doubted that it was purchased for speculation, and not specially for building purposes.

It does appear that the land lost was not



The mistake was as to the boundary line of the lot on the side next to the Moorman road. The land was contracted for and conveyed upon the belief that the line indicated on the plat by the letters B, C, D, was the line between the road and the lot, when in fact the true line was B, G, C, D. The land lost is represented on the plat by the triangle, B, G, C, B. Unless the purchase was made for some special purpose, which has been defeated by the land lost, it cannot be said, in any proper sense, that it was the very substance of the subject-matter of the contract.

The vendee claims that he purchased the

quite so low as the land in rear of it, and was, therefore, more suitable for building upon, and that by its loss the width of the lot between the Moorman road and West Giller street has been decreased, and that by reason thereof it has been injured for building purposes. The evidence further tends to show that the land lost is more valuable, foot for foot, than the residue of the lot, and that such residue is not as valuable as the whole lot would be, by one-third, or perhaps more.

These facts, if the contract were executory, might be sufficient to justify a court of

equity in refusing to specifically execute it at the suit of the vendors; but they are not sufficient, in our opinion, to require its rescission when executed by the parties. The land lost was a material part of the substance of the contract under consideration, but it was not the substance of it. What the vendors intended to sell, and the vendee to purchase, was a parcel of land, known as "Section 17," situated in a certain portion of the city of Roanoke, bounded by certain streets, and of certain dimensions. The land conveyed to and held by the vendee is section 17, is situated at the same place, is bounded by the same streets, and is the identical property which the parties intended to sell and purchase, except as to the narrow strip taken by the Moorman road.

We are of opinion, therefore, that the circuit court erred in decreeing a rescission of the contract. Its decree must be reversed, and the cause remanded, with direction to the court to ascertain and allow the vendee just compensation for the land lost by superior title; it now being settled in this state that, notwithstanding the vendee's right to proceed at law upon his covenants for title, he has the right to go into a court of equity, upon the ground of mistake, and recover compensation. *Blessing's Adm'r v. Beatty*, 1 Rob. 287; *Boschen's Ex'r v. Jurgens' Ex'r*, 92 Va. 753, 24 S. E. 390; and *Hull v. Watts*, 95 Va. 10, 27 S. E. 829.

RIELY and CARDWELL, JJ., absent.

(96 Va. 518)

DRIVER v. HARTMAN.

(Supreme Court of Appeals of Virginia. Dec. 6, 1898.)

APPEAL—BILL OF EXCEPTIONS.

Assignment of error to refusal to allow witnesses to answer certain questions cannot be considered, the bills of exception not showing what was expected or proposed to be proved by the witnesses.

Error to circuit court, Rockingham county.

Action by John H. Hartman against Perry M. Driver. Judgment for plaintiff. Defendant brings error. Affirmed.

O. B. Roller, Mr. Martz, and Winfield Liggett, for plaintiff in error. Sipe & Harris, for defendant in error.

PER CURIAM. Under the rule applicable in the consideration of this case, the verdict of the jury cannot be disturbed. Code, § 3484.

The first and second assignments of error, touching the action of the court in refusing to allow witnesses to answer certain questions, cannot be considered, because the bills of exception do not show what the defendant expected or proposed to prove by either witness. *Insurance Co. v. Pollard*, 94 Va. 146, 26 S. E. 421.

For these reasons, the writ of error cannot be awarded.

(96 Va. 528)

HAFFNER'S ADM'R v. CHESAPEAKE & O. RY. CO.

(Supreme Court of Appeals of Virginia. Dec. 7, 1898.)

BRAKEMEN—INJURY FROM BRIDGE—CONTRIBUTORY NEGLIGENCE.

A brakeman of experience, and without defect of sight or hearing, struck by a low bridge under which his train was going, and under which he had frequently gone, is guilty of contributory negligence, in not having lowered his head, though a signal to put on brakes had just been given.

Appeal from circuit court of James City county and city of Williamsburg.

Action by Haffner's administrator against the Chesapeake & Ohio Railway Company. Judgment for defendant. Plaintiff brings error. Affirmed.

N. S. Henly and L. L. Lewis, for appellant. H. T. Wickham and H. Taylor, Jr., for appellee.

KEITH, P. This is a writ of error to a judgment of the circuit court of James City county and the city of Williamsburg, and is the sequel to the case of *Railway Co. v. Hafner's Adm'r*, 90 Va. 621, 19 S. E. 163.

At the first trial the jury found a verdict for the plaintiff, and the railway company brought the case to this court, where it was reversed, and the verdict and judgment set aside as being contrary to the law and the evidence, the court holding that the contributory negligence of the plaintiff's intestate was the proximate cause of his injury. The case was remanded for a trial de novo, and upon that trial the jury found a verdict for the plaintiff, subject to the defendant's demurrer to evidence, and upon that demurrer the circuit court entered judgment for the defendant. Thereupon Haffner's administrator obtained a writ of error to this court.

When the case was reversed and remanded upon the former hearing, it was sent back to be tried upon such evidence as might be adduced before the jury; and, in the event of a substantial change in the facts, a new decision as applicable to them would have been required, and the former decision would cease to be the law of the case; for it is clear "that a party on a retrial de novo may introduce new evidence, and establish an entirely different state of facts, to conform to which is no violation of principle in a court, even if thereby it does set aside its former decision as inapplicable, and adopt a new one, as suited to the new phase of the controversy. But even then the former decision, so far as applicable, will be adhered to." *Wells, Res. Adj.* § 619, and *Carper's Adm'r v. Railway Co.*, 95 Va. 45, 27 S. E. 813.

Upon the former trial the court deduced the following facts from the evidence: "That the deceased had been employed by the R. & A. B. R. as brakeman four months before he applied for employment with the plaintiff in error company. Upon application to the plain-

tiff in error company for employment, he was given a free pass over the road from Charlottesville to Newport News, and required to inform himself of his duties and the character of the road. He was a man of full age, with no defect in his eyesight or hearing. He frequently passed under this bridge by day and by night, safely, in the discharge of his duty, without injury. On the occasion of the accident which caused his death, he was struck on the head (as is stated by a witness who stood on the bridge, and says he heard the blow) by the sill or stringer of the bridge on the west side of the bridge, the train going west at the time of the accident; so that he had passed in safety under three sills of the four supporting the bridge. He stooped or lowered his head under it, and raised it just before he got from under it. The character of the injury received from the collision with this sill was never ascertained, because, descending by the stepladder, he fell off the car, and across the track, and his head was cut in twain by the wheels of the car, and his body otherwise badly mutilated. The bridge is shown to have been a dangerous one, being only 28½ inches above the car, which dangerous character was known to the company, and was also known to the said brakeman. While dangerous in character, its danger could, however, be avoided by stooping low enough in passing under it, as is shown by the number of times he passed under it, and the number of times others pass and repass without injury. The train in question was halting at the station to take the siding, to allow a meeting train, presently due, to have the main track. It is alleged that there was a call for brakes here as the station was reached. The evidence is conflicting on this point, it being otherwise testified to that the long whistle sounded was simply a blow for the station; but we must consider this case, as other cases upon a demurrer to the evidence, under the well-known rule of this court prescribed by statute."

Every fact here stated and relied upon by the court as controlling its decision is established by the evidence in the record before us, which is substantially identical with that considered by the court upon the former hearing, except that the evidence upon this trial is to the effect that the deceased came to his death by a collision with a stringer on the eastern side of the bridge, instead of that upon the west side of the bridge, the train at the time moving from the east to the west. This difference we do not think material to the decision. The decedent was held to have been guilty of negligence upon the former trial, because, having bowed his head and passed in safety from the eastern edge of the bridge under three sills, he raised his head, and was struck by the fourth sill. In thus raising his head, he was considered as being guilty of contributory negligence, and himself the author of the injury he sustained; and it was no less negligent upon his part to fail

to lower his head upon approaching the bridge, resulting, as the evidence now shows, in death from a collision with the first, or eastern, sill.

It is negligence for a railroad company to operate its road with such a bridge; but, "while dangerous in character, its danger could be avoided by stooping low enough in passing under it, as is shown by the number of times he (plaintiff's intestate) passed under it, and the number of times others passed and repassed without injury." *Railway Co. v. Hafner's Adm'r*, 90 Va. 622, 19 S. E. 166.

The evidence as to the age, experience, knowledge, and means of knowledge, of plaintiff in error's intestate, is in this record just what it was when the case was before this court upon a former occasion. The employment blank was then in the record, and was considered along with other facts in the case; and if the case were now before us for the first time, and if that employment blank contained the only information imparted to the employees of the railway company as to the dangerous character of some of its bridges, we should be strongly inclined to hold it to be misleading in the particular insisted upon by counsel for plaintiff in error, for the declaration that it was unsafe to pass under certain bridges while "standing on a car" might reasonably induce the belief that it was not dangerous to pass under the bridges in any other position; but the effect of that paper was considered by this court along with other facts in the record, and it contains by no means the only or most important sources and opportunities for information open to the employees of the company.

It is claimed that the evidence shows that the plaintiff's intestate was killed while applying the brakes in obedience to a signal to that effect given by the engineer, in order to stop the train, and place it on a side track a short distance in advance, so as to leave the main line open for a passenger train due within a few minutes, and that, being required to act upon this sudden emergency, want of ordinary circumspection and care upon his part is to be excused.

In the first place, we do not consider that the circumstances set out in this record prove the existence of an "emergency," in the sense in which that term is sought to be employed. There is nothing in the customary signal to a brakeman to put brakes upon his train which should so disturb his equanimity as to render him irresponsible for his acts.

In the second place, the evidence upon this point now before us is just what it was when the case was formerly heard by this court. The very point was considered, and the evidence as to whether the whistle sounded the signal for brakes or to announce the approach to a station was held to be conflicting, but that upon a demurrer to evidence it was to be considered most favorably to the demurree, and was therefore to be taken as establishing a signal for the application of brakes, but

It was not held to constitute an "emergency" which would relieve the decedent from the consequences of his own negligence.

We conclude from the evidence that the bridge was a dangerous one; that its danger was known, or should have been known, to the intestate; that the accident could have been avoided by ordinary care upon his part; and that, in failing to lower his head upon reaching the bridge, he was guilty of such contributory negligence as precludes the recovery of damages by his administrator for his death.

The judgment of the circuit court is affirmed.

CARDWELL and RIEBLY, JJ., absent.

(96 Va. 521)

CAMP et al. v. BRUCE.

(Supreme Court of Appeals of Virginia. Dec. 7, 1898.)

CONTRACTS—ILLEGALITY—SELLING RIGHT OF BIDDER AT JUDICIAL SALE—OBJECTION ON APPEAL.

1. Illegality of a contract, though not pleaded or relied on as a defense at the trial court, will prevent its enforcement when suggested on appeal.

2. The contract is illegal where, before confirmation of a judicial sale, one, instead of putting in an upset bid, purchases of the bidder his rights, giving him an advance on his bid.

Appeal from circuit court, Nansemond county.

Bill by Camp and others against Bruce. Bill dismissed, and complainants appeal. Affirmed.

Jackson Guy and J. B. Prince, for appellants. R. H. Rawles and R. E. Boykin, for appellee.

BUCHANAN, J. The record shows that on the 11th day of June, 1894, at a judicial sale in the case of Ranstead against Ranstead, etc., the appellee purchased a tract of land containing 2,900 acres, at the price of \$2,100; that he complied with the terms of sale by paying the cash required and executing his bonds for the deferred payments; that the sale was reported to the court, but pending confirmation he entered into a written agreement with the appellants by which, in consideration of their assuming payment of the purchase-money bonds held by the commissioner, and the payment of \$1,565 to the appellee (which was \$500 profit on his bid), he sold and conveyed all his right, title, and interest in the land and in the sale and purchase thereof to the appellants, and agreed that he and his wife would unite with the commissioner in his conveyance of the land, which he was directed to ask the court to have made to the appellants. An upset bid having been put in, the sale to the appellee was set aside, and a resale ordered. After the land had been resold several times, upset bids having been put in from time to time, the appel-

lee finally became the purchaser, at the price of \$4,850, at a sale which was confirmed.

Some months after the confirmation of that sale, the appellants filed this bill to compel the appellee to specifically execute its provision, upon the ground that he, in violation of his agreement with them and in fraud of their rights, had improperly and fraudulently procured the upset bid to be put in, which prevented the confirmation of the first sale made to him.

The appellee answered the bill, and, among other things, admitted the execution of the agreement, and alleged that he would have complied with its provisions if the sale had been confirmed, but denied that he procured the upset bid to be put in, which prevented its confirmation.

The first question to be determined is whether that agreement is one which a court of equity will enforce. If it be an illegal contract, as claimed in argument, this suit cannot be maintained, although that defense was not raised by the pleadings, nor relied upon in the circuit court. The law refuses to enforce illegal contracts, as a rule, not out of regard for the party objecting, nor from any wish to protect his interests, but from reasons of public policy. Whenever, therefore, the illegality of the contract appears, whether alleged in the pleadings or made known for the first time in the evidence, it is fatal to the case. That defect cannot be gotten rid of either by failure to plead it or by agreeing to waive it in the most solemn manner. The law will not enforce contracts founded in its violation. Fry, Spec. Perf. § 309; 1 Story, Eq. Jur. § 261; Pom. Cont. (2d Ed.) 286; Coppel v. Hall, 7 Wall. 542.

We have no statute declaring that contracts like the one under consideration are unlawful; yet, under the principles of the common law, any contract that is made for the purpose of or whose necessary effect or tendency is to lessen competition and restrain bidding at judicial sales is held to be illegal, because opposed to public policy. The object in all such sales is to get the best price that can be fairly had for the property. The policy of the law, therefore, is to secure such sale from every kind of improper influence. To allow one bidder to buy off another, which is but a species of bribery, and thus prevent the property from bringing the best price, is condemned by the law, and the courts will not enforce contracts founded in such practices. Underwood v. McVeigh, 23 Grat. 409, 428, 429; Cocks v. Izard, 7 Wall. 559, 562; Fry, Spec. Perf. § 308; Pom. Cont. § 283; Greenh. Pub. Pol. pp. 183-189.

Tested by these principles, the agreement in question was clearly illegal.

If the parties had succeeded in having the sale confirmed by the court, and the appellants substituted as purchasers, in lieu of the appellee, at his bid of \$2,100, the agreement

would have operated as a fraud upon the court and the parties whose lands were being sold for purposes of partition. It would have enabled the appellee to put \$500 in his pocket, for which he furnished no valuable consideration; would have taken from the co-owners that much of their inheritance, and enabled the appellants to get the property by buying off the court's bidder, instead of putting in an upset bid, and taking the chances of having to pay a higher price for it at a resale. Neither in this case nor in the case in which the land was sold could such an agreement be enforced. If the commissioner who made the sale in the case of Ranstead against Ranstead had reported to the court that since the sale to him the appellee had sold his bid to the appellants, at a profit of \$500, to be paid when the sale was confirmed (as he ought to have done, for he wrote the agreement, and knew all the facts, and the court, whose agent he was, had the right to know all that he knew about the appellants' dealings with their bidder that could affect the confirmation of the sale), instead of merely reporting that the appellee desired the conveyance for the land to be made to the appellants, the court would not have confirmed the sale at the appellee's bid of \$2,100, although no upset bid had been put in.

A court will never, where the facts are known to it, confirm a sale where the bidder has sold his bid at an advance, unless the advance paid or to be paid inures to the benefit of the parties to the suit. It does not allow bidders to trade behind its back, and speculate in that way on property which it is selling. 2 Daniell, Ch. Prac. (5th Ed.) 1285; Hodder v. Ruffin, 1 Tam. 341.

In order to prevent this, it became the practice of the English chancery courts, in the time of Lord Eldon, it is said, to require the bidder who desired the court to substitute another in his stead to file an affidavit that there was "no underhand bargain between them." Rigby v. Macnamara, 6 Ves. 515; Vale v. Davenport, Id. 615; Holroyd v. Wyatt, 9 Jur. 1072, 2 Colly. 327.

The rule of the English chancery courts upon this subject is thus stated in 2 Daniell, Ch. Prac. (5th Ed.) 1285: "If, after becoming the bidder for an estate, the purchaser is desirous of being discharged from his contract, and of substituting another person in his stead, the court will, on motion, make an order to that effect. He must, however, support the motion by an affidavit that there is no underbargain, for the new purchaser may give the other a sum of money to stand in his place, and so deceive the court; and the rule appears to be that, if a purchaser resell behind the back of the court before the purchase is confirmed, the second purchaser is considered as a substituted purchaser, and must pay the additional price into court for the benefit of the estate. When the highest bidder at an auction induced the auc-

tioner to accept another person in his place, concealing the fact that he had sold his bargain at an advance, which he received, and absconded, the property was ordered to be resold, reserving all questions of liability of the original or subpurchaser."

The English rule of requiring affidavits where one purchaser is asked to be substituted for another is a wise one, and in this case the agreement sought to be enforced shows the necessity for some such safeguard in our practice. It might be well for our courts in all such cases, unless the parties consent to the substitution, to adopt the English practice. It is of the utmost consequence that judicial sales, and especially sales for partition, where infants are generally interested, should be protected from practices and influences which may prevent the lands from bringing the best price.

The bill was properly dismissed by the circuit court, and its decree must be affirmed.

GARDWELL and RIELY, JJ., absent.

(36 Va. 484)

DAY v. NATIONAL MUT. BUILDING & LOAN ASSN.

(Supreme Court of Appeals of Virginia. Dec. 1, 1898.)

AGENCY—RATIFICATION.

Plaintiff bought property of a third person, subject to a mortgage to defendant building association, payment of which he assumed, relying on the statement of its agent, who had authority to receive and receipt for premiums and dues payable to it by its local members, that the amount thereof was less than what it really was. Held, that his unauthorized statement was not ratified, so as to discharge the lien on payment of the amount stated, it not having knowledge of the statement when the payment was made; nor by it, in a suit by him to discharge the mortgage because of such statement, praying not only for enforcement of the lien, but for personal judgment against him, the latter of which prayer was not granted.

Appeal from hustings court of Roanoke.

Suit by V. L. Day against the National Mutual Building & Loan Association. Decree for defendant. Complainant appeals. Affirmed.

Hoge & Hoge and Scott & Staples, for appellant. L. H. Cocke, for appellee.

KEITH, P. The facts to be considered in this case are as follows: William J. and L. Blair subscribed to certain shares of the National Mutual Building & Loan Association, and obtained upon them a loan of \$3,500, and gave a deed of trust upon real estate to secure the amount to be repaid in monthly installments. After making numerous payments upon this loan, they sold the property to Davis and Bumberger, who, with the knowledge and consent of the association, assumed to pay the amount unpaid upon the loan. Bumberger and Davis subsequently

sold the property to the appellant, V. L. Day, for the sum of \$8,000. Before making this purchase, appellant applied to Edward White, the collecting agent of the association, to ascertain the balance due upon the loan originally made to the Blairs; and her contention is that the balance was reported to her by White as \$2,384.50, which she assumed to pay the association, and paid to Bumberger and Davis the sum of \$3,615.15. Some question having arisen after the payments were made to Bumberger and Davis as to the amount due the building association in order to satisfy its loan, Edward White,—as he states, at the request of Mrs. Day,—on November 3, 1892, addressed a letter to the secretary of the association, in New York, and as a result of the correspondence thus begun the secretary, on November 12th of that year, wrote to Mrs. Day, informing her in detail upon the whole subject as to the sum necessary to be paid in order to satisfy the demands of the association with respect to the loan secured upon the real estate purchased by her. Mrs. Day continued to pay all dues and assessments to the association upon the stock originally issued to the Blairs, making in all 36 payments of \$56 each, aggregating the sum of \$2,016. At her request, in October, 1894, a statement was made to her by the association, showing that there was still a balance due, in order to satisfy the loan, of \$2,153.25. Appellant refused to make any further payment, and in July, 1895, filed a bill, in which she asked for relief upon several grounds, all of which were rejected by the hustings court, and a decree rendered directing the sale of her property unless she, or some one for her, should pay to the association the sum of \$2,680.84.

Appellant claims in this court that there is error in this decree, because she purchased the property after being informed by the agent of the association that the balance due to it was \$2,384.50. White was the collecting agent of the building and loan association. His duty was to receive and receipt for premiums and dues payable to the association by its members in the city of Roanoke. His agency was limited to those subjects, and he had no power to make the statement attributed to him, and the association is not bound by it, even assuming that he made it. But it is claimed that the association has accepted the benefit of the transaction into which the appellant was induced to enter by reason of the act of its agent, and is estopped to deny his authority. It is true that the act of an unauthorized agent may be adopted by the principal, or if, with knowledge of the facts, the principal accepts the benefit of such act, he will be estopped to deny the agent's authority. But ratification rests upon and implies knowledge on the part of the principal, and there is nothing to show that the association had any knowledge of the alleged act of its agent prior to the institution of this suit. It knew that appellant had purchased

the property upon which the payment of the debt due to it was secured; it knew that premiums and dues had been paid to it by appellant upon that stock; but there is no evidence that it had any knowledge of the representations which its agent is alleged to have made.

The whole matter, however, is set out in the bill, and to that bill the association filed its answer, in which it asks that the property upon which it has a lien may be sold, the proceeds of sale applied to the debt due it, and that for the balance, if any, it may have a personal decree against the appellant. It is this prayer for a personal decree that is chiefly relied upon by the appellant as binding the association to make good the representations alleged to have been made on its behalf by White. In support of this contention the case of *Owens v. Land Co.*, 95 Va. 560, 28 S. E. 950, is cited. That case illustrates the familiar principle that where a person seeks to take the benefit, by suit or otherwise, of a contract made on his behalf by an unauthorized agent, he must assume the burden with the benefit. *Owens* was sued by the *Boyd Land Company* to recover the amount of subscription to its stock. He pleaded certain false representations made to him as having induced him to subscribe. The association denied the agency of him by whom the representations were made, but, as it was seeking to enforce the contract thus procured, it was held to be bound by the representations which induced the defendant to enter into it. This is no such case. Appellant bought real estate bound by a lien to the appellee; and, assuming that its collecting agent made the statement attributed to him, and that it induced the appellant to make the purchase and assume the payment of the debt, yet the result for which appellant contends does not follow. Appellee is not bound by the unauthorized act of White, of which it was ignorant, and the prayer for a personal decree does not operate by way of estoppel or otherwise to prevent the appellee to deny the agency. There was no fraud on its part, and no injury results to the appellant by reason of the prayer which has not been granted. It is more than likely that the proceeds of sale will satisfy the demand of appellee, in which case the question will never arise. If, however, the proceeds of sale prove insufficient, and the company seeks to enforce the personal liability, it will then be time to inquire if the representation in fact was made, and, if so, whether the company was bound by it. The appellee has asked for relief which has not been granted, and to which it may be shown not to be entitled if it ever comes to be a living issue. If it had not asked for the personal decree, there would be no ground upon which to controvert its enforcement of the lien upon property bound by it, and it would be strange, indeed, if a rejected prayer should be found efficacious to defeat an otherwise incontestable right.

We are of opinion that there is no error in the decree complained of, and it is affirmed.

RIELY and CARDWELL, JJ., absent.

(96 Va. 503)

CHRISTIAN v. TAYLOR, Clerk.

(Supreme Court of Appeals of Virginia. Dec. 1, 1898.)

TAX SALES—REDEMPTION—STATUTES.

1. Act Feb. 24, 1898, amending and re-enacting Code, § 664, as amended by Act Feb. 28, 1890, providing how and by whom real estate purchased in the name of the auditor at tax sale may be redeemed, does not repeal so much of Act Feb. 11, 1898, amending and re-enacting section 666, as amended by Act March 5, 1894, providing how lands so purchased by the auditor and not redeemed should be sold, as provided for payment of costs of application to purchase and a penalty of \$5 to the applicant; said sections being part of a chapter of 41 sections, constituting a comprehensive system of law touching "the sale of delinquent lands," so that the amendment and re-enactment of each of said sections must be read in their regular order in place of the original sections.

2. Act Feb. 11, 1898, amending and re-enacting Code § 666, as amended by Act March 5, 1894, providing how lands purchased in the name of the auditor at tax sale and not redeemed should be sold, is not within Const. art. 10, § 11, providing how the vote shall be taken on passage of an act which "imposes, continues or revives any appropriation of public or trust money or property, or releases, discharges or commutes any claim or demand of the state."

Application by Thaddens Christian for mandamus to John R. Taylor, clerk, to allow redemption from tax sale. Denied.

Cardwell & Cardwell and Rutherford & Page, for petitioner.

HARRISON, J. Two grounds are alleged in support of this application for a mandamus. The first is that the act of February 24, 1898, repealed so much of the act of February 11, 1898, as provided for the payment of the costs of application, and the penalty of \$5 to the applicant; and the second is that the act of February 11, 1898, is unconstitutional and therefore void.

In February, 1898, the legislature passed two acts,—the first, on the 11th day of that month, amending and re-enacting section 666 of the Code, as amended by an act approved March 5, 1894, providing how lands purchased in the name of the auditor and not redeemed should be sold; and the second, on the 24th of said month, amending and re-enacting section 664 of the Code, as amended by an act approved February 28, 1890, providing how and by whom real estate so purchased may be redeemed. These two acts, passed by the same legislature, amended and re-enacted 2 sections of chapter 28 of the Code, which contains 41 sections, together constituting a comprehensive system of law touching "the sale of delinquent lands." The amendment and re-enactment of sections 664 and 666 must therefore be read in their regular order in the

room and stead of the original sections as found in the Code. When thus read, the legislative intent is clear, and there is no ground for the contention that the one repeals any part of the other, and no reason why both cannot stand together.

The second contention is that the act of February 11, 1898, was not passed in the house of delegates by a recorded vote, and is therefore void, for the reason that article 10, § 11, of the state constitution provides that "on the passage of every act which imposes, continues or revives any appropriation of public or trust money or property, or releases, discharges or commutes any claim or demand of the state, the vote shall be determined by ayes and noes, and the names of the persons voting for or against the same shall be entered on the journals of the respective houses, and a majority of all the members elected to each house shall be necessary to give it the force of law." This provision of the constitution was not intended to apply to the passage of an act like that under consideration. The act in question imposes, continues, or revives no appropriation of public or trust money, nor does it release, discharge, or commute any claim or demand of the state. It is a general law providing for the sale of lands the state has been compelled to buy as a means of realizing her delinquent taxes, and when said taxes are realized, by the contemplated sale, they are, like all other taxes, paid into the public treasury, and the constitutional provision which has been invoked is in no way invaded or affected thereby.

For these reasons the writ prayed for must be denied.

(96 Va. 506)

LEWIS v. COONS, Clerk.

(Supreme Court of Appeals of Virginia. Dec. 1, 1898.)

SALE FOR TAXES—APPLICATION TO BUY FROM AUDITOR.

1. The requirement of the statutes, that one applying to purchase land from the state bought by it for delinquent taxes, and not redeemed in two years, shall state in whose name the land stood at the date of the purchase by the state, and the person in whose name it stands when the application is filed, is sufficiently complied with by application to purchase land "standing in name of L. * * * purchased by the commonwealth * * * at the sale of delinquent lands * * * for * * * taxes, and at the date of the application standing in the name of L."

2. The requirement that one desiring to purchase land bought by the state for delinquent taxes shall file an application for the purchase "for the amount for which the sale to the commonwealth was made, together with such additional sums as would have accrued from taxes and levies, and interest, if such real estate had not been so purchased by the commonwealth," is not complied with by applicant's statement that he was prepared to pay "the amount so paid for its purchase, and all subsequent taxes, penalties, costs, and levies," as, having attempted to specify what he would pay, he should have specified interest.

Application by E. H. Lewis for mandamus to W. H. Coons, clerk, to allow redemption for a certain amount from tax sale. Granted.

J. L. Jeffries, for petitioner.

HARRISON, J. Two of the grounds urged in support of this application for a mandamus are held to be insufficient in the case of *Christian v. Taylor* (decided to-day) 31 S. E. 904, and therefore need not be considered further. In this case, however, the petitioner relies upon two additional grounds, which relate to the sufficiency of the application.

The first contention is that the application of Charles Baker to become the purchaser of the land in question does not state in whose name the land stood at the date of the sale to the commonwealth. The statute requires that the application shall state in whose name the land stood at the date of the purchase by the commonwealth, and also the person in whose name it stands when the application is filed. The language employed by the applicant is: "I hereby make application to purchase a tract of land standing in the name of E. H. Lewis, and being two lots, etc., purchased by the commonwealth of Virginia, or auditor of the state of Virginia, at the sale of delinquent lands, December, 1892, for 1891 taxes, and at the date of the application standing in the name of E. H. Lewis." This is a substantial compliance with the statute. When the whole paper is read together, the meaning is clear. Two statements are made. The last is plain,—that the land stood in the name of E. H. Lewis at the time the application was filed; and the first statement, read in connection with the last, can mean nothing else but that the land stood in the name of E. H. Lewis at the time of the purchase by the commonwealth.

It is further contended that the application is invalid because the price offered for the land is not the amount required by the statute. The language of the act on this point is as follows: "When real estate so purchased in the name of the auditor is not redeemed by the previous owner, his heirs or assigns, or some person having the right to charge the same with a debt, within two years from the date of such purchase, any person desiring to purchase it shall file an application with the clerk of the county or corporation court wherein such real estate is situated, for the purchase of such real estate, for the amount for which the sale to the commonwealth was made, together with such additional sums as would have accrued from taxes and levies and interest, if such real estate had not been so purchased by the commonwealth, with interest on the amount for which said sale was made at the rate of six per centum per annum from the day of sale, and on the additional sums

from the fifteenth day of December in the year in which the same would have accrued." Act Feb. 11, 1893.

The language of the application, after describing the property proposed to be purchased, is as follows: "And I am prepared to pay the amount so paid for its purchase, and all subsequent taxes, penalties, costs, and levies." This is a plain declaration by the applicant that he is prepared to pay the amount the commonwealth had paid for the land, together with all subsequent taxes, penalties, costs, and levies; and I am inclined to regard the language used broad enough to cover all demands of the state under and by virtue of the statute. The majority of the court is, however, of opinion that it was only necessary for the applicant to declare his readiness to pay the amount required by law, and that, inasmuch as he has undertaken to specify what he will pay, and has failed to say he is prepared to pay the interest on the state's demand, provided for by the statute, the application is therefore not a substantial compliance with the terms of the act, and the petitioner entitled to redeem, without paying the \$5 penalty, and the costs incident to filing the application.

For this reason the writ prayed for must issue.

RIELY, J., absent.

(45 W. Va. 708)

HARR v. SHAFFER et al.

(Supreme Court of Appeals of West Virginia.
Dec. 17, 1893.)

BILL TO REMOVE CLOUD—DISCOVERY—RELIEF IN EQUITY.

1. A party who files a bill to remove a cloud from his title to a tract of land, who shows on the face of his bill that he has no title to the land himself, and no right to interfere with others who appear to have good title thereto, is not entitled to be heard in a court of equity, and his bill will be dismissed.

2. Where a party seeks to be heard in a court of equity on the ground that he is entitled to a discovery, and his bill and exhibits show that he already has information he pretends to seek by his prayer for discovery, such prayer will not entitle him to relief in equity.

(Syllabus by the Court.)

Appeal from circuit court, Tucker county; J. H. Holt, Judge.

Bill by Seymour Z. Harr against Samuel J. Shaffer and others. From a decree dismissing the bill, plaintiff appeals. Affirmed.

L. Hansford, Dayton & Dayton, and Fred O. Blue, for appellant. O. Wood Dailey, J. P. Scott, and A. B. Parsons, for appellees.

ENGLISH, J. This was a suit in equity instituted in the circuit court of Tucker county by Seymour Z. Harr against Samuel J. Shaffer, A. B. Parsons, Joseph Harper, P. T. Shearer, James S. Whiting, John T. Vanmeter, Gottlieb Hutter, O. W. Dailey, trustee, and

others. The controversy seems to have arisen from the fact that the plaintiff, Harr, claims to be entitled to a certain tract of land of 312½ acres, which on October 2, 1889, was conveyed to him by Samuel H. Shaffer and wife. This tract of land appears in the record to have been variously described, sometimes as containing 298 acres, again 312½, and again 320, and to this some of the confusion in the cause may possibly be attributed. Did the plaintiff acquire any title to said land under the deed from S. H. Shaffer and wife? It appears from the record that this tract and several others in Tucker county belonged at one time to one Adam C. Harness, and that on the 19th of August, 1882, said Harness conveyed said tract, describing it as 320 acres, to William M. Randolph, trustee, to secure to one Joseph Harper the sum of \$400 evidenced by a note payable one year after date. At the October rules, 1883, Lorenzo S. Anvil brought a suit in equity against Adam C. Harness and others to subject the real estate of said Harness to the satisfaction of certain judgments and liens thereon, but said Harper was not made a party thereto, neither were his sureties. A copy of the record of the proceedings in said suit is exhibited in his cause, from which it appears that the cause was referred to a commissioner who was directed to report the real estate owned by defendant A. C. Harness, the state and condition of the title thereto, and the annual rental value thereof, the liens thereon, their character, amounts, and priorities, and to whom owing. Among the liens reported was a trust lien against the 298-acre tract, balance of the 400-acre tract, due to Joseph Harper for principal and interest, \$441.60. (This 298-acre tract seems to be the same elsewhere described as 312½ acres.) Such further proceedings were had in said cause that a decree was rendered therein directing the sale of certain lands reported as owned by said A. C. Harness, and, the commissioner appointed to make said sale having reported his sale, the same was confirmed, and he was directed to collect the proceeds and disburse same according to the priorities ascertained by said commissioner and fixed by a former decree, except the deed of trust lien of \$441.60 due said Joseph Harper, which was a specific lien on the 298-acre tract mentioned in said commissioner's report, which was directed not to be paid out of the proceeds of said sale; and it was directed that said Harper was not to be prejudiced or prevented by said decree from enforcing his said trust lien against said land by any proper proceedings instituted by him for that purpose. It further appears that at the sale of said lands made by special commissioner said Harness became the purchaser, and the defendant Shaffer became his surety; that, Harness failing to comply with the terms of sale, the commissioner obtained a decree to resell them for the purchase money, and the land was again offered, and said Shaffer became the purchaser; and by ref-

erence to the deed from A. B. Parsons, special commissioner, to Shaffer, it will be seen that the 298-acre tract—described in the commissioner's report as 400 acres, less 102 acres sold to Leatherman—was not conveyed to Shaffer, and it should not have been, for the reason that the decree confirming his report of sale to Harness expressly provided that said Harper was not to be prejudiced or prevented from enforcing his trust lien against said 298-acre tract, and when Harness failed to comply, and Shaffer became the purchaser, he took the land that Harness had formerly purchased, and in no manner prejudiced or interfered with the lien of Harper upon said 298 acres, and Commissioner Parsons recognized this fact by not conveying the tract to him. On the 6th of March, 1891, it appears that William M. Randolph, the trustee named in the deed of trust executed by Adam C. Harness on said 312½-acre tract, which is described as 298 acres, to secure Joseph Harper his note of \$400, ceased to act. C. W. Dalley was appointed trustee in his room and stead by the circuit court of said county, and, having subsequently advertised said tract as trustee, sold it to John Chipley and P. T. Shearer, and conveyed same to them by his deed as such trustee dated May 30, 1893. The plaintiff, in his bill filed in this case to remove said conveyance made by C. W. Dalley to Chipley and Shearer as a cloud upon his title, alleges that the land directed to be sold by the decree of September, 1884, was not embraced in the trust deed in favor of Harper to Randolph, and a reference to that decree shows that the trust debt of Harper for \$441.60 was adjudicated as a lien on 298 acres, the residue of said 400 acres, which is conceded to be the 312½-acre tract, and the decree in the case of Anvil v. Harness, which confirmed the sale of the Harness lands, expressly provided that the trust lien due to Harper, and a specific lien on said 298-acre tract mentioned in the report of Commissioner Adams, should not be paid by Commissioner Parsons out of the proceeds of the sale of said lands, and the right of enforcing said trust lien against said 298-acre tract was expressly reserved to said Harper, which right, as we have seen, he subsequently exercised by requiring C. W. Dalley, who was substituted as trustee in the room and stead of William M. Randolph, deceased, to advertise and sell said 298 or 312½ acre tract, at which sale said Chipley and Shearer became the purchaser and acquired the title thereof on May 30, 1893. It appears from the bill and exhibits that said Harness, by deed bearing date of September 4, 1885, conveyed said 312½-acre tract with others to A. B. Parsons, trustee, to secure and indemnify said S. H. Shaffer as his surety on several notes, but this trust was long subsequent to the trust executed thereon to William M. Randolph, trustee, and for that reason said Harness could only convey the equity of redemption, and it does not appear that any sale was ever made under said trust deed.

Now, while it is true the plaintiff's bill alleges that on the 2d of October, 1889, S. H. Shaffer and wife conveyed this tract of 312½ acres of land to the plaintiff, yet it is clear that said Shaffer never acquired any title to said tract; that before he became interested in any manner in said land the title of said 312½-acre tract had been conveyed by A. C. Harness to W. M. Randolph, trustee, and, as we have shown, was sold by his successor, O. W. Dalley, trustee, to Chipley and Shearer; and if plaintiff took possession, as is alleged, he did so in the absence of any title. As to the title of Shaffer to said 312½-acre tract, from whom plaintiff claims to have derived his title by the deed of October 2, 1889, said Shaffer in his answer to plaintiff's bill claims that he derived title thereto by purchase from A. B. Parsons, trustee; but, as we have seen, Harness did not convey said tract to Parsons, trustee, until September 4, 1885, at which time the legal title was in W. M. Randolph, and he only could have acquired the equity of redemption in said tract, and that was extinguished by the sale under said first trust deed by C. W. Dalley, who was substituted for Randolph, so that it is clear that said S. H. Shaffer had no title to the land in controversy and passed none to the plaintiff by his deed of October 2, 1889. The plaintiff's bill was demurred to by S. H. Shaffer, C. W. Dalley, J. J. Chipley, Gottlieb Hutter, and Benjamin Dalley. These parties, together with A. B. Parsons, answered the plaintiff's bill, putting in issue its allegations. Depositions were taken, and on the 17th of March, 1896, the cause was heard and the bill dismissed, and the plaintiff appealed.

The only error assigned was that the court erred in dismissing the cause. Did the court commit an error in rendering this decree? The plaintiff in his bill appears to claim that Shaffer, the party under whom he claims, had no title, and alleges that the sale made by C. W. Dalley, trustee, to Shearer and Chipley of said 312½ acres was made without his consent, and by the concurrence and connivance of these defendants to defraud him. He, however, in no manner shows how he has been defrauded by them, or anything they have done that they had not a perfect right to do. While in his bill he alleges that the 312½-acre tract, as he is informed and believes, was not within the bounds and scope of said Shaffer's purchase of the Harness lands, and has never been owned by him,—which allegation, if true, would show that Shaffer by his deed conferred no title on him,—yet he in an indefinite way claims that he is entitled to have his rights defined, and to be extricated from the confusion and lack of identity of the lands purchased by him. In other words, he asks that the cloud occasioned by the trust sale and conveyance made by C. W. Dalley may be removed from his 312½-acre tract, and this, so far as I can discover, is relied on to entitle him to relief in a court of equity. It is true he desires to have the title derived

from Shaffer by him settled and quieted, but on the face of his bill and exhibits he shows that he acquired no title from that source. He resists the title and pretension contended for by the defendants Harper, Shearer, Whiting, Vanmeter, Hutter, and Dalley, trustee, and calls for discovery thereto, and the establishment of any claim they have to said land, but his bill and exhibits show that he has no title himself and is entitled to no discovery. He also prays an injunction to restrain the recording of, or attempting by process of law to acquire, the right or title of any of them under any title by or through the said Dalley, trustee, but there is no affidavit to support the bill. Plaintiff also prays for a discovery as to the manner in which the Harper claim attached to and affected said 312½ acres, all of which is fully shown in the proceedings had in the chancery cause of *Anvil v. Harness et al.*, the record of which case is made an exhibit with the plaintiff's bill; so that, in my opinion, the circuit court committed no error in dismissing the plaintiff's bill, if the demurrers alone were relied on; but when we look to the final decree the cause appears to have been heard upon its merits, upon full denial of the allegations of the bill in the answers, and upon the proofs taken in the cause. Looking at the entire record, my opinion is that the court committed no error in dismissing the bill. The decree complained of is therefore affirmed.

(45 W. Va. 183)

BENT v. LIPSCOMB et al.(Supreme Court of Appeals of West Virginia.
Nov. 16, 1898.)**ATTORNEY'S LIEN—ASSIGNMENT OF JUDGMENT.**

1. An attorney at law has a lien upon a judgment recovered by him for his client for his compensation, which lien is good against an assignee of the judgment, though he had no notice of the lien.

2. A writing given by a client to his attorney in a suit authorizing the attorney to retain out of the judgment, when recovered, a part for his compensation, is an assignment of such part. (Syllabus by the Court.)

Error to circuit court, Randolph county; Joseph T. Hoke, Judge.

Action by James A. Bent against Lipscomb & Lipscomb. Judgment for defendants, and plaintiff brings error. Reversed.

Samuel V. Woods, for plaintiff in error. P. Lipscomb, in pro. per.

BRANNON, P. Action by Bent against Lipscomb & Lipscomb before a justice, appealed to the circuit court, where, upon demurrer to evidence, judgment was given for defendants. One Kessell, in an action against Hinkle, recovered a judgment. Bent was one of his attorneys. The common law gave him a lien on that judgment for his compensation as attorney, and he had a writing from Kessell giving him right to "retain, out of any

recovery of money had by a verdict and judgment, one-fourth value of such verdict and judgment in said suit in money, as compensation for his (said Bent's) services as one of my counsel in said case." Lipscomb & Lipscomb were associate counsel with Bent in the case, and took from Kessell an assignment of the judgment, and collected it. Bent brought this action against them to recover his fourth of the judgment. I think the record shows an assignment to the firm, not to one of them. At any rate, the firm collected the money. Counsel for Lipscomb & Lipscomb says that Bent had no lien. Why not? He had by common law and the writing. *Fowler v. Lewis' Adm'r*, 36 W. Va. 112, 14 S. E. 447. Notice of such lien is necessary as to debtor, but not to an assignee of the judgment. *Renick v. Ludington*, 16 W. Va. 378; 3 Am. & Eng. Enc. Law (2d Ed.) 472. This would show right to judgment under the head of assumpsit for money had and received by the defendants to the use of plaintiff,—money of his received by them. The evidence shows that defendants had notice of Bent's right, and took the assignment, as one of them declared, with set purpose to keep the money from going to Bent's hands, which shows they had notice of his right, if that were material, as also does other evidence show it, and makes the case all the stronger against them. They said they took the assignment to keep the money from going to Bent's hands, as they had fees. So had Bent. They were justified in taking the assignment; but law and justice to Bent make them take the assignment subject to his rights. They afterwards paid half the judgment to Kessell. This seems to show that they took the assignment to defeat Bent. His lien forbade this payment to Kessell. Moreover, that paper from Kessell to Bent was an assignment. It would not destroy, but confirm, his common law lien. *Bentley v. Insurance Co.*, 40 W. Va. 730, 23 S. E. 584; 2 Am. & Eng. Enc. Law, 1055. Defendants had full notice of Bent's right before payment to Kessell, and were warned not to pay him. They could not pay him Bent's money. As an assignment, it is good against them; and, even if there were no lien, this assignment would sustain the case.

Counsel argues that the court had no jurisdiction, as Kessell was not, but should have been, a party to this suit, and that the constitution says that he cannot be deprived of property without due process of law. Now, it is not with defendants to defend Kessell's rights. The question in this case was, did defendants collect and refuse to pay money belonging to Bent? Between these parties, that was the sole question,—assumpsit for money had and received. If defendants wished to vindicate Kessell's right, why did they not hold the money, and, when sued, claim to be stakeholders, and bring in Kessell by interpleader, and at once protect Kessell and themselves, and thus have justice done be-

tween all parties? Or, even after payment to Kessell, why not show by proof that for some reason, not even hinted at by the record, Bent had no claim to this money, instead of merely demurring to Bent's evidence, which clearly shows his lien? Kessell could not be a party to this suit. The case is plainly with the plaintiff, and we reverse the judgment, and enter judgment for him.

(45 W. Va. 245)

ALEXANDER v. MARLING.(Supreme Court of Appeals of West Virginia.
Nov. 19, 1898.)**VERDICT—INSTRUCTION.**

An instruction in the following language: "If the jury believe from the evidence that the plaintiff is entitled to recover a greater sum than \$280, then their verdict should be: (1) We, the jury, find for the plaintiff, and assess his damages at \$——. Otherwise, their verdict should be: (2) We, the jury, find for the defendant,"—must be construed to mean that the verdict of the jury should be for such greater sum, inclusive of the sum of \$280, and not for the excess of such greater sum after deducting therefrom such sum of \$280.

(Syllabus by the Court.)

Error to circuit court, Ohio county; Joseph R. Paull, Judge.

Action by E. W. Alexander against John Marling. Judgment for plaintiff. Defendant brings error. Reversed.

Frank W. Nesbitt, for plaintiff in error. T. M. Garvin, for defendant in error.

DENT, J. E. W. Alexander instituted an action of assumpsit in the circuit court of Ohio county against John Marling, claiming the sum of \$967, subject to a credit of \$140. On the 9th day of September, 1896, the defendant filed a special plea tendering \$140 in full satisfaction of plaintiff's demand, and also the general plea of non assumpsit. The plaintiff replied to the general plea, but made no reply as to the special plea, except as shown by the order of the court as follows, to wit: "And the plaintiff, by his attorney, thereupon refused to accept the said sum of \$140 paid into court as aforesaid, and as to the whole of the damages alleged in the said declaration against the said defendant prays judgment whether he ought to have and maintain, and of this he puts himself upon the country." This issue was submitted to a jury, which found for the plaintiff the sum of \$503. The defendant moved to set aside the verdict, but the court overruled his motion, and entered a judgment for the amount found by the jury; and further ordered "that the sum of \$140 heretofore paid into court be paid to the plaintiff or his attorney, such sum not constituting a part of the judgment aforesaid." The defendant, after motion made in the circuit court, now complains that such court erred in not crediting the sum of \$140 on the judgment. When the tender was made, the

plaintiff did not accept the sum in part satisfaction and reply to the plea generally, but, as the order shows, refused to accept it unconditionally. See sections 2 and 3, c. 126, Code. Therefore the money, although in the control of the court, still remained the defendant's. On the trial of the issue the defendant asked and was allowed the following instruction: "The court instructs the jury that if you believe from the evidence that \$280 is sufficient compensation for the medical services rendered, and for the board and lodging furnished by the plaintiff to the defendant, then you must find for the defendant." And the court then gave the following instruction on its own motion: "If the jury believe from the evidence that the plaintiff is entitled to recover a greater sum than \$280, then their verdict should be: (1) We, the jury, find for the plaintiff, and assess his damages at \$——. Otherwise, their verdict should be: (2) We, the jury, find for the defendant." The defendant, in support of his motion, filed the affidavit of the full jury to the effect that this instruction was understood by them to mean that in making up their verdict they should find for such "greater sum than \$280," inclusive thereof. Standing by itself, this is the clear logical and legal meaning of this instruction, although the judge may have had a different intention in his mind. Such intention he might have easily expressed in unequivocal language. In considering the instruction, the jury could not arrive at any other conclusion than that if they found the plaintiff was entitled to a greater sum than \$280 they should return a verdict for such greater sum, and not for the excess of such greater sum after crediting thereon the \$280. It is a general rule that testimony of jurors will not be heard to impeach their verdict because they misunderstood the instruction of the court. *Thomp. Trials*, § 2405. But in this case the attempt is not made to impeach their verdict, but to show that such verdict is in accord with the plain and literal meaning of the instruction given. Such being the object, their testimony is wholly unnecessary, as the instruction must be construed by itself. The defendant's money was not applied to the plaintiff's debt, nor accepted by him until after the verdict was rendered, and therefore the burden is on the plaintiff to show that the verdict did not include the \$140, for when the court ordered the \$140 to be paid over to him independent of its judgment on the verdict it virtually rendered a judgment for this amount in his favor, in addition to that already given. The only thing offered to sustain such pretension on his part is the instruction of the court referred to above. This, in its plain, literal meaning, not only does not do so, but sustains the contention of the defendant. For this reason the judgment of the circuit court, in so far as it refused credit to the defendant for said sum of \$140, is reversed.

(45 W. Va. 297)

WILLIAMS et al. v. MAXWELL et al.
(Supreme Court of Appeals of West Virginia.
Nov. 23, 1898.)

FRAUD — LACHES — JUDICIAL SALES — ATTORNEY AND CLIENT.

1. To set aside a sale for fraud and conspiracy, suit must be brought within a reasonable time after the discovery of such fraud.

2. One who delays three years after knowledge of all the facts attending a sale before bringing such suit is guilty of such laches as will debar him from relief.

3. An attorney for a client whose property is sold at judicial sale to satisfy liens and charges against it, who notified such client prior thereto of the time and terms of sale, and of the result thereof soon after the sale and confirmation, and no objection was made thereto by the client, the relation of attorney ceased between the parties, as to the land itself, from the confirmation of the sale, and only continued so far as such attorney might have to do with the proceeds of the sale.

(Syllabus by the Court.)

Appeal from circuit court, Tucker county, Joseph T. Hoke, Judge.

Bill by George C. Williams and others against W. B. Maxwell and others. A decree was rendered, from which defendant Maxwell appeals. Reversed.

C. Wood Dailey, for appellant. F. M. Reynolds and P. J. Crogan, for appellees.

McWHORTER, J. In 1887 a suit was pending in the circuit court of Tucker county in the name of the administrator of Mary C. Cameron against George C. Williams and others, to subject the estate, consisting of 1,454 acres of land, to the payment of certain debts against said estate. Mortimer G. Williams, Lucy V. Hanson, Horace D. Williams, W. H. Williams, Sallie L. Reynolds, and George C. Williams, heirs at law of said Mary C. Cameron, employed W. B. Maxwell as attorney to attend to their interests in said cause as against the claim of Gertrude Hocker; and the first five gave their joint note to him, dated June 8, 1887, for \$42, payable six months after date, and George C. Williams gave his individual note to said Maxwell for \$10, dated said June 8, 1887, and payable six months after date. The cause was referred to a commissioner to ascertain the debts against the estate, and report made, and the land decreed to be sold, and A. B. Parsons and J. P. Scott were appointed special commissioners to make the sale. The land was advertised to be sold on the 3d day of September, 1888. The record shows that it was put up on that day, and, not a sufficient bid being received, sale was postponed until the following day, September 4th, when it was sold at public auction to L. L. McCrum for the sum of \$3,225. McCrum paid the cash payment, amounting to \$187 (being sufficient to pay the costs of suit and charges of sale), and gave his three several notes, at 6, 12, and 18 months, with W. B. Maxwell as security, for the deferred payments. In August, 1887, several of the other heirs sent notes to said

Maxwell against the estate for collection, which were provided for in the decree of sale. At February rules, 1892, George C. Williams, Mortimer G. Williams, Sallie L. Reynolds and T. S. Reynolds, her husband, W. H. Williams, Horace D. Williams, Lucy V. Hanson and James A. Hanson, her husband, and Martin V. Miller, administrator of Mary C. Cameron, deceased, filed their bill in the circuit court of Tucker county against W. B. Maxwell, L. L. McCrum, J. W. Nihiser, James B. Reese, D. R. Leatherman, Cyrus H. Maxwell, and Albert Thompson, alleging that they were the heirs at law and administrator of Mary C. Cameron, daughter of George C. Harness, deceased; that in a partition suit among the heirs of said Harness, this parcel of 1,454 acres of land was assigned to Mrs. Cameron (who, after the death of her husband, John J. Williams, father of the plaintiffs, intermarried with Dr. Cameron, who died leaving no children by her), and alleging the pendency of said suit, in which said land was sold by the administrator aforesaid; that W. B. Maxwell and purchaser, McCrum, entered into a fraudulent scheme and combination, whereby McCrum was to become the nominal purchaser of the land at the lowest possible price, and that Maxwell was to have a half, a controlling, or an entire interest in the property, and was to pay the purchase price, or a large part of it; that bidders were deterred from bidding by McCrum, and also by Maxwell, informing them that it was needless for them to bid, that McCrum was bidding solely for the heirs and proposed to buy it for them, and that, in consequence of such representations, outside bidding ceased, and the land was knocked off to McCrum at less than one-fifth its value; that Maxwell became McCrum's security on the purchase notes, and that McCrum has since the sale stated that he and Maxwell were partners; that decree was entered in said cause on the 9th day of September, 1889, confirming a report made therein by Commissioner J. J. Adams, ascertaining the debts against the estate and their priorities, including a claim of purchaser, McCrum, for \$334.94 taxes, set up by petition filed by appellant, Maxwell, which accrued before the sale, and adjudicating the rights of the parties therein, and showing that after payment of all the debts there remained the sum of \$122.37 to be paid to the heirs, and which was by said decree required to be paid to the parties entitled thereto; that, within three days after McCrum obtained his deed for the land, he conveyed same to defendants Nihiser, Reese, and Leatherman, and that in such conveyance the said W. B. Maxwell and his brother C. H. Maxwell joined in the deed of conveyance, showing that the Maxwells had two-thirds interest in the property; that McCrum conveyed his entire interest a short time afterwards, which was done in part consideration for the Cameron lands in the A. B. Parsons farm, to said Maxwell, "thus rounding out and fully consummating this fraudulent

transaction," as alleged in the bill; that said heirs of Cameron employed said Maxwell to attend to their interests in the said suit; that they were all nonresidents of the state of West Virginia, except George C. Williams, who was still a resident of Cabell county, this state; that J. A. Hanson and H. D. Williams were the administrators of their mother's estate in Florida, where she died; that their said attorney directed a demurrer to be entered at rules to the bills before the same were matured, and, when said demurrers were overruled, he waived the right to answer on the part of defendants; that when said 1,454 acres of land were sold it was worth from \$15,000 to \$25,000; that when the day of sale came there were bidders present who would have given from \$10,000 to \$15,000 for the land, and were there for the purpose of bidding, but were prevented from bidding for the reasons before given, and the property was knocked off to McCrum at the price of \$3,225, less than one-fifth its value, at the lowest estimation; that plaintiffs were kept in profound ignorance of said sale until long afterwards; that defendant Maxwell had receipted to the commissioners for moneys due certain of the plaintiff heirs ascertained by the decree, as well as the balance due the estate of \$123.37, to be distributed among them, which he had not paid over to the parties entitled to it; that McCrum and Maxwell sold the property to Nihiser and others for a consideration of \$9,000, as expressed in the deed, the A. B. Parsons farm being estimated at \$7,000, and notes given for the \$2,000; that in August, 1891, said Nihiser and others sold the timber on said land to Albert Thompson, together with another tract of about the same size, for \$16,000; that plaintiffs were uninformed whether or not defendants Nihiser and others had knowledge of the fraudulent and corrupt methods whereby the said McCrum and the Maxwells acquired title to said land, but that they, as well as Thompson, were proper parties to the proceeding, and plaintiffs entitled to a full and complete discovery as to the information they had, and, if it should turn out that they had knowledge and information of the fraud, then the plaintiffs would be entitled to cancellation of the deeds, and to have the land reconveyed to them by defendants, together with an accounting on their part of all timber removed therefrom; that, as to defendant C. H. Maxwell, his knowledge and information, as well as his participation in said fraud, was full and complete, and, if it should turn out that Nihiser and others were innocent purchasers from the Maxwells and McCrum, then the plaintiffs were entitled to recover, by proper decree, full value of said lands from said McCrum and the Maxwells, and plaintiffs would be entitled to conveyance to them of the A. B. Parsons farm as part payment of the amount found due them; and praying for general relief, according to the allegations of their bill.

The defendants Reese, Nihiser, and Leatherman, and the defendants W. B. and C. H. Maxwell, and the defendant A. Thompson, filed their demurrers to the plaintiffs' bill, all of which demurrers were overruled. Defendants Nihiser, Leatherman, and Reese filed their answer, denying all fraud or any knowledge of fraud. W. B. Maxwell filed his answer, containing also a demurrer to the bill, denying all participation in the purchase of the land, and averring that McCrum was a bona fide purchaser, and denying all allegations of the bill setting up fraud against him, either on his part, or on the part of McCrum or C. H. Maxwell; averring that he was employed by plaintiffs for \$50 to defend the estate against the claim of Gertrude V. Hocker, which he reduced from \$1,409.98, ascertained to be due her by the commissioner, to the sum of \$360.47; that afterwards the plaintiffs, who were creditors of the estate, sent their claims to him for collection; denying that he tried to prevent the land bringing all it would bring, and alleging that all his actions were in good faith, and in the interest of his clients, the plaintiffs; that he never owned any interest in said lands until more than a year after they were purchased by McCrum; that he notified his clients through Hanson, the only one with whom he had communication, of the result of the sale, but failed to hear anything from them; that the sale was a fair one, and brought a fair price at the time. The defendant C. H. Maxwell filed his answer, denying all fraud on his part or that of the defendants, and all knowledge of fraud, and averring that the sale was fair and made in good faith; that while the land might have been sold for more at private sale, yet the price realized for it was, in respondent's opinion, fully up to the average price of lands sold at judicial sale; that he had no interest in the land until he bought it, more than a year after the sale to McCrum. Defendant McCrum filed his answer, denying all allegations of fraud, and alleging that the sale was fair; that he bought it in good faith; that if the defendants had come on in a reasonable time, by paying a proportion of the money he had paid, and assuming that which was to become due, he would have given them an interest in the property; that neither of the Maxwells had any interest in the purchase, directly or indirectly, until they purchased an interest in it from him more than a year after his purchase. Defendant Thompson also filed his answer, denying all allegations of the bill charging fraud, or knowledge of fraud, upon him.

Depositions were taken and filed for plaintiffs and defendants. On the 20th day of June, 1894, the cause came on to be heard upon the bill, answers, and depositions, and the original record in the cause of Cameron's administrator against Williams and others, and upon the petitions and records of L. L. McCrum, Thomas Perry, and Lucy V. L.

Hanson, which were heard together; whereupon the court was of opinion, upon the pleadings and proofs, that the plaintiffs were entitled to the relief prayed for in their bill, and that the judicial sale made by Commissioners Parsons and Scott in September, 1888, in said original cause, and the deed of the commissioners to McCrum for said land, should be set aside and avoided in favor of plaintiffs, as against defendants McCrum, W. B. Maxwell, and C. H. Maxwell; that the defendants Reese, Nihiser, and Leatherman were innocent purchasers of said land, without notice of fraudulent acts of defendants McCrum and Maxwells, and that they were entitled to said land, and that the sale of the timber sold to defendant Thompson could not be affected or impaired, but that plaintiffs were entitled to have said McCrum and W. B. Maxwell account to them for the full price of the land they sold to Reese, Nihiser, and Leatherman, with its interest; and the cause was referred to Commissioner W. J. Conley to ascertain the purchase price paid by Reese and others to the defendants McCrum and Maxwells, with its interest, and the total price paid by McCrum to the commissioners for said land, with its interest, and the difference between the two sums, and to ascertain the amount of money paid to W. B. Maxwell by the said commissioner belonging to plaintiffs, and received by him as their attorney, after allowing him for all proper disbursements made by him, and stating the amount due to each plaintiff, and in what manner due, whether as heir or creditor, and to ascertain and report the value of the Parsons farm of 320 acres conveyed by Reese and others to McCrum and Maxwell and his brother, and its annual rental value. Commissioner Conley filed his report, to which various exceptions were taken by both plaintiffs and defendants.

The cause came on to be heard on the 21st day of June, 1895, upon all the papers, orders, and decrees, and upon said report and exceptions thereto, and the court held that plaintiffs, by reason of their laches in instituting the suit, were not entitled to charge against and recover, from the defendants C. H. Maxwell and the administrator of L. L. McCrum, anything by reason of the matters set up in their bill, but that, by reason of the relationship of attorney and client that existed between them and the defendant W. B. Maxwell, they were entitled to recover from him as therein set forth, and ascertained that there is due from him, besides the moneys which he collected in the cause for the heirs against the estate, aggregating the sum of \$742.72 due to certain of the plaintiffs as in said decree specified as creditors of the estate, and \$123.37, the surplus to be distributed among all the heirs as provided by the decree of September, 1889, the aggregate sum of \$4,036.44, including interest to the date of decree, for which aggregate the plaintiff heirs jointly were entitled

to a personal decree against said W. B. Maxwell; from which decree the defendant W. B. Maxwell appealed to this court, assigning several errors.

It is insisted by appellant and his co-defendants L. L. McCrum and C. H. Maxwell that the bill is multifarious, and should have been dismissed on demurrer for that reason, and it is contended by defendant McCrum that he is brought in as a defendant upon a record with a large portion of which he has had no connection whatever. The matters at issue in this suit all grew out of the suit of Cameron's administrator against Williams and others. The bill seeks—First, to set aside the sale of the 1,454 acres of land to McCrum on the ground of conspiracy and fraud, and to have the land reconveyed to them, or, in case it had passed into innocent hands without notice of fraud, that the true value be ascertained, and a decree rendered therefor against the Maxwells and McCrum, and, if plaintiffs so elect, that the A. B. Parsons farm, taken by the purchaser of the 1,454 acres in part payment of the price of the timber sold from said 1,454 acres, be conveyed to plaintiffs as part payment of the amount due them from the defendants, to be ascertained in the cause; second, to require a strict accounting for, and to recover from the defendant W. B. Maxwell, certain moneys collected by him for certain of the plaintiffs, as their attorney, from the proceeds of said sale in said cause. As to these claims the plaintiffs had adequate remedy at law, and the demurrer should have been sustained as to that part of the bill. *Gay v. Skeen*, 36 W. Va. 582, 15 S. E. 64 (Syl. point 2); *Morgan v. Morgan*, 42 W. Va. 542, 28 S. E. 294 (Syl. point 1).

Defendants also allege as grounds of demurrer that plaintiffs in their bill allege no sufficient excuse for their delay in instituting this suit, having delayed it between three and four years, and until the rights of third parties had intervened; because plaintiffs did not bring or offer to bring into court, or even pay as the court might direct, the money paid out by McCrum, the purchaser of the land from the commissioners, nor the money alleged in the bill to have been expended by the defendants Maxwell; and because plaintiffs should have proceeded by bill of review, or by petition for rehearing in the original cause in which said land was sold, to have the sale set aside. The authorities agree that it is utterly impossible to lay down any rule or abstract propositions as to what constitutes multifariousness, which can be made universally applicable. 1 Barb. Ch. Prac. 256. In *Dunn v. Dunn*, 26 Grat. 291, 296, it is held that a bill is demurrable for multifariousness; and cites *Story, Eq. Pl. § 271*: "A bill should not be what is technically termed 'multifarious'; for, if it is so, it is demurrable, and may be dismissed by the court of its own accord, even if it is not objected to by the defendant. By multifariousness in a bill is

meant the improperly joining in one bill distinct and independent matters, and thereby confounding them; as, for example, the uniting in one bill of several matters perfectly distinct and unconnected against one defendant, or the demand of several matters of a distinct and independent nature against several defendants in the same bill." Note to the same section: "Multifariousness must be objected to by the defendant on demurrer, and cannot be objected to by him at the hearing. But the court may, however, take the objection at the hearing sua sponte; for the court is not bound to allow a bill of such a nature, although the parties may not take the objection in season."

The principal allegation of the bill, giving excuse for the delay in bringing this suit is in the following words (referring to the sale of the 1,454 acres of land sought to be set aside): "Of this sale these plaintiff heirs were kept in profound ignorance until long after, and plaintiff Miller, having been appointed as administrator solely on account of his official position as sheriff, had never paid any attention whatever in the matter." While this allegation is hardly as definite as it should be, perhaps, and fails to show the length of time they were so kept in ignorance of such sale, or to show what efforts, if any, they made to ascertain the facts, yet it makes very definite charges of fraud and conspiracy to wrong the plaintiffs, and is deemed sufficient to warrant an investigation. More than three years had elapsed after the sale before this suit was brought, and yet it is admitted by plaintiff M. G. Williams, in his testimony, that he knew of the sale from McCrum himself a few days after the sale, that McCrum had bought the land, and that the sale had been confirmed, and that he had a talk with appellant about it. This sale was made and confirmed in September, 1883. This suit was instituted in February, 1892. The record shows that Hanson, the husband of one of the heirs, and the only one with whom appellant was in correspondence, and who had employed appellant as attorney in their behalf, was informed of the time the sale was to take place; that he informed appellant that he would be present at the sale; that he could not get the balance of the heirs to do anything; and that he would have to buy it himself. He failed to attend the sale, and was informed by appellant immediately after the sale of the result of the sale, and that if he would come on and take the land at what it cost the purchaser, repaying to him the purchase money which he had paid out, and securing the balance thereafter to become due, he could do so. The property was not purchased by McCrum for plaintiffs. He was not authorized to bid for them, nor was any person. He could not have required them to take it off his hands. Although the plaintiffs knew immediately after the sale all about it, the price it brought, and the offer to them to take the property

on the terms of the sale, yet they virtually repudiated the trust, if anything was created in their favor, and with full knowledge of the sale and the price the property brought, and the confirmation of the sale, stood by more than three years after the confirmation without taking any steps to correct the wrong of which they complain.

The plaintiff M. G. Williams in his testimony says that a few days after the sale he saw the purchaser, McCrum, who said to him, "You owe me a set-up for buying your Cameron land;" that he asked McCrum if the sale had been confirmed, and he said it had; and he also states that he had an interview with appellant concerning the sale some time after the sale of the land, and charged him in said interview with fraud in relation to the sale. So it appears that plaintiffs had notice of the fraud, if any there was, immediately after the sale. In *Whittaker v. Improvement Co.*, 34 W. Va. 217, 12 S. E. 507 (Syl. point 2): "He who elects to set aside his contract for fraud must bring suit for the purpose, without unreasonable delay, after discovery of the fraud, unless there be good reason to excuse it; otherwise his delay will deny him relief." In this 34 W. Va. and 12 S. E. case, the question of laches is well discussed. In *Newcomb v. Brooks*, 16 W. Va. 32, it is held that a suit to avoid a sale for fraud must be brought in a reasonable time, though the property remains in the hands of the fiduciary. In *Strong v. Strong*, 102 N. Y. 69, 5 N. E. 799, it is held that the right to rescind a contract for fraud must be exercised immediately upon discovery thereof, and any delay in doing so, or the continued use and occupation of the property received under the contract, will be deemed an election to confirm it. Also, in *Schiffer v. Dietz*, 83 N. Y. 300: A vendee entitled to rescind a contract for fraud must act promptly on discovery of the fraud, and restore, or offer to restore, the property. By dealing with it as owner after such discovery, deprives him of this remedy. In *Hunt v. Blanton*, 89 Ind. 38, an offer to rescind a purchase of land for fraud, made five months after the conveyance, without any reason for the delay, comes too late. Mr. Justice Lawrence, in delivering the opinion of the court in *Cox v. Montgomery*, 36 Ill. 396, says: "In a country where the values of real estate change as rapidly as in Illinois, it would be clearly unwise to permit a purchaser of land to retain it for nearly 18 months after the discovery of fraud before filing his bill to rescind. This is an unreasonable delay, which a court of chancery cannot tolerate." This case was reversed and remanded, with leave to appellee to explain, if he could, the delay in the institution of his suit. In *Sleveking v. Litzler*, 81 Ind. 13: "The party claiming to rescind a contract of sale on account of fraud must act at once upon discovery of the fraud, and he cannot postpone discovery by neglect to

use ordinary diligence. This rule must be strictly enforced, where the law affords a complete remedy in damages." In the case at bar there is no evidence to show that there was any effort whatever on the part of plaintiffs to inquire into the matter of fraud, if any there was, but it is shown that they knew of the whole transaction within a few days after the sale; but it seems that there was a great increase in the value of property of that character, and in that location, in the course of two or three years after the judicial sale,—a tramway having been projected to run into the neighborhood of the land, which added immensely to its value. Touching this same question, in *Grymes v. Sanders*, 93 U. S. 55, the syllabus is as follows: "(2) Mistake, to be available in equity, must not have arisen from negligence where the means of knowledge were easily accessible. The party complaining must have exercised, at least, the degree of diligence 'which may be fairly expected from a reasonable person.' (3) Where a party desires to rescind, upon the ground of mistake or fraud, he must, upon the discovery of the facts, at once announce his purpose, and adhere to it. If he be silent, and continue to treat the property as his own, he will be held to have waived the objection, and will be as conclusively bound by the contract as if the mistake or fraud had not occurred. This applies peculiarly to speculative property, which is liable to large and constant fluctuations in value. (4) A court of equity is always reluctant to rescind, unless the parties can be put back in statu quo. If this cannot be done, it will give such relief only where the clearest and strongest equity imperatively demands it." 1 Pom. Eq. Jur. § 419: "A court of equity, which is never active in relief against conscience or public convenience, has always refused its aid to stale demands, where the party has slept upon his rights for a great length of time. Nothing can call forth this court into activity but conscience, good faith, and reasonable diligence. The principle has in fact two aspects,—one of them wholly independent of any statutory limitations, and the other with reference to such statute." In *Trader v. Jarvis*, 23 W. Va. 100 (Syl. point 2): "Delay in the assertion of a right, unless satisfactorily explained, even where it does not constitute a positive statutory bar, operates in equity as an evidence of assent, acquiescence, or waiver, and especially is such the case in suits to set aside transactions on account of fraud or infancy. Laches and neglect are always discountenanced by a court of equity."

It is clearly shown that neither of the Maxwells had any interest in the purchase at the time of the sale, nor until more than a year after the confirmation, and the plaintiffs utterly fail to establish their allegations of conspiracy. There was no concealment in the actions of the defendants McCrum or

the Maxwells. Their acts were all frank and open. Plaintiffs wholly fail to prove any conspiracy or any intended fraud on the part of the defendant McCrum, the purchaser, or either of the Maxwells. The circuit court held that, by reason of the laches of plaintiffs in bringing their suit, they were not entitled to charge against, and recover from, defendants McCrum and C. H. Maxwell anything by reason of the matters set up in the bill, but that, by reason of the relationship of attorney and client that existed between them and defendant W. B. Maxwell, they were entitled to recover from him, as set forth in the decree. If W. B. Maxwell performed his whole duty to plaintiffs, his clients, in relation to the sale, as it appears from the record he did, having informed them of the time and terms of sale prior thereto, and having assurance from them that they would be present to attend the same, after the sale was made and confirmed, of which they were advised, Maxwell had nothing further to do as attorney, unless plaintiffs within a reasonable time took some action in relation to the sale, or raised objection to, or protest against, it; but, having remained silent, his relation of attorney for them ceased so far as the land was concerned, and the moment such relation ceased he was at liberty to purchase the land or an interest in it; and if by their laches they were not entitled to relief against McCrum, the purchaser, how can they be injured by Maxwell purchasing an interest in the property from McCrum, who is entitled to hold it? The exceptions to the commissioner's report relate to the value of the land, the profits made upon it by the defendants, the rental value of the Parsons farm, etc.; which, in the view of the case I have taken, are immaterial.

For the reasons herein stated, the decree complained of is reversed and annulled; and, the court proceeding to render such decree as the circuit court should have rendered on the hearing of the cause, it is adjudged, ordered, and decreed that the bill in this cause be dismissed, but without prejudice to the plaintiffs to take such proceedings as they may be advised to take against the defendant W. B. Maxwell to recover the various sums of money collected by him for plaintiffs in the said cause of Cameron's administrator against Williams and others, the collection of which was sought to be enforced in this cause, and that the defendant W. B. Maxwell recover his costs by him expended in his defense of this suit in the circuit court of Tucker county.

(45 W. Va. 405)

SCHWARTZ v. SHULL.

(Supreme Court of Appeals of West Virginia.
Nov. 30, 1898.)

MASTER AND SERVANT—NEGLIGENCE—PROXIMATE CAUSE—PROVINCE OF COURT—INSTRUCTIONS.

1. The measure of care imposed upon the master for the safety of his servant in the use of

dynamite is that ordinary care which reasonable and prudent men would and do exercise under like circumstances. *Zinc Co. v. Martin's Adm'r*, 22 S. E. 869, 93 Va. 791.

2. The proximate cause of an injury is the last negligent act contributing thereto, and without which such injury would not have resulted.

3. Where the evidence is not contradictory, proximate cause is a question of law to be determined by the court, and not a question of fact to be submitted to a jury.

4. A person may admit moral guilt of a wrong in cases where he is not legally liable; hence an instruction to the effect that, although the defendant admitted his negligence caused the injury, the plaintiff is not entitled to recover, unless the evidence including such admission shows that the defendant was negligent, and that such negligence was the proximate cause of the injury, is not improper, and, when asked, should be given.

5. An instruction to the effect that if the jury believe that the defendant was negligent, and that such negligence was the proximate cause of the injury complained of, they must find for the plaintiff, although they believe another person's negligence intervened between the negligence of the defendant and the injury, is erroneous.

(Syllabus by the Court.)

Error to circuit court, Mineral county: *R. W. Dailey, Jr., Judge.*

C. Wood Dailey, for plaintiff in error. F. M. Reynolds, for defendant in error.

DENT, J. An action of trespass on the case, instituted by A. F. Schwartz against L. E. Shull and others, resulted in a verdict for the plaintiff for the sum of \$1,200. Defendant Shull appeals, and relies on the following assignment of errors: "First. Overruling petitioner's demurrer to the plaintiff's amended declaration. Second. Refusing to give petitioner's instruction A, as set out in bill of exception No. 1. Third. Giving the three instructions, and each of them, at the instance of the plaintiff, as set out in bill of exception No. 2. Fourth. Refusing to give, at the instance of petitioner, instructions Nos. 3, 4, 7, 8, 11, 13a, 14, 17, and 18, as asked, and as set out in petitioner's bill of exception No. 3, and in modifying Nos. 7 and 14, as set out in said bill of exception. Fifth. Overruling petitioner's motion in arrest of judgment and for a new trial, as set out in defendant's bill of exception No. 4. Sixth. Overruling petitioner's objection to that part of the testimony of Mary Schwartz, wife of the plaintiff, set out in petitioner's bill of exception No. 5, and in refusing to exclude such evidence from the jury."

As cause for demurrer, defendant says that it is not negligence to carry dynamite and caps in sawdust, in an exposed condition, on a locomotive engine, unprotected from sparks thrown off by such engine. The result of the accident is a sufficient answer to this. It was a dangerous explosive, carried in a dangerous place, in close proximity to defendant's employes on such engine, by his direction. A person of ordinary prudence, fully advised of the dangerous character of dynamite, would not undertake such risks. In the case of *Zinc Co. v. Martin's Adm'r*,

93 Va. 791, 22 S. E. 869, the law is stated correctly to be: "The measure of care imposed upon the master for the safety of his servant in the use of dynamite is that ordinary care which reasonable and prudent men would and do exercise under like circumstances,"—such care being regulated to a great extent by the dangerous character of the article; a stick of dynamite requiring more care than a potato, although both might be dangerously handled.

Petitioner's first instruction, which is in these words: "The court instructs the jury that the evidence in this case is not sufficient to sustain the issue on the part of the plaintiff, and they should find a verdict for the defendant,"—is virtually nothing more than a demurrer to the declaration. From the plaintiff's standpoint, the declaration has been fully proven; and the allegation that the evidence is insufficient, although it fully tends to sustain every averment of the declaration, being, in effect, a demurrer to the evidence, is equivalent to saying that the plaintiff has no cause of action. The court, therefore, could not do otherwise than to hold such instruction bad. The plaintiff's evidence establishes the facts to be as follows: That the defendant Shull placed some explosive caps in an open box containing eight sticks of dynamite placed in sawdust, and directed an employé by the name of Davis to take the same to the tram road, and put it on the engine; that Davis, in obedience to such direction, set such open box on the tender; that after the engine, to which several trucks were attached, had proceeded some distance, the engineer noticed the sawdust was on fire, and called to the plaintiff, who was riding on the tender as an employé of the defendant, to throw the box off. He promptly did so, and while he was in the act of doing it the dynamite exploded, and seriously injured him. This evidence is certainly sufficient to go to the jury on the question of negligence, and it would be for it, and not the court, to say whether the defendant, in directing the explosives to be placed on the engine in their exposed and dangerous condition, was exercising the ordinary care of a prudent man towards his employés. As to whether defendant Shull directed Davis to put the dynamite on the engine is a disputed question, the plaintiff's evidence tending to prove that he did, while the defendant's evidence tends to the contrary; thus raising a question for the jury to determine.

Taking up the numerous instructions refused to the defendant, we find the court refused to give instruction No. 3, which is as follows: "The court instructs the jury that, even if they believe from the evidence that defendant Shull put the caps spoken of in the evidence into a box with dynamite, and told the witness John Davis to carry it over to the train, and put it on the engine, and said Davis put the same on the tender, and though the jury may believe that such ac-

tion on the part of said Davis was negligent, and that such negligence was the proximate cause of the plaintiff's injuries, yet that does not constitute negligence on the part of said Shull." This instruction tries to make a distinction between the tender and the engine, which is untenable, as the tender is a necessary part of the engine, and is that part on which it was shown the employés were in the habit of carrying articles for the company's use. Such a distinction is a mere quibble, especially in the face of the fact that the defendant denies telling Davis to put the box on the engine.

Instruction No. 4, refused, is as follows: "The court instructs the jury that if they believe from the evidence that defendant Shull told witness John Davis to take the box with dynamite and caps in it over to the tram road, and that said Davis took the same over, and put it on the tender, and that to do so was negligence, and that such negligence caused the plaintiff's injury, yet such negligence was the negligence of said Davis, a fellow servant of the plaintiff, and that for such negligence the defendant is not responsible." This instruction was also properly refused, as the jury had the right to infer from the evidence in the case that Davis, in placing the box on the tender, was acting in obedience to the instruction of the defendant, and not in disobedience thereto.

Instructions 7, 11, 17, and 18 are as follows: (7) "The court instructs the jury that if they believe from the evidence that the plaintiff, by his own negligence, or want of care and prudence, contributed directly to the injuries which he received, then they should find a verdict for defendant Shull, although they may believe that he also was negligent in the matter." (11) "The court instructs the jury that if they believe from the evidence that the plaintiff's injuries resulted from the explosion of the dynamite when the plaintiff threw it from the tender, or when it struck the ground or rocks, and that the said plaintiff knew, or ought to have known, that it was dangerous to handle said dynamite in that condition, and the jury further believe from all the evidence in the case that it was dangerous, and that it was imprudent and careless in him to do so, then they should not find a verdict in favor of the plaintiff." (17) "The court instructs the jury that, though they may believe from the evidence, even under the instructions of the court, that the defendant Shull was guilty of negligence, yet if they further believe from the evidence that the plaintiff was guilty of carelessness or imprudence that contributed directly to his injuries, they should find for the defendant." (18) "The court instructs the jury that if they believe from the evidence that it would have been less dangerous to throw the dynamite off on the upper side of the road than on the lower side, and that the plaintiff knew that fact, or should have known it, and yet threw the box off on the

upper side, when he could have thrown it off on the lower side, then the plaintiff is not entitled to recover." These instructions raise questions of contributory negligence. This does not appear in the case, for the undisputed evidence plainly frees plaintiff from all contributory negligence. It shows he was endeavoring to save the defendant's property and the lives of himself and others from destruction, and he did, under the circumstances, only what a brave man could do, while a coward might have fled, and left the property of his employers, and his fellow servants, to their uncertain fate. Under the circumstances it was the duty of the court to settle the question of contributory negligence in favor of the plaintiff, as the evidence justifies no other course. Instruction No. 7, modified, which is as follows: "The court instructs the jury that if they believe from the evidence that the plaintiff, in taking up the box of dynamite, and throwing it from the tender, showed a want of reasonable care and prudence, and that such want of care and prudence was the proximate cause of the injuries he received, then the jury should find for the defendant,"—was more than the law entitled the defendant to have on the question of contributory negligence. Instruction No. 8 is liable to the same objections as instructions Nos. 3 and 4. It is as follows: "The court instructs the jury that if they believe from the evidence that the defendant Shull, after he put the caps into the box with the dynamite, told the witness Davis to take the box down to the tram road, and put it on the engine, or told him to take it over to the tram road without telling him what to do with it after getting it there, and believe that plaintiff, Schwartz, and others working on construction of tram road, were going up on the train, together with Charles Bender, acting as engineer, and Davis as fireman, in charge of the logging train, then said Shull is not liable in this case because he failed, after he got to the tram road, and before or after starting, to ascertain where said dynamite or caps had been placed for carriage; and is not liable in this action because they were placed together, by said Davis, on the back of the tender, even if the jury believe that it was negligence in said Davis to put them there, and that the plaintiff's injuries resulted directly from such negligence."

Defendant's instruction 13a is as follows: "The court instructs the jury that, even if they believe from the evidence that defendant Shull, after the explosion, and injury of the plaintiff, stated or admitted that he was to blame in the matter, or that it was his fault, yet that does not entitle the plaintiff to recover unless the evidence in the case before the jury, including such statement of said Shull, if the jury believe it was made, under the instructions given by the court, shows that the said Shull was negligent, and that his negligence was the direct and

proximate cause of plaintiff's injuries." This instruction should have been given, for a person may acknowledge that he is morally responsible for an act when not legally so. He may feel, on account of sensitiveness, that by using more prudence than the law requires, or by having prevented a remote cause, he might have rendered the proximate cause of the accident impossible.

Instruction No. 14, refused by the court, and No. 14, as modified by the court, applied alone to the allowance of doctor's bills; No. 14 being that no such bills should be allowed, and the modified instruction allowing such as had been established by proof. The declaration alleges, among other things, that the plaintiff "incurred great and heavy expense in his endeavor to be cured of the said injuries, which expense amounted to the sum of — dollars." The court therefore did not err in this instruction, as plaintiff had the right to recover his curative expenses, together with his other damages, if the same did not exceed the amount claimed, to wit, \$5,000. Nor is instruction 14, as modified, inconsistent with instruction No. 1 given for plaintiff. No. 1 tells the jury to allow him his medical expenses, while No. 14, as modified, limits the same to the amount proved to have been expended.

Plaintiff's instructions Nos. 1 and 3, which are as follows, to wit: (1) "The court instructs the jury that, if they find the issue for the plaintiff, Schwartz, in determining the measure of damages they may take into consideration the mental and physical pain and suffering endured by the plaintiff since he received the injury complained of, in consequence thereof, the character and extent of such injury, and its continuance, if permanent, together with his loss of time and service, and his disability, if any, resulting from said injury, to earn a livelihood for himself and family, and his necessary expenses for medicine and medical attention; and may find for him such sum as, in the judgment of the jury under the evidence, will be a fair compensation for the injury, not to exceed the sum of five thousand dollars." (3) "The court instructs the jury that if they believe from the evidence that the plaintiff, Schwartz, was injured by the explosion of dynamite, as complained of in the declaration, and that the negligence of the defendant Shull was the proximate cause of the injury received by the plaintiff, then they must find a verdict for the plaintiff,"—properly propound the law, and were rightly given.

Plaintiff's instruction No. 2 is as follows, to wit: "The court instructs the jury that if they believe from the evidence that the defendant Shull was guilty of negligence in putting the dynamite mentioned in the evidence in a box, and in with it caps for exploding such dynamite, and putting sawdust on it, without the box so packed being covered or protected, then they must find for the plaintiff, if they believe such negligence of

the defendant to have been the proximate cause of the injury complained of, although they may further believe from the evidence that the witness Davis was negligent in placing said box so unprotected on the tender of the engine." This instruction should not have been given, for it is misleading, in that it submits to the jury the question of determining whether the defendant's negligence in putting the caps and dynamite together, packed in sawdust, in an uncovered box, was the proximate cause of the plaintiff's injury. This is a legal question, and should have been determined by the court. The legal definition of the word "proximate" is very hard for those unlearned in the law to understand, and the jury might easily be misled into the belief that any act of negligence, however remote, was the proximate cause of an accident. Cooley, Torts, 76, states the law to be: "If the original act was wrongful, and would naturally, according to the natural course of events, prove injurious to some other person or persons, and does actually result in injury through the intervention of other causes which are not wrongful, the injury shall be referred to the wrongful cause, passing by those which were innocent. But, if the original act only becomes injurious in consequence of the intervention of some distinct wrongful act or omission by another, the injury shall be imputed to the last wrong as the proximate cause, and not to that which was more remote." The instruction under consideration positively violates this law, for it tells the jury that, if they believe the defendant's negligence was the proximate cause of the plaintiff's injury, they must find for the plaintiff, "although they may further believe from the evidence that the witness Davis was negligent in placing said box, so unprotected, on the tender of the engine." Although it may be carelessness to place explosive caps and dynamite together, packed in sawdust, yet, if not then in an uncovered condition, exposed to fire, no accident could possibly follow. Now, if Davis' conduct in placing the box uncovered on the tender, where it was exposed to sparks from the engine, could be regarded as innocent, and not negligent, then the plaintiff's carelessness might be held to be the proximate cause of the accident. At the time the box was turned over to Davis it was not dangerous, because not in an exposed condition. If he had negligently applied fire to the box before he reached the tram road, he could not have recovered for an accident resulting, for his own negligence would have been the proximate cause thereof. But if he had not been aware what was in the box, and he had accidentally dropped a spark therein, and caused an explosion, he could have recovered for injury occasioned thereby, for he is innocent of wrong or negligence. The

proximate cause of the injury in this case was not the placing the explosives, packed in sawdust, in a box together, but it was the placing of such box, uncovered, on the tender of the engine, where it was exposed to heat and sparks, and liable to explode to the injury of the employees of the defendant transported on such engine to their place of work. Had the box been carefully covered, or placed on some other, unexposed part of the train, no accident would have happened, although it might have been considered careless to pack explosive caps and dynamite in the same box, and cover them with sawdust. Before they will explode otherwise than by concussion, fire must reach them in some way,—either by outside application or spontaneous combustion. The latter is not claimed to have resulted. In the case of *Foley v. Railway Co.*, 48 Mich. 622, 12 N. W. 879, it was held that a railroad company transporting nitroglycerin in the customary way was not liable to its employees for injuries occasioned by the explosion thereof, as this was a risk incidental to their employment. The transporting of these explosives on the tender of an engine in an exposed condition is extremely dangerous, and is not the customary way, and cannot be considered a risk assumed by innocent employees. Had the witness Davis been the injured person, he certainly could not have complained, for his negligence contributed to the accident.

On the subject as to whether Davis, in placing the box on the tender, was acting under the direction of the defendant, the evidence is contradictory, and it was, therefore, a question for the jury to determine. But the instruction takes this question away from the jury by telling them they must find for the plaintiff, without consideration of the question as to who was guilty of negligence in exposing the explosives to the sparks from the engine. This is a matter of vital importance, and the very gist of this case; and for this reason it will have to be reversed, and a new trial awarded.

The evidence of Mrs. Schwartz that the defendant said "he did not fault Mr. Schwartz for throwing the dynamite off; he said it was all right," as heretofore shown, is immaterial, as Schwartz plainly did only what a brave man could do, under the circumstances, in an effort to save the property of the defendant and the lives of his employees. For doing this no man could "fault" him; much less those he was endeavoring to serve. The law does not convict a man of contributory negligence because he fails to preserve himself to the injury of others through selfishness and cowardice. For the refusal to give defendant's instruction 13a, and the giving of plaintiff's instruction No. 2, the judgment is reversed, the verdict of the jury set aside, and a new trial is awarded.

(45 W. Va. 333)

BARTLETT v. TOWN OF CLARKSBURG.(Supreme Court of Appeals of West Virginia.
Nov. 30, 1898.)**MUNICIPALITY — LIABILITY — DISCHARGE OF FIRE-
WORKS—NEGLECTANCE OF OFFICERS.**

1. An incorporated town is not liable for personal injuries occasioned by the firing of squibs, rockets, fireworks, and firearms on the streets by a crowd of citizens, although such acts be done with the knowledge and consent of the mayor, council, police, and other officers of such corporation.

2. As to the powers and functions of an incorporated town of a public governmental character, it is not liable for damages caused by the wrongful acts or negligence of its officers or agents therein.

(Syllabus by the Court.)

Error to circuit court, Harrison county; John Marshall Hagans, Judge.

Action by R. B. Bartlett against the town of Clarksburg. From a judgment sustaining a demurrer, plaintiff brings error. Affirmed.

W. Scott, for plaintiff in error. John Bassel and M. M. Thompson, for defendant in error.

MCWHORTER, J. R. B. Bartlett brought his action on the case in the circuit court of Harrison county, to recover damages against the town of Clarksburg for personal injuries sustained by plaintiff by reason of the discharge by private persons of firearms, squibs, rockets, and fireworks at a narrow place in one of the streets of said town, on the ground that the said fireworks were discharged by the consent and written permission of the mayor, and with the knowledge and consent of the council and police and other officers of said town, and that the said discharge of firearms, fireworks, etc., was of such a nature as to be a public nuisance, whereby the team of horses of plaintiff attached to his buggy became frightened and unmanageable, and beyond the control of plaintiff, and ran away, throwing plaintiff from his buggy seat, and badly injuring him, for which injuries plaintiff alleges said town is liable to him for damages. The declaration contains two counts. Defendant demurred to the declaration and each count, which being argued and considered, the court sustained said demurrers; and, plaintiff not desiring to amend his declaration, the same was dismissed, and judgment rendered in favor of defendant for costs. No ground of demurrer is contended for, except that the town is not liable, and that an action cannot be maintained against the town for the wrong complained of. The appellant cites *Speir v. City of Brooklyn*, 139 N. Y. 6, 34 N. E. 727, which is, as he claims, on all fours with the case at bar, where it is held that "a city is liable for injury to property by an explosion of fireworks constituting a dangerous public nuisance, when the display was made under a permit given by the mayor of the city acting under authority of a city ordinance." In the case under consideration, it is not al-

leged in the declaration that the written permit was granted by the mayor acting by virtue or under authority of an ordinance of the town. This is about the only particular in which the two cases differ. In *Speir v. City of Brooklyn* the judge says: "It is the settled doctrine of the courts that a municipality is not bound merely by the assent of its executive officers to wrongful acts of third persons; nor could the mayor bind the city by a permit for the granting of which he has no color of authority from the common council, and which was not within the general scope of his authority." The case of *Speir v. City of Brooklyn* is supported by some other authorities; and I confess I am largely in sympathy with the decision in that case, and agree with Judge Okey as to the nuisance in the case of *Robinson v. Greenville*, 42 Ohio St. 630, where he says: "That firing of cannon in a public street of a municipal corporation, except in case of imperative and urgent necessity, is an intolerable nuisance, and that all persons engaged in such unlawful act are personally liable for all damages caused thereby, are propositions concerning which there is no room for difference of opinion. But a very different question is presented when it is attempted to fasten liability for such injuries on a municipal corporation."

In the case at bar the acts complained of are equally as great a nuisance as the firing of cannon, as stated in above case. Appellee contends that "the law in this state has been settled in at least two cases upon all fours with this case," viz. *Mendel v. City of Wheeling*, 28 W. Va. 233, and *Brown's Adm'r v. Town of Guyandotte*, 34 W. Va. 290, 12 S. E. 707. Cooley on Torts (pages 738, 739) says: "Municipal corporations are to be considered—First, as parts of the governmental machinery of the state, legislating for their corporations, and planning and providing for the customary local conveniences of their people; second, as corporate bodies, through proper agencies putting into execution their plans, and discharging such duties as they have imposed upon themselves, or as the state has imposed upon them; and, third, as artificial persons owning and managing property. In the last capacity they are chargeable with all the duties and obligations of other owners of property, and must respond for creating or suffering nuisances, under the same rules which govern the responsibility of natural persons. . . . For taking or neglecting to take strictly governmental action, municipal corporations are under no responsibility whatever, except the political responsibility to their corporations and to the state. The reason is that it is inconsistent with the nature of their powers that they should be compelled to respond to individuals in damages for the manner of their exercise. They are conferred for public purposes, to be exercised within prescribed limits, at discretion for the public good;

and there can be no appeal from the judgment of the proper municipal authorities to the judgment of courts and juries. Therefore one shows no ground of action whatever when he complains that he has suffered damage because the city he resides in has made insufficient provision for protection against fire, or because cattle are not prohibited from running at large, or because coasting in the highways is not prevented, or because the operation of an ordinance which prohibits the explosion of fireworks in the city is temporarily suspended, or because provision is not made for lighting the streets. * * * Neither is a municipal corporation responsible for the failure of its officers to discharge properly and effectively their official duties; for in respect to these the officers are not properly the servants or agents of the corporation, but act upon their own official responsibility, except as they may be specially directed by the corporate authority." In *Robinson v. Greenville*, supra (Syl. point 4): "An assemblage of disorderly persons, after having been engaged for several hours in discharging a cannon in a public street of a municipal corporation, seriously injured a resident of the corporation, himself without fault, by one of such discharges. Held, that such corporation is not liable for the injury, although the statute provides that the council shall have the care, supervision, and control of the streets, 'and shall cause the same to be kept open and in repair, and free from nuisance' (Rev. St. Ohio, § 2840); and it will make no difference that the authorities of such corporation, with knowledge of such firing, took no steps to prevent the same." Also *Borough of Norristown v. Fitzpatrick*, 94 Pa. St. 121 (Syl. points 1 and 2): "(1) N. was injured, while crossing a street in a borough, by the firing of a cannon by a crowd of citizens. In an action against the borough to recover damages for the injury, the jury, in a special verdict, found that the cannon had been fired at short intervals for several hours, at various points in the borough; that it was not fired at any public or authorized celebration; that a policeman was standing by, and made no effort to stop the firing. A special act of assembly authorized the borough to appoint policemen, remove nuisances, etc. Held, that the borough was not liable. (2) Admitting that such an assemblage was a nuisance, and that of the worst kind, it is one that a municipal corporation cannot abate by the use of ordinary appliances, such as suffice for the removal of natural or material obstructions in or near a highway, and resort therefor must be had to the police; but for the doings or misdoings of those who compose this force the municipality is not liable." *Campbell's Adm'r v. City Council*, 53 Ala. 527: "The city is not liable for injuries resulting from violence, which the police, by diligent discharge of duty, might have prevented. Although appointed by the

city, the police are quasi civil officers, for whose misfeasance or nonfeasance in office the city is not responsible, though they are personally answerable." *City of La Fayette v. Timberlake*, 88 Ind. 330: "A municipal corporation is not liable for a personal injury occasioned on its streets by persons making an unlawful use of its streets, as by coasting. A municipal corporation is not liable for failure to exercise governmental powers, as for failure to enforce the state laws or its own ordinances. A municipal corporation is not liable for the negligence of its police officers. They are not its agents, but public officers." *Faulkner v. City of Aurora*, 85 Ind. 130: "A city, after having adopted an ordinance prohibiting, upon its streets, sports tending to produce personal injury, is not liable for a collision occurring upon a street, whereby a traveler was injured, as the result of coasting for sport, though the sport was carried on by crowds, publicly, in the presence of its officers and police, to the obvious danger of persons using the streets." *Ball v. Town of Woodbine*, 61 Iowa, 83, 15 N. W. 846: "Where fireworks are discharged within the limits of an incorporated town, in violation of the ordinances of the town, whereby one is injured, the town is not liable for such injury, notwithstanding the town council and officers of the town and a majority of the citizens actively participate in the discharge of the fireworks, and the town, by its officers, makes no attempt to stop the proceedings." *Hill v. City of Charlotte*, 72 N. C. 55: "A municipal corporation having power, under its charter, to make ordinances for the safety of its property in the city, suspended for a short time the operation of an ordinance forbidding the use of fireworks within the city. During such time, plaintiff's building was set on fire, and destroyed, by fireworks negligently used by boys. Held, that the corporation was not liable for such destruction." *Dill Mun. Corp.* § 753: "A municipal corporation is not liable to an action for damages, either for the nonexercise of, or for the manner in which, in good faith, it exercises, discretionary powers of a public or legislative character." *Wheeler v. City of Cincinnati*, 19 Ohio St. 19; *Forsyth v. Mayor, etc.*, 45 Ga. 152; *Fisher v. City of Boston*, 104 Mass. 87.

Authorities might be multiplied indefinitely. While the decisions are not all on one side, yet the great weight of the authorities, including those of our own state, is with the action of the circuit court in this case. In *Brown's Adm'r v. Town of Guyandotte*, 34 W. Va. 299, 12 S. E. 707 (Syl. point 1), it is held that, "as to the powers and functions of a town of a public governmental character, it is not liable for damages caused by the wrongful acts or negligence of its officers or agents therein." *Mendel v. City of Wheeling*, 28 W. Va. 233. The judgment will have to be affirmed.

(45 W. Va. 478)

STATE v. CHENEY et al.(Supreme Court of Appeals of West Virginia.
Dec. 3, 1898.)**TAXATION—FORFEITURE OF LANDS FOR NONENTRY
—CONSTITUTIONAL LAW.**

1. Under the act of 1869, and under section 6, art. 13, of the constitution, forfeiting land for nonentry on the tax books, where a tract lies partly in one county and partly in another, entry in the county wherein its greater part lies saves the whole tract from forfeiture. Entry in either county would likewise save it.

2. Where a patent is for a tract of land of a given number of acres, and it is entered for taxes accordingly, the fact that the tract contains a greater quantity will not forfeit the whole or the excess for nonentry for taxation, under chapter 126, Acts 1869, or section 6, art. 13, of the constitution.

3. Acts 1869, c. 125, and section 6, art. 13, of the state constitution, forfeiting land for nonentry for taxation, are not repugnant to amendment 14 to the constitution of the United States. (Syllabus by the Court.)

Appeal from circuit court, Clay county; V. S. Armstrong, Judge.

R. R. Andrews, for the State. Brown, Jackson & Knight, for appellees.

BRANNON, P. In 1895 the state filed its bill in chancery in the circuit court of Clay county against M. A. Cheney and others to sell 10,000 acres of land as forfeited for nonentry for taxation, and the court decreed that the land had not been forfeited, and dismissed the bill, and the state appeals. On July 21, 1797, Virginia, by patent, granted to Jacob Skyles a tract described as containing 32,097 acres in Kanawha county; and, after Nicholas county was formed, the land was in it; and, after Clay county was formed, a quantity of 10,000 acres of the tract fell in Clay county. None of this land was entered for taxation in Clay from its formation, in 1858, to 1891; but 10,000 acres of it was in that year, and up to 1895, charged there with taxes. The tract was charged in Kanawha, and afterwards in Nicholas county, from the date of the grant till 1894, and all taxes paid. In 1869 a survey revealed the fact that the tract contained a greater acreage than the patent stated,—40,372 acres, instead of 32,097. Before this the charge for taxation had been largely less than the true quantity; but after 1869 it was charged at 40,372 acres in Nicholas. It is on the omission to charge any of it in Clay from 1858 to 1891 that the bill bases its prayer for the sale of the 10,000 acres lying in Clay. True, the argument of counsel refers to the fact that up to 1869 too small a quantity was charged in Nicholas; but that, if material, is not a fact stated in the bill as a basis of relief, but only the omission in Clay. The charge in Nicholas was for quantity on the basis of the patent call, less some sales from time to time, up to 1869, when the survey disclosed a greater area, after which it was entered for that quantity. In fact, when the county court of Clay entered 10,000 acres for taxes in that

county, and the true quantity was still kept up in Nicholas, there was double taxation for several years; but that is not material.

Does the fact that the land was charged in Nicholas, when part of it was in Clay, forfeit that part in Clay? I do not understand the state's counsel as distinctly taking this stand. If he so mean, the stand is not tenable. Forfeiture of land is a harsh, even dreadful, remedy; and courts lean from it, and never apply it except where the law clearly warrants. The above question is to be answered, first, under the act of 1869 (Code 1868, c. 31, § 34; Acts 1869, p. 90), and then under section 6, art. 13, Const., as there was no forfeiture law from 1835 till 1869, though that of 1869 retroacted to 1832. This act of 1869 declared a forfeiture for five successive years of nonentry "on the land books of the proper assessor." Which was the proper assessor? The act of 1859-60 (Code 1860, c. 35, § 26) says: "Land lying partly in one county and partly in another shall be entered by the commissioner of the county in which the greater part lies, but entry and payment of taxes in the county where any part is situated, shall, for such time, be a discharge of so much of the taxes as may be so charged and paid." Act 1863, c. 118, § 25, was likewise. As the greater part of this land was in Nicholas, its entry there was "on the proper assessor's land book," thus complying with the act of 1869. From 1858 to 1869 the law did not require this land held under one patent as an entire tract to be divided as to assessment, so as to charge part in Clay. So there is clearly no forfeiture under the act of 1869. After that act, till the constitution of 1872, that was still the rule, under section 32, c. 29, Code 1868.

Next, as to the constitution: What did it demand? "It shall be the duty of every owner of land to have it entered on the land books of the county in which it, or a part of it, is situated, and to cause himself to be charged with the taxes thereon and pay the same. When for any five successive years after the year 1869, the owner of any tract of land containing 1,000 acres or more, shall not have been charged on such books with state taxes on said land, then by operation hereof, the land shall be forfeited and the title vest in the state." This does not demand of the owner that he shall survey his land to see in which county the greater part lies, and that he shall run the risk of losing it if he errs therein, but relieves it from forfeiture if any part lies in the county wherein he enters it for taxation. The constitution, as also the act of 1869, forfeited only for failure to pay state taxes; and it was immaterial as to state taxes in which county it was charged, as they would be paid wherever charged. So, the entry in Nicholas saved from any forfeiture. Act 1875, c. 54, § 32, directed the assessor to enter the land in the county where its greater part lay. Chapter 98, Acts 1877, directed that it be charged by

the assessor in the county wherein the greater part in value lay, but provided that entry and payment in any county where any part lay should be a discharge for the whole state taxes on it. So did the act of 1879. The act of 1881 (Code 1891, c. 29, § 32) enacts, as to tracts of more than 1,000 acres lying in different counties, that they shall be entered in each magisterial district to the extent, as near as may be, the same lies therein. This was the first act cutting an entire tract up for taxation. It was to let each county and district have its share of tax. But what of this? It is only directory to the officer. As to the landowner, the paramount constitution says his land shall not be forfeited, if entered where any part of it lies. The constitution repealed the act of 1869, and so its exaction, that, to save forfeiture, the entry should be on the land book "of the proper assessor," ended. Up to the act of 1881 the assessment was in the proper county. Under it the clerk should apportion. But that is immaterial as regards forfeiture. Therefore entry in Nicholas clearly prevents forfeiture, unless entry for too small a quantity produces forfeiture. The state claims that it forfeits the excess beyond question. I think it beyond question that it does not.

Before the patent to Skyles, the surveyor surveyed the entry, reported quantity, the state issued a grant for that quantity, and entry for taxation was of the tract as such, not of or by acres, but by exterior boundary, we may say. It cannot be that if a patent calls for 5,000 acres, but its boundaries include 6,000, any of it is forfeited. It is the tract entered, not acres. Does the patentee know of the excess? The state has certified it to be 5,000 acres. Whose tract would be safe? Old grants have often been found to contain excess. Then, what particular part is forfeited? What right has the state to elect to take the excess out of that part in Clay? Assessment of wrong number of acres does not render it bad. *Desty, Tax'n*, 567. There is no forfeiture.

The question is raised that these forfeiture laws are unconstitutional, because in conflict with amendment 14 to the constitution of the United States. We hold them valid, for reasons stated in *State v. Sponagle* (decided this term) — S. E. —. We affirm the decree.

(45 W. Va. 583)

MIDDLE STATES LOAN, BUILDING & CONSTRUCTION CO. v. ENGLE et al.
(Supreme Court of Appeals of West Virginia.
Dec. 10, 1898.)

ASSUMPSIT—WHEN LIES—GUARANTORS—LIABILITY.

1. Assumpsit will lie on a writing under seal guarantying repayment of money borrowed evidenced by borrower's bond, and secured by collateral mortgage which is to be repaid in monthly installments and payment of monthly dues on stock, and providing that, after six months' default in monthly payments, at option of the lender the principal debt shall at once become due and collectible and the mortgage foreclosed,

when default has been made and mortgage foreclosed in a court of competent jurisdiction having jurisdiction of the subject-matter and parties, and a decree ascertaining the balance due after subjecting all the property embraced in the mortgage on account of the debt, if the insolvency of the principal debtor be alleged.

2. The contract of a guarantor is collateral and secondary, and when he guaranties the payment of a bond secured by collateral mortgage referred to in the bond he is not liable upon his guaranty until resort has been had to the mortgage, also to the bond, for the collection of the moneys secured, unless the principal be insolvent, rendering further pursuit fruitless.

(Syllabus by the Court.)

Error to circuit court, Jefferson county; E. Boyd Faulkner, Judge.

Assumpsit by the Middle States Loan, Building & Construction Company against John H. Engle and another. The court sustained a demurrer to the third count of the declaration, and plaintiff brings error. Affirmed.

Joseph Trapnell and Benjamin Trapnell, for plaintiff in error. Forrest W. Brown and Jacob F. Engle, for defendants in error.

McWHORTER, J. The Middle States Loan, Building & Construction Company brought its action of assumpsit in the circuit court of Jefferson county against John H. Engle and Thomas Jones, as guarantors of G. Frank Engle, and at April rules, 1897, filed its declaration containing the common counts and three special counts. The defendants demurred to the declaration and to each count, in which the plaintiff joined. The court overruled the demurrer to first and second special counts and the common counts, and sustained it as to the third special count. Plaintiff, by leave of the court, withdrew the first and second special counts and the common counts, and the court, being of opinion that the action could not be maintained upon the contract set out in the remaining (third) count, dismissed the action, but without prejudice, to which ruling of the court plaintiff excepted, and obtained a writ of error. The said third count is as follows: "And whereas, also, the said G. Frank Engle, at the time of the promises and undertakings of the defendants, hereinafter mentioned, was indebted to the plaintiff in a certain other sum of money, to wit, in the sum of \$800, and, being so indebted, the said G. Frank Engle did execute and deliver to the plaintiff a certain obligation, in writing, signed and sealed by him, in words and figures following, to wit: 'Know all men by these presents, that G. Frank Engle, of Brunswick, Frederick county, and state of Maryland, is indebted to the Middle States Loan, Building and Construction Company, of Hagerstown, Md., in the sum of \$800.00, being the amount of a loan this day received by him from said company, with interest thereon from this date, payable monthly. Now, the condition of the above obligation is such that if the said G. Frank Engle shall pay the interest monthly on said sum of \$800.00, received by him, and shall make the monthly payments monthly on sixteen

shares of stock of said company, subscribed for by him in said company, eight of such shares being premium shares required to be taken for the loan instead of the usual premium, and any and all fines assessed against him or his said shares of stock, and shall likewise pay, when due, the taxes assessed against the property mortgaged to secure the payment of said loan of \$800.00, and the premiums necessary to keep the building on said mortgaged property insured from loss by fire, in such sum as the said company may require (not exceeding \$2,000.00), until the said stock subscribed by him, as aforesaid, becomes fully paid in and of the value of one hundred dollars per share, then it is understood that upon the surrender of said stock to said company this obligation shall be deemed fully paid and canceled. But if he fail to pay when due and payable the said taxes and insurance premiums, or make default in the payment of said monthly interest, fines, and monthly payments on said stock for a period of six months after the same or any installment thereof is due, then, at the option of the said company, the whole indebtedness evidenced by this obligation (including any taxes and insurance premiums due or paid by said company) shall at once become and be due and collectible, and a foreclosure of said mortgage in the manner therein provided may be had; but if the money due on this bond is paid or collected by the company by suit or foreclosure before the stock subscribed for shall have matured as aforesaid, then such rebate, if any, from payments on the premium shares will be allowed as the board of directors of this company shall, in their discretion, deem equitable. And thereupon, heretofore, to wit, on the said 27th day of August, 1894, the said defendants and each of them did guaranty and faithfully promise the payment to the plaintiff of the said sum of money and interest, by a certain writing under seal, indorsed on the said obligation and signed by the defendants, in words following, to wit: 'In consideration of the Middle States Loan, Building and Construction Company, of Hagerstown, Md., making a loan of \$800.00 to G. Frank Engle, and for the securing of the payment of which the said Engle did execute and deliver to the said company the within bond, and a mortgage of even date herewith, we and each of us hereby guaranty the payment of said sum of eight hundred dollars by the said Engle to the said company, on the terms and in the manner set out in said bond and mortgage. Witness our hands and seals this 27th day of August, 1894.' That, default having been made by the said G. Frank Engle in his payments to the plaintiff, according to the tenor and effect of the said obligation the said debt and interest became due and payable, and the plaintiff instituted and prosecuted, in the circuit court of Frederick county, in the state of Maryland, a court of record having jurisdiction of the subject-matter and the parties, a proceeding in

equity against the said G. Frank Engle, and for the foreclosure of the mortgage in the bond referred to, and that such proceedings were had that, after fully subjecting the property embraced in the said mortgage, it was ascertained by a decree of the said court that there remained due the plaintiff, on account of the obligation in writing aforesaid, a balance of \$935.26 as of the 8th day of August, 1896, and that the said decree remained wholly unsatisfied; that the defendants were duly notified of these facts, and thereby, according to the tenor of their said guaranty, they did on the day and year last aforesaid become liable to pay to the plaintiff the said sum of money, with interest, as aforesaid. And, being so indebted, the said defendants afterwards, on said day and year, in consideration of the premises, promised to pay said several sums of money and interest, respectively, to the plaintiff on request. Yet they have disregarded said promises, and have not paid the said moneys or any part of them, to the plaintiff's damage \$1,500.00."

The question arising upon the record is whether the circuit court erred in sustaining the demurrer to the third special count. The court says, "Being of opinion that this action cannot be maintained upon the contract set out in the remaining (third) count of the declaration, doth sustain the demurrer thereto, and doth order the plaintiff's action be dismissed, without prejudice." I deem it unnecessary to go into the origin and history of the action of assumpsit. That is found in the text-books. However, it grew out of the necessity for a broader, more liberal and comprehensive form of action than the old actions of debt and covenant, and in order to make the action of assumpsit still broader in its scope the legislature has from time to time enlarged it. In *State v. Harmon*, 15 W. Va. 115, Judge Haymond gives us a comprehensive history of the legislation upon this subject, which legislation has finally evolved section 10, c. 90, Code 1868, which provides that "an action of debt or assumpsit may be maintained on any note or writing, whether sealed or not, by which there is a promise, undertaking, or obligation to pay money, if the same be signed by the party who is to be charged thereby or his agent." It is insisted by the appellees that the instrument upon which the guaranty is indorsed is not for the unconditional payment of money alone, and that it comes within the purview of the case of *State v. Harmon*, supra, which was an action based upon a bond for three hundred dollars, conditioned that if the principal could prove in any suit brought upon the bond within three months that he was the owner of certain property levied upon as the property of another, or, if he should fail to do so, would pay the value thereof, then the bond to be void, upon which bond the court held the action of assumpsit could not be maintained because it was not "such a bond, not being such a sealed instrument of writing, containing a

promise, undertaking, or obligation to pay money as that upon which said tenth section of chapter 99 of said Code authorizes an action of assumpsit to be brought." The case at bar is quite different. The bond is for the repayment of \$800 loaned money. The principal made his bond providing for its repayment in certain monthly payments, and further providing that, if he made default for a certain specified time in his monthly payments, then the whole sum of \$800 should at once become and be due and collectible, and a foreclosure of the mortgage executed on property to secure it should be had. And the defendants guarantied the payment of the \$800 by the principal to the plaintiff on the terms and in the manner set out in the said bond and mortgage. The declaration avers that default was made by the principal, that proceedings were had for foreclosure of the mortgage in a court of record of competent jurisdiction having jurisdiction of the subject-matter and the parties, and the property covered by said mortgage was fully subjected thereto, and by decree of said court it was ascertained that there remained due the plaintiff on account of the said obligation in writing a balance of \$935.26 as of the 8th day of August, 1896, and that the said decree remained wholly unsatisfied, of all of which facts the defendants were duly notified. Here there is default of the principal, a legal subjection of the mortgaged property to payment of the obligation as far as it would go, and ascertainment by a competent court of the exact amount of the balance due from the principal debtor, and the guaranty by the defendants in writing for the payment of the debt. If the plaintiff had pursued the principal debtor still further, and had taken personal judgment against him and exhausted his other property, if any he had, and had averred such proceedings in its third count in the declaration, or had averred the insolvency of the principal to show that further pursuit would be fruitless, I think the declaration would have been good on demurrer. "A guarantor is one who becomes responsible for the debt, default, or miscarriage of another person. * * * The contract of the guarantor is his own separate undertaking, in which the principal does not join. It is usually entered into before or after that of the principal, and is often founded on a separate consideration from that supporting the contract of the principal. The original contract of the principal is not his contract, and he is not bound to take notice of its nonperformance." 1 Brandt, Sur. § 1. "The contract of a guarantor is collateral and secondary; that of a surety is direct. The guarantor contracts to pay if, by the use of diligence, the debt cannot be made out of the principal debtor, while the surety undertakes directly for the payment, and so is responsible at once if the principal debtor makes default." Kearnes v. Montgomery, 4 W. Va. 29. So in Barman v. Carhartt, 10 Mich. 338 (Syl. point 1): "Where one guaran-

ties the collection of a note which is secured by a collateral mortgage referred to in it, and at the same time assigns the mortgage with the note, he is not liable upon his guaranty until resort has been had to the mortgage as well as to the note for the collection of the moneys secured." Also Johnson v. Shepard, 35 Mich. 115: "A guaranty of collection of a debt secured by mortgage creates no obligation on the part of the guarantor to pay until after foreclosure, decree, and a failure to obtain payment out of the mortgaged premises and out of the property of the principal." In Farrow v. Respass, 33 N. C. 170, on the guaranty, "I hereby guaranty the payment of the within note," it was held the guarantor was not primarily liable, and in order to charge him it was necessary that the creditor should be diligent in endeavoring to collect the note from the principal unless diligence would have been unavailing. Also, Benton v. Gibson, 1 Hill (S. C.) 56; Rudy v. Wolf, 16 Serg. & R. 79; Johnston v. Chapman, 3 Pen. & W. 18. In Kern v. Ziegler, 13 W. Va. 707 (Syl. point 1), "Under section 10, c. 99, Code 1868, assumpsit will lie on a writing under seal containing dependent covenants, when the covenant sued on contains a provision, undertaking, or obligation to pay money, when the instrument is signed by the party to be charged or his agent." The appellees say that "non est factum is the general issue in debt upon writing obligatory, but no such plea is known in the action of assumpsit," and call attention to the fact that in this very case one of the defendants will and must rely upon that plea, because he claims that his signature to the writing sued upon is a forgery. If it be true that assumpsit cannot be maintained upon a writing obligatory because, perchance, the defendant might be under the necessity of pleading non est factum in order to make a complete defense, then section 10 is indeed rendered nugatory. I apprehend, however, that this is fully provided for by section 40, c. 125, Code: "Where a declaration or other pleading alleges that any person made, endorsed, assigned or accepted any writing, no proof of the handwriting of such person shall be required, unless the fact be denied by an affidavit with the plea which puts it in issue." And this really is all there is in the plea of non est factum,—simply a denial under oath of the making of the writing obligatory. The judgment of the circuit court sustaining the demurrer to plaintiff's third count of the declaration, and dismissing the action without prejudice, is affirmed.

(45 W. Va. 563)

CANN v. CANN'S HEIRS et al.

(Supreme Court of Appeals of West Virginia.
Dec. 10, 1898.)

APPEAL—REVIEW—LIMITATIONS—ACCRUAL OF CAUSE.

1. The syllabus in the case of Cann v. Cann, 20 S. E. 910, 40 W. Va. 138, is approved.
2. Where adult defendants are negligent of

their defense in the lower court, they cannot be heard in an appellate court.

8. A finding of facts by a commissioner, confirmed by the circuit court, is viewed with peculiar respect by this court, and such finding will not be disturbed unless plainly erroneous.

4. If an employer promise to make compensation for services at the time of his death, by will or otherwise, the statute of limitations does not begin to run until the death of such person.

(Syllabus by the Court.)

Appeal from circuit court, Morgan county; R. Boyd Faulkner, Judge.

Bill by Harrison Cann against Jacob Cann's heirs and others. From a decree for complainant, the heirs appeal. Affirmed.

Daniel B. Lucas, for appellants. W. H. Travers and Faulkner & Walker, for appellee.

DENT, J. This case was in this court before (40 W. Va. 138, 20 S. E. 910), on an appeal from a decree sustaining an exception to a commissioner's report and dismissing the bill. This time it comes here on an appeal from a decree of the circuit court overruling exceptions to a commissioner's report, and confirming the same,—two entirely different conditions, governed by different principles of law. "Every presumption is made in favor of the correctness of the decision of the commissioner in chancery. If the testimony is conflicting, the court rarely interferes with his finding on the facts, provided he makes no error of law affecting the result." *Hartman v. Evans*, 38 W. Va. 670, 18 S. E. 810. And this is peculiarly so in this court when such finding has been confirmed by the circuit court. *Fry v. Feamster*, 36 W. Va. 454, 15 S. E. 253; *Reger v. O'Neal*, 33 W. Va. 159, 10 S. E. 375; *Handy v. Scott*, 26 W. Va. 710. The evidence is conflicting, and this court is thereby limited to the questions of law raised in the case. Most of these were settled by the former decision. The case was remanded to the circuit court to ascertain what sum, if any, the plaintiff was entitled to recover on a quantum meruit. The commissioner fixed the amount at \$5,874, and the court confirmed his finding, and decreed accordingly. The heirs of Jacob Cann appeal. The bill is taken for confessed as to Sarah Cann, Catherine Ziler, and Emma Cann, adult defendants, who therefore have no standing in this court, for they should have first made their defense in the lower court. As to them no proof of plaintiff's claim was necessary, under section 36, c. 125, Code, which provides: "Every material allegation of the bill not controverted by an answer * * * shall for the purpose of the suit be taken as true and no proof thereof shall be required." As to the infant defendants the bill cannot be taken as true, but when the proof is satisfactory to the commissioner and the circuit court the decree thereon will rarely be disturbed in their favor, they having reserved rights by statutory enactment until after they arrive

at the age of majority. All this was plainly enough stated in the former decision to put the adult defendants on their guard, and gave them the opportunity of making any defense they might have against plaintiff's demand. They made none. They are, therefore, without standing in this court. The counsel appear to have misunderstood the former decision. The court held that the duebill found written in Jacob Cann's account book, not having been delivered, or the contents thereof made known, was neither good as a note nor as a promise to avoid the statute of limitations, but, if held to be genuine, was admissible as evidence to establish a quantum meruit. The genuineness, while admitted to be doubtful, was left open for further consideration by the lower court and its commissioner as evidence bearing on the question of quantum meruit. The fact that the adult defendants failed to answer denying the plaintiff's right of recovery weighs heavily in favor of the justice of plaintiff's demand. They were his sisters, and should have been acquainted with the circumstances; and a legal admission by them is almost equivalent to positive proof or affirmation. As to themselves it certainly is so regarded by the law of pleading. So the only legal question presented is as to the statute of limitations, and this was virtually settled before. It does not begin to run until the right of action accrues. See first point in syllabus, *Cann v. Cann*, above. If this had been a claim for a sum to be paid annually, the right of action would accrue as soon as the day of payment expired. Such is not the demand, but it is for the lump services of the plaintiff for about 20 years, for which he was promised compensation by deed or will, in real estate, a lump amount. While he cannot recover the real estate promised, yet, if he has rendered the services in expectancy thereof, the law will give him the true value of such services in lieu of such land in money. And as he labors in expectancy of such provision to be made by the will of his employer, he has no right to sue, and action does not accrue until after the death of his employer, unless he sooner repudiates the contract, for until such occurrence he may fulfill his promise; nor can it be known whether he has done so or not until the existence or non-existence of a will is ascertained. The opinion of Judge Holt in the former case of *Cann v. Cann*, 40 W. Va. 154, 20 S. E. 910, is very full and satisfactory on this point, and is referred to and adopted as part hereof as a true exposition of the law and careful collection of the authorities on this question. "Where a right depends upon some condition or contingency, the cause of action accrues and the statute runs only from the fulfillment of the condition of the contingency." 13 Am. & Eng. Enc. Law. 720. "On a promise to pay for services by will, the cause of action accrues at the employ-

er's death." *Stone v. Todd*, 49 N. J. Law, 274, 8 Atl. 800. The decree complained of is affirmed.

(45 W. Va. 283)

SWING v. BENTLEY & GERWIG FURNITURE CO.

(Supreme Court of Appeals of West Virginia. Nov. 23, 1898.)

FOREIGN CORPORATIONS—TRUSTEES—ACTIONS—INSURANCE—PREMIUMS.

1. A receiver, trustee, or assignee of a dissolved foreign corporation, appointed in the state of its domicile, may institute in the courts of this state suits in his own or the corporate name for debts or claims due such corporation.

2. Circuit courts of this state are authorized by sections 58, 59, c. 53, Code, in proper cases therein set forth, to appoint receivers for and wind up the affairs of foreign corporations who have done business, acquired property, and contracted debts in this state. The law on this subject as propounded in the case of *Nimick v. Iron Works Co.*, 25 W. Va. 184, has been superseded by chapter 39, Acts 1885.

3. Before a receiver or trustee of a dissolved foreign corporation can recover on a premium note a quasi ex parte assessment, he must show that the conditions precedent to such recovery contained in such note have been fully satisfied.

(Syllabus by the Court.)

Error to circuit court, Wood county; L. N. Tavenner, Judge.

Assumpsit by James B. Swing, trustee, against the Bentley & Gerwig Furniture Company. There was a judgment for defendant, and plaintiff brings error. Reversed.

J. W. Vandervort, for plaintiff in error. Van Winkle & Ambler, for defendant in error.

DENT, J. On the 23d day of July, 1897, James B. Swing, trustee of the creditors and stockholders of the Union Mutual Fire Insurance Company of Cincinnati, Ohio, in the circuit court of Wood county instituted an action of assumpsit against the Bentley & Gerwig Furniture Company on the following note: "In consideration of the policy No. 1,067, dated the first day of October, 1888, we promise to pay the Union Mutual Fire Insurance Company of Cincinnati, Ohio, the sum of four hundred and sixty-four dollars and sixty cents (\$464.60), by such installments and at such times as the directors of said company shall assess and order, pursuant to the charter and by-laws thereof, and it is expressly agreed that this note is not transferable, and the liability is only for the losses and expenses incurred by the said company, and that no liability is incurred beyond the face amount thereof. (The secretary is authorized to insert the number and date in this note, and, in event of renewal or reissue, to change number and date to that of the new policy.) Cincinnati, Ohio, August 10th, 1888. Bentley & Gerwig Furniture Company"—for the purpose of recovering a special assessment of \$185.84, balance on said note, made by him by virtue of the laws of Ohio, and under the supervision of the supreme court

thereof, in certain proceedings therein pending for the final dissolution and winding up of the affairs of such Union Mutual Fire Insurance Company. The defendant demurred to the plaintiff's declaration, the circuit court sustained the same, and, plaintiff not wishing to amend, the case was dismissed. Plaintiff obtained a writ of error.

The defendant insists that the demurrer was properly sustained, for two reasons: (1) Because the plaintiff, being the legally appointed receiver or trustee of a foreign corporation, could not sue in the courts of this state, but was confined to the state of his appointment. (2) The declaration did not show a sufficient cause of action. As to the first of these objections, the law is now settled by an irresistible preponderance of authority that a receiver, trustee, or assignee of a foreign corporation, with general powers over the property of such corporation, has the right, by virtue of the comity existing between the various states of this Union, to sue for any debt, claim, or property owing to or belonging to such corporation. Such receiver, trustee, or assignee, being clothed with the full powers of such corporation, and the right to exercise them in so far as is necessary to wind up its affairs, is the sole legal representative thereof, with full authority to reduce to possession the corporate property wherever found. This principle is admitted as settled law in the case of *Grogan v. Egbert*, 44 W. Va. 75, 28 S. E. 714. Defendant's counsel in his brief fails to produce authority justifying a change in opinion on the subject. The same comity should be shown to the citizens of Ohio, at least, as that state extends to citizens of other states. In the case of *Bank v. McLeod*, 38 Ohio St. 174, the law of Ohio is recognized as above stated. On page 184 Judge Johnson says: "The distinction is drawn between the case of a receiver acting under the inherent force of his appointment alone, and a case where, by the terms of his appointment, he is directed to gather the assets wherever found. The power of a court to confer such authority on a receiver is not limited to property found within the state where he is appointed. It is not necessary that the property should be within the jurisdiction of the court. Thus, the courts of England have appointed receivers to manage landed property in India, Canada, China, Ireland, and South American states and other places. 2 Danell, Ch. Pl. & Prac. *1781, and cases cited. So, on principles of comity, the aid of a New Jersey court was extended to a foreign receiver to obtain possession of property, as against the officers of a corporation of which he was receiver, who may be endeavoring by fraud or subterfuge to withhold it. *Bidlack v. Mason*, 26 N. J. Eq. 230. * * * Great reliance is placed on the remarks of Mr. Justice Wayne in deciding the case of *Booth v. Clark*, 17 How. 334, where it is said 'that the receiver's right to the possession of the property is limited to

the jurisdiction of his appointment.' This and other remarks of the learned judge are termed dicta when applied to cases like the present. *Hurd v. City of Elizabeth*, 4 N. J. Law, 41; *Ex parte Norwood*, 3 Biss. 512, Fed. Cas. No. 10,364." Authorities sustaining this conclusion are so numerous that it is useless to repeat them here, as it has already become text-book law. The case of *Nimick v. Iron Works Co.*, 25 W. Va. 184, is referred to and relied upon. The decision in that case was to the effect that a general suit to settle up the affairs of a foreign corporation and assess liabilities against the stockholders must be brought in the state of its domicile or origin, as such settlement must be had in accordance with the law of its creation and charter, which could not be enforced in this state. This decision, which was rendered November 29, 1884, was superseded by chapter 39, Acts 1885, which gave the circuit courts of this state jurisdiction to appoint receivers for and wind up the affairs, in proper cases therein set forth, of foreign corporations who have done business, acquired property, and contracted debts in this state. See sections 53, 59, c. 53, Code. By virtue of these sections suits may be brought in the name of dissolved corporations, foreign and domestic, so far as necessary or proper "for collecting the debts and claims due to the corporation, converting its property and assets into money, prosecuting and protecting its rights, enforcing its liabilities and paying over and distributing its property and assets, or the proceeds thereof, to those entitled thereto."

2. The defendant further insists that the declaration fails to show a good cause of action in that it is for an assessment made by a foreign receiver of a foreign corporation, under the supervision of a foreign court without jurisdiction, and whose decree sued on is not properly set forth. The suit is an action of assumpsit on a conditional note, and not on the decree of the court. The plaintiff alleges that the assessment was legally made by him under the laws of the state of Ohio "in order to pay the just losses and expenses of the said the Union Mutual Fire Insurance Company and the expenses of winding up its affairs according to law"; that the same was reported to and approved by the court of his appointment, and he directed to collect the same. These are allegations showing the legality of the assessment, and therefore its binding character on the defendant. This assessment, thus made in its absence, being personal in its nature, has the same binding force and effect on it as if made by the corporation itself if not dissolved. The trustee, under the supervision of the court, was clothed with the full power of the corporation so far as necessary to close up its business. Therefore it devolves upon the receiver to allege and prove that such assessment so made by him is fully covered by the note sued on. The defendant objects that the declaration does not exhibit the losses and expenses, and

show explicitly what they were. This, of course, could have been done, but it is not absolutely necessary, to make the declaration good under section 29, c. 125, Code, but is matter that the plaintiff must show by his proof as a condition precedent to his right to recover. *Mor. Priv. Corp.* § 153. The allegation is general, but the proof must be specific. The corporation, having been dissolved at the time of the assessment, could hardly be held in existence and representative of the defendant so as to render the order confirming the assessment conclusive as to it in its absence. Hence the burden is not cast on him of showing that the assessment was unjust and contrary to his obligation or undertaking, but it devolves on the plaintiff to establish his right of recovery. This is not a general assessment upon unpaid stock on all stockholders, as in the case of *Hawkins v. Glenn*, 131 U. S. 319, 9 Sup. Ct. 739, and other cases of a similar character relied on by plaintiff, but it is a specific assessment on a note limited by express agreement to the "losses and expenses incurred by the company." If the company itself had made the assessment, although the same rules so far as applicable govern in both characters of cases, it would have been bound to show, on resistance of payment thereof, that it was within the liability covered by the note, as the proof of the same is wholly within its power. Such being the case as to the company, its trustee could have no greater power. Nor does it entail any hardship upon him, as all the proofs are in his hands and under his control. This, however, is a question of proof, and does not arise on demurrer; which admits the truth of the allegations contained in the declaration. These appear to be sufficient to justify a recovery, if sustained by proof. The judgment of the circuit court is reversed, the demurrer overruled, and the case is remanded for further proceedings according to law.

(45 W. Va. 285)

SWING v. PARKERSBURG VENEER & PANEL CO.

(Supreme Court of Appeals of West Virginia.
Nov. 23, 1896.)

FOREIGN CORPORATIONS—TRUSTEES—ACTIONS—INSURANCE—PREMIUMS.

1. A receiver, trustee, or assignee of a dissolved foreign corporation appointed in the state of its domicile may institute in the courts of this state suits in his own or the corporate name for debts or claims due such corporation.

2. Circuit courts of this state are authorized by sections 53, 59, c. 53, Code, in proper cases therein set forth, to appoint receivers for and wind up the affairs of foreign corporations who have done business, acquired property, and contracted debts in this state. The law on this subject, as propounded in the case of *Nimick v. Iron Works Co.*, 25 W. Va. 184, has been superseded by chapter 39, Acts 1885.

3. Before a receiver or trustee of a dissolved foreign corporation can recover on a premium note a quasi ex parte assessment, he must show

that the conditions precedent to such recovery contained in such note have been fully satisfied. (Syllabus by the Court.)

Error to circuit court, Wood county; L. N. Tarenner, Judge.

Assumpsit by James B. Swing, trustee, against the Parkersburg Veneer & Panel Company. There was a judgment for defendant, and plaintiff brings error. Reversed.

J. W. Vandervort, for plaintiff in error. Van Winkle & Ambler, for defendant in error.

DENT, J. James B. Swing, trustee of the creditors and stockholders of the Union Mutual Fire Insurance Company of Cincinnati, Ohio, on the 11th day of March, 1889, in the circuit court of Wood county, instituted a suit against the Parkersburg Veneer & Panel Company on the following premium note: "In consideration of policy No. 8,400, dated the first day of October, 1888, we promise to pay to the Union Mutual Fire Insurance Company, of Cincinnati, Ohio, the sum of four hundred and eighty-seven dollars and fifty cents (\$487.50), by such installments and at such times as the directors of said company shall assess and order, pursuant to the charter and by-laws thereof, and it is hereby expressly agreed that this note is not transferable, and the liability is only for the losses and expenses incurred by the said company, and that no liability is incurred beyond the face amount hereof. (The secretary is authorized to insert number and date in this note, and, in event of renewal or reissue, to change the number and date to that of the new policy.) Cincinnati, Ohio, November 1st, 1889. [Signed] Parkersburg Veneer and Panel Company." A balance of \$312 is claimed as due thereon. Defendant demurred to the declaration, which was sustained. A writ of error brought the case to this court. The questions and points raised in this case are similar to the ones raised in the case of the Same Plaintiff v. Furniture Co. (decided at this term) 31 S. E. 925, and the same conclusion in regard thereto is reached. And for the same reasons the judgment of the circuit court is reversed, the demurrer overruled, and the case is remanded to the circuit court for further proceedings according to law.

(46 W. Va. 715)

HYRE et al. v. LAMBERT.

(Supreme Court of Appeals of West Virginia. Dec. 17, 1898.)

APPEAL—FINDINGS OF COMMISSIONER—PARTNERSHIP—ACCOUNTING.

1. Where questions of fact are referred to and passed upon by a commissioner, and the findings of the commissioner are overruled and disaffirmed by the circuit court, the appellate court must determine for itself, from the facts and circumstances disclosed by the record, whether it will sustain the conclusion of the commissioner or that of the circuit court.

2. A case in which the appellate court, upon the facts and evidence, reversed the action of

the circuit court in overruling the findings of the commissioner and in sustaining exceptions taken to the commissioner's report.

(Syllabus by the Court.)

Appeal from circuit court, Tucker county.

Bill by James H. Lambert against R. A. Hyre and J. S. Hyre. Decree for plaintiff, and defendants appeal. Reversed.

W. B. Maxwell and J. F. Harding, for appellants. Dayton & Dayton and L. S. Auvil for appellee.

McWHORTER, J. This cause was brought here by plaintiff Hyre on appeal from a decree in favor of defendant against plaintiff on settlement of partnership accounts. The decree was reversed (see 37 W. Va. 26, 16 S. E. 446), and cause remanded for further proceedings by recommission to commissioner to retake, state, and report such accounts. The circuit court acted on the suggestion of this court as to facts to be reported, and referred the cause to Commissioner John J. Adams, directing him to report as follows: (1) The amount of bonds, notes, and accounts that went into the hands of defendant, Lambert, to settle and collect; (2) what amount he collected or should have collected; (3) what amount he has properly paid out; (4) what amount remains uncollected, and with which he should not be charged; (5) what amount is insolvent, what barred by the statute of limitations, or otherwise noncollectible; (6) what debts or liabilities, if any, unpaid, remain, of the firm, to persons who are not partners; (7) what advances (as distinguished from capital put in), if any, have been made by any partners to or for the firm. Appellant Hyre sued out execution against appellee, Lambert, for \$178.29, costs of appeal incurred in this court, when Lambert filed his bill against R. A. Hyre and Jacob S. Hyre, her husband, to enjoin the enforcement of the collection of said sum, alleging that there was due from Hyre a much greater sum, for which he was entitled to a decree in said cause upon a settlement of the partnership accounts for which Hyre had instituted the suit, and alleging the insolvency of said Hyre, and that the object and purpose was to collect the said judgment for costs before her liability to plaintiff could be ascertained and fixed by proper decree, and then by every means evade the payment of such decree; and praying that defendants be enjoined and restrained from the collection of said costs, that the liability of said partnership due plaintiff might be ascertained and fixed by proper decree in said original cause, and that the judgment for costs might be set off against said liability, and decree be rendered for plaintiff for residue and for general relief. Injunction was granted as prayed for, March 8, 1893. Defendants waived process, and on 22d of November, 1894, by leave of the court, filed their joint and separate answer to said bill, and moved to dissolve the injunction; the answer ad-

mitting the former decree against Rebecca A. Hyre, which had been reversed, and her judgment for costs, but denying most positively her insolvency, or her intention to collect costs and then evade payment of any amount which might be found due to plaintiff, and denying any indebtedness to plaintiff on a settlement of the partnership affairs, but averring, on the contrary, that on such settlement plaintiff was largely indebted to her, and averring that since the injunction was awarded in this cause the said suit to settle the partnership had been pending before one of the commissioners of the court, who had taken a large amount of proof and had sifted the case to the very "dregs," and had found the sum of \$—— in favor of respondent Rebecca A. Hyre, which amount respondent did not believe was the true amount due her, but that it should be a much larger amount, and referred to the commissioner's report, which she asked to be read with her answer, which report conclusively showed that she was entitled to have the injunction dissolved. Commissioner Adams returned his report, which, leaving off the formal portion, is as follows:

Proceeding "to fully execute said order of reference, and to further audit and state and settle the partnership accounts between the plaintiff R. A. Hyre and the defendant, James H. Lambert, thereupon I ascertain and find as follows, to wit:

"From the testimony, which is somewhat conflicting, your commissioner finds that, in his opinion, a clear preponderance thereof sustains the items of account between said plaintiff and defendant, as follows: (1) The amount of bonds, notes, and accounts that went into the hands of defendant, Lambert, to be settled and collected (including the amount of \$1,124 collected by him on the Dry Fork and Red Creek lumber contracts) I have ascertained to be \$3,374. (2) The amount he collected, or should have collected, I have ascertained to be \$2,535.12. (3) The amount properly paid out by him I have ascertained to be \$2,922.84. (4) The amount uncollected of said accounts, and with which said Lambert should not be charged, including insolvent, barred by statute, and otherwise noncollectible claims, I find to be \$838.88. (5) I find there are no debts or liabilities remaining unpaid of the firm to persons who are not partners. (6) I further find that there is due from the defendant, Lambert, to the plaintiff R. A. Hyre, individually, as formerly reported, a balance found due her at the February settlement, 1885, of \$200; also a settlement made August 15, 1885, a balance of \$64.83; total, \$264.83.

"From the foregoing, I find the accounts, more briefly stated, to be as follows: Amount of bonds, notes, and accounts that went into the hands of said Lambert to be settled and collected as above stated, \$3,374; less amount of uncollected notes, accounts, etc., as above stated, \$838.88; leaving

amount in hands of said Lambert to be accounted for, \$2,535.12; amount properly paid out by said Lambert on firm debts as aforesaid, \$2,922.84; balance due said Lambert from the firm of Lambert & Hyre, \$387.72; one-half to be paid Mrs. Hyre to said Lambert, \$193.86; amount due from said Lambert to Mrs. Hyre, individually, and as formerly found and reported as above stated, \$264.83; balance now found due from said Lambert to Mrs. R. A. Hyre, \$70.97.

"All of which is respectfully submitted to the court this 29th day of September, 1894. Jno. J. Adams, Commissioner."

To this report he added the following statements made at the request of the counsel for the parties, which statements, together with exceptions to said report indorsed by the parties, are as follows:

"At the request of counsel for the plaintiffs, I state and report said partnership accounts to be as follows: First. The amount of bonds, notes, and accounts that went into the hands of defendant, Lambert, to be settled and collected, I ascertain to be \$3,374. Second. The amount he collected, or should have collected, I have ascertained to be \$2,705.78. Third. The amount properly paid out by him I have found to be (uncertain and objected to) \$2,856.64. Fourth. The amount uncollected of said accounts, and with which said Lambert should not be charged, including insolvent, barred by statutes, and otherwise uncollectible claims, I find to be \$668.22; and from undisputed items due from defendant, Lambert, to Mrs. Hyre, from former reports, \$299.83. Fifth. I further find there are no debts or liabilities remaining unpaid of the firm to persons who are not partners.

"From the foregoing version by the plaintiffs, I find the said accounts, more briefly stated, to be as follows: Amount of bonds, notes, and accounts that went into the hands of James H. Lambert for collection, \$3,374; amount of notes, accounts, etc., not collected or collectible, \$668.22; amount of notes, accounts, etc., collected by said Lambert and to be accounted for, \$2,705.78; amount of debts properly paid by said Lambert for the firm of Lambert & Hyre, \$2,856.64; amount due Lambert from said firm, \$150.86; one-half of this last-named sum due from Mrs. Hyre to Lambert, \$75.43; amount due from said Lambert to Mrs. Hyre, individually, at the time of dissolution, on account of undisputed items due Mrs. Hyre, as shown by former reports herein, \$299.83; balance now found due from said Lambert to Mrs. Hyre, \$224.40.

"And, at the instance and request of counsel for defendant, Lambert, I further state and report said partnership accounts to be as follows: First. The amount of bonds, notes, and accounts that went into the hands of James H. Lambert to settle and collect I ascertain to be \$2,423.88. Second. The amount he collected, or should have col-

lected, I find to be \$1,518.60. Third. The amount properly paid out by him I have found to be \$2,993.24. Fourth. The amount uncollected of said accounts, and with which Lambert should not be charged, including insolvent, barred by statute, and otherwise noncollectible claims, I find to be \$905.28. Fifth. I further find there are no debts or liabilities remaining unpaid of the firm to persons who are not partners.

"From the foregoing version by the defendant, I find the said accounts, more briefly stated, to be as follows:

"Amount of bonds, notes, and accounts that went into the hands of said Lambert for collection, I find to be \$2,423.88; amount of notes, accounts, etc., collected by him, \$1,518.60; amount with which said Lambert should not be charged, \$905.28; total, \$2,423.88.

"Amount of firm debts properly paid by said Lambert, \$2,993.24; from which deduct total amount of collections, \$1,518.60; leaving a balance paid by said Lambert for the firm out of his own private fund of \$1,474.64; one-half of which balance should be charged to defendant Hyre, \$737.32, subject to credits as follows:

"Amount of costs of the supreme court, \$174.89; amount of balance found due Mrs. Hyre at the August settlement, 1885, \$64.83; total, \$239.72.

"Balance due Lambert at this date, \$497.60.

"All of which is respectfully submitted to the court this the 20th day of September, 1894. Jno. J. Adams, Commissioner.

"And now, on this day, to wit, Monday, the 1st day of October, 1894, I further report to the court that, after the completion of the foregoing statement and report, I retained the same in my office ten days for inspection and exceptions thereto by any person interested therein, during which time the plaintiff R. A. Hyre, by her counsel, Maxwell & Harding, as well as the defendant, James H. Lambert, by his counsel, Dayton & Auvil, each filed exceptions in writing thereto; which several exceptions, together with all the evidence and proofs filed before me, I now herewith return to the court. Given under my hand this the said 1st day of October, 1894. Jno. J. Adams, Commissioner."

Exceptions by Rebecca A. Hyre:

"The plaintiff Rebecca A. Hyre excepts to the report of Commissioner J. J. Adams made in the above-styled cause, and to be filed for the November term of the circuit court of Tucker county, 1894, and now in the office of said commissioner for examination, for the following reasons: First. Because said commissioner reports the amount of debts due to the firm of Lambert & Hyre, and heretofore turned over to Lambert for collection and disbursement, which have turned out to be uncollectible and worthless, at the sum of \$838.88, when the proofs filed before him clearly show that this sum could not possibly

exceed \$668.22, and even a much less sum than this is sustained by the evidence. Second. Because by said report said commissioner reports the assets or funds coming into said Lambert's hands to be disbursed for the benefit of said firm at the sum of \$2,535.12, when in fact he actually collected and should be charged with at least \$2,705.78, and even more than this sum is proven by a preponderance of the evidence filed. Third. Because by said report said commissioner reports the amount properly paid out by said Lambert upon the debts assigned said firm at \$2,922.84, when the evidence clearly shows that at most he only paid out the sum of \$2,856.64, and much of this amount rests on such doubtful and contradictory evidence that it ought not to be sustained. Fourth. Because by said report said commissioner has not allowed her credit for \$35, the price of one cow, hereinbefore reported, passed upon, and not excepted to. Fifth. Because by said report said commissioner reports a balance due from said Lambert to said R. A. Hyre of \$70.97 only, and that, too, without interest, when in fact, under the evidence filed before said commissioner, she should recover at least the sum of \$224.40, with interest from July 25, 1889. Rebecca A. Hyre, by Counsel. Maxwell & Harding, Attys."

Defendant's exceptions:

"The defendant, James H. Lambert, excepts to the confirmation of Commissioner John J. Adams' report made in said cause of date the — day of September, 1894: (1) Because the said commissioner charges the defendant, Lambert, with the sum of \$3,374 of notes, accounts, etc., when the proof nowhere shows more than the sum of \$2,423.88 worth of accounts, notes, etc., with which he should be charged. (2) Because said commissioner allows to the plaintiff \$200, as and at the February settlement between said partners, when a preponderance of the proof shows that said amount was carried into the August settlement, 1885, which was a full and complete settlement of all the individual transactions between said partners of H. Lee Nester, J. H. Lambert, J. B. Lambert, and C. C. Lambert. (3) Because the commissioner considered the deposition taken by the plaintiff (in making up said report) at Justice Coberly's, in Randolph county, on the 27th day of August, 1894, and at G. W. Summerfield's residence on the 29th day of August, 1894, when the defendant, James H. Lambert, had no notice of the taking of the same. (4) Because said commissioner gave due weight and credit to the deposition of Jacob G. Flanagan in his findings, when he should have discarded said statements altogether, as said witness was successfully impeached before said commissioner. (5) Because said commissioner charges said defendant with \$1,125 collected on lumber after dissolution of said firm, when the proof shows that \$200 of said sum have been collected

before the dissolution of said partnership, and applied upon the debts of said firm, and, if charged to defendant, defendant should have had credit for more, which said commissioner wholly disallows. (6) Because said report is erroneous in many other respects, and prays that the proofs, books, evidence, etc., before said commissioner be turned into court with report. James H. Lambert, by Counsel. Dayton & Auvil, Attys.

"The defendant, James H. Lambert, excepts to the special finding of the commissioner at the instance of the plaintiffs, and to the finding at his own instance, and insists the only true statement of the partnership is that found at the instance of the defendant. James H. Lambert, by Counsel. Dayton & Auvil."

On the 28th day of November, 1894, the cause was heard. The court overruled all the exceptions of plaintiff Hyre, and sustained all the exceptions of defendant, Lambert; adopted the statement made by Commissioner Adams at the request of defendant, Lambert; entered a decree in his favor against Rebecca A. Hyre for \$497.60, with interest from October 20, 1894, and perpetuated the injunction, and decreed in favor of Lambert for costs of the injunction proceedings, and that the said sum of \$497.60, together with the costs incurred by said Lambert in said two causes, are a lien upon said Rebecca A. Hyre's separate personal property, and a charge upon the rents, issues, and profits of her separate real estate, if any such personal or real estate she has; from which decree Rebecca A. Hyre and J. S. Hyre appealed to this court, and assign as error, first, that the court erred in overruling plaintiffs' exceptions to the report of Commissioner Adams. Defendant, Lambert, filed a "statement of amount remaining uncollected, and with which Lambert should not be charged, insolvent and barred by statute," amounting to \$1,000.90. The commissioner took the testimony of various witnesses as to the payment of some of these claims, and as to their solvency; the time of their payment, if paid,—whether before or after the dissolution of the partnership; and, after considering the evidence, he reduced the aggregate to the sum of \$838.88. From an examination of the evidence touching the several items of account in dispute, I have no doubt that the commissioner arrived at about the right conclusion as to this item of his report. Defendant, Lambert, himself, while he claims in his deposition the amount to be \$1,000.90, admits, in the statement made at his request by the commissioner, that the amount should be reduced to \$905.28.

Appellants' second exception involves the question raised by appellee's first exception. The commissioner takes as a basis \$3,374 as amount of bonds, notes, and accounts that went into the hands of Lambert to be settled and collected, from which deducting above item of \$838.88, leaves \$2,535.12, amount of

assets that went into the hands of Lambert. Hyre's exception claims that it should have been \$2,705.78, while Lambert, by exception No. 1, claims that the \$3,374 should have been but \$2,423.88. This amount claimed by Lambert, however, fails to include the amount of the Red Creek lumber contract, the proceeds of which amounted, according to the various witnesses examined concerning it, to from \$925 to \$1,200, and in the commissioner's report formerly filed in the cause, and copied in the opinion (37 W. Va. 32, 16 S. E. 446), was stated at \$1,124, "as shown by deposition of Lambert." Taking the smallest amount, \$925, and adding it to the \$2,423.88, as claimed by Lambert, makes the sum of \$3,348.88, being only \$25.12 short of the amount stated by the commissioner. I think plaintiffs' second and defendant's first exceptions should both be overruled.

Plaintiffs' third exception goes to a question of \$66.20 difference between the amount allowed by the commissioner to defendant as paid out on debts of the firm and the amount plaintiffs claim ought to have been allowed. This difference is made up of small sums, upon which the evidence is conflicting and uncertain, and the benefit of the doubt should be given the commissioner, who stands between the parties, and should be, and evidently was, trying to get at the truth of the matter.

Plaintiffs' fourth exception is as to \$35, price of a cow, which was proved as reported in commissioner's former report, and unexcepted to, and the exception should be sustained.

The fifth exception of plaintiffs, in so far as it claimed the right to judgment for at least \$224.40, was properly overruled.

Upon defendant's second exception, as to the \$200 found due plaintiffs at February settlement, 1885, and allowed to plaintiffs and as claimed by the defendant to have been carried into the settlement of August 15, 1885, the evidence is conflicting; some witnesses testifying positively and squarely that the item of \$200 was carried into the settlement of August 15th, while others testified as positively that it was not. In the commissioner's report of former date, and copied in the opinion of this court in 37 W. Va. 32, 16 S. E. 446, as to this item, it was held by the commissioner, as he holds in this last report, that it was not carried into the late settlement, and no exception was made to that report by defendant for that reason, and he took his decree allowing that claim. The commissioner was warranted in allowing it to plaintiffs, and exception 2 should have been overruled.

The third exception of defendant relates to notice to take depositions, upon the depositions taken at G. W. Summerfield's, not at J. W. Summerfield's, as specified in the notice, "because the defendant had no notice of the taking of any depositions except of Solomon Flanagan, Enos G. Carr, and J. W. Flanagan." While the depositions of said Flana-

gans do not appear to have been taken, and that of Enos G. Walker is taken as the fifth deposition of about thirty or more short depositions, of about three to the page, taken to sustain the reputation for truth and veracity of plaintiffs' witness Jacob G. Flanagan, whose reputation defendant had brought in question, it is difficult to conceive how defendant should have notice of one deposition grouped in some thirty, which would require perhaps five minutes each to take, and know nothing of the taking of the others. How far the commissioner gave weight to or considered such depositions does not appear. There is but little in the depositions complained of, aside from the bearing on the reputation of said witness, to sustain it.

The fourth exception is that the commissioner gave due weight to the testimony of Jacob G. Flanagan, witness on behalf of plaintiffs. Flanagan was plaintiffs' principal witness, apparently a man of very good standing in the community, trusted by his neighbors with the responsible position of assessor. He had given testimony in this cause in October, 1887, and the cause was heard upon his testimony. The thought of impeaching him seems to have been a recent thought. Jacob Wolfred says his reputation is not very good, and would not from that reputation believe him on oath, especially if he was interested in the matter in any way. John T. Wolfred is acquainted with his reputation; "it's nothing extra good." In answer to question, "From that reputation would you believe him on oath?" he says, "If his interest was at stake, and he was under the influence of liquor, I would be inclined to dispute." Witness G. W. Snyder, referring to Flanagan's reputation: "Well, sir, I would say it was bad. Q. From that reputation would you believe him on oath? A. No, sir." Defendant then introduces two of his sons, L. D. and J. B. Lambert, who say, respectively, as to his reputation, "It is not good," and "It is bad," and both say they could not believe him on oath. J. B. Lambert, when asked if he and Flanagan were friendly or he had had trouble with him, answered, "We had some words, but still I would not vary on oath for that." Snyder is the only one of the first three witnesses who says unqualifiedly that his reputation is bad. I know it is a delicate matter for a man to take the witness stand and testify that the reputation of his neighbor for truth and veracity is bad; but, if it is notoriously bad, after one or two reputable and respectable citizens have so testified it is usually not much trouble to find others at hand to "swell the chorus." I think the attempt to impeach Flanagan a very lame one, and the commissioner was at liberty to give his testimony such weight as seemed right to him.

Defendant's fifth exception is that the commissioner had charged him with \$1,125 collected on lumber after dissolution of the firm, when the proof shows that \$200 of said sum had been collected before the dissolution of

the partnership, and applied on firm debts. I think quite a sufficient reply to that is that in the original report of the commissioner, which was the basis of defendant's decree before brought to this court, the very first item charged to defendant was, "Amount collected on the Red Creek and Dry Fork lumber contracts from the Hulings Lumber Company, as shown in the deposition of said Lambert, \$1,124." Said item was proved by his own deposition, allowed by the commissioner, no exception to the report, and defendant's decree based on it.

As to the sixth exception, praying that the proofs, books, evidence, etc., before the commissioner, be returned into court with his report, section 7, c. 124, Code, as amended by chapter 8, Acts 1893, requires the commissioner, "with his report, to return the evidence filed in the case, including all the evidence taken upon the execution of the reference," which the certificate of the commissioner shows he did in this cause.

Defendant's seventh exception insists that "the only true statement of the partnership is that found at the instance of the defendant," and the court seems to have thoroughly ignored the findings of its commissioner, and adopted the account made up by the defendant, very much of which is unsustained except by the evidence alone of the defendant, and even he is not clear on parts of his evidence. It is shown that when the partnership was dissolved the books of the firm were placed in the hands of defendant, where they remained for some time, until they were called for in this cause; and when they came from his hands they were so mutilated that it would be impossible to make a statement showing the amount of accounts which were upon them when they were given over in August, 1893. Several half leaves, and some whole leaves, were out of the books, and figuring and writing in the books which were not in them when they were calculated and footed up before. J. S. Hyre testified that with reasonable diligence all the notes, bonds, and accounts belonging to the firm, and turned over to Lambert, amounting to some \$2,250, could have been collected, except about \$25 or \$30; and J. G. Flanagan, who was familiar with them, did not think there was over about \$20 which could not be collected. In *Graham v. Graham*, 21 W. Va. 698, it is held that, "where questions of fact are submitted to a commissioner in chancery, his findings thereon should be fully sustained, unless the court is fully satisfied that the evidence before the commissioner does not warrant them"; and it is further held, when the decree of the court below approves such findings, this court will not, except in a plain case, reverse such decree. "Where questions of fact are referred to and passed upon by a commissioner, and the findings of the commissioner are overruled and disaffirmed by the circuit court, the appellate court must determine for itself, from the facts and circumstances disclosed by

the record, whether it will sustain the conclusion of the commissioner or that of the circuit court." *Roots v. Kilbreth*, 32 W. Va. 585, 9 S. E. 927.

On a review of all the evidence and the record, I am of opinion that the commissioner was about as nearly right as the character of the case would enable one to get, and that his finding in favor of plaintiff of \$70.97 should be approved, with the sum of \$35 added, making the sum of \$105.97 in favor of plaintiff Rebecca A. Hyre against the defendant, James H. Lambert; that upon the filing of the answer of Rebecca A. Hyre and James S. Hyre to the bill of complaint of James H. Lambert, denying all the material allegations of the bill and moving to dissolve the injunction, said injunction should have been dissolved and the bill dismissed. *Schoonover v. Bright*, 24 W. Va. 698; *Farland v. Wood*, 35 W. Va. 458, 14 S. E. 140 (Syl. point 2).

For the reasons herein contained, the decree of the circuit court is reversed and annulled, and the order perpetuating the injunction is reversed and set aside. It clearly appears from the record that there is no indebtedness against the firm; and, the court proceeding to render such decree as the circuit court should have rendered, it is adjudged, ordered, and decreed that the plaintiff Rebecca A. Hyre do recover of the defendant, James H. Lambert, the sum of \$105.97, with interest thereon from October 20, 1894, until paid, and the costs of the prosecution of her suit by her expended in the circuit court; and it is further adjudged, ordered, and decreed that the injunction awarded James H. Lambert against J. S. Hyre and Rebecca A. Hyre be, and the same is, dissolved, and the bill dismissed, and that the defendants therein recover against the plaintiff, James H. Lambert, their costs by them about their defense in that behalf expended in said circuit court.

(45 W. Va. 311)

ZELL GUANO CO. et al. v. HEATHERLY et al.

(Supreme Court of Appeals of West Virginia. Nov. 23, 1898.)

FRAUDULENT CONVEYANCES — CONSIDERATION — RIGHTS OF CREDITORS AND GRANTEE.

On January 31, 1889, H. conveyed all his property, real and personal, to P., trustee, to secure his creditors named therein, in the order of priority named, including a debt of \$8,100 to C., to be the first paid after taxes, etc., which \$8,100 included an item of \$6,500 in cash sent to wife of H. by C. at the time of the execution of the trust. On February 2, 1889, Z. G. Co. instituted suit to set aside the trust as fraudulent and void as to the \$8,100 secured to C., in which suit the plaintiff was successful, H. and C. were adjudged to pay the costs of the suit, and all the property conveyed in the trust was sold, and proceeds paid to the creditors entitled to it, to the exclusion of C.'s claim, which was remitted to the foot of the list of creditors to be last paid. On the 8th of January, 1891, and before final decree in the cause, H.'s wife returned to C. \$6,025 of the identical money, in the same papers in which she had received it

two years before from C., having kept it intact. In January, 1897, Z. G. Co. and others, creditors of H., filed their amended bill, alleging that the \$6,025 so returned to C. was the property of H., and as such liable to their debts, and praying that C. be required to pay it into court, and that it be applied to their debts against H. *Held*, that the circuit court did not err in dismissing said amended bill.

(Syllabus by the Court.)

Appeal from circuit court, Barbour county; John H. Holt, Judge.

Bill by the Zell Guano Company and others against Samuel J. Heatherly and others. A decree was entered, from which plaintiffs appeal. Affirmed.

Samuel V. Woods, for appellants. W. T. Ice and Dayton & Dayton, for appellees.

McWHORTER, J. Samuel J. Heatherly, having become involved in debt beyond his ability to pay out, on the 31st day of January, 1889, executed a deed of trust conveying all his lands and personal property to Melville Peck, in trust to secure the debts specifically set forth in the trust deed, among which was a debt of \$8,100 to J. N. B. Crim, as third in order of priority; the first being for taxes, and the second for purchase money on one of the tracts of land conveyed in the trust deed, for which there was also a vendor's lien. On the 2d of February, 1889, the Zell Guano Company instituted suit in the circuit court of Barbour county to set aside the said deed of trust as fraudulent and void as to the said debt to Crim of \$8,100, because said debt was alleged to be fictitious, and that said trust was made with intent to hinder, delay, and defraud the plaintiffs and other creditors of said Heatherly. Said debt of Crim was made up, among other items, of \$6,500 in cash loaned at time of execution of trust deed. At the hearing of the cause, the court held that the said trust deed was made with intent to hinder, delay, and defraud plaintiffs and other creditors, and was therefore fraudulent and void, and that the trustee, Peck, had full knowledge thereof at the time it was executed, and the same was set aside and held for naught; and upon appeal to the supreme court the same was reversed, in so far as it held that the trustee had notice of the fraud, and set aside the trust in toto, but it was held that it was made with fraudulent intent, and was void, as to the said debt of \$8,100 secured to Crim, which debt was remitted to the foot of the list of debts, and placed in a new class, No. 8, to be paid last in the order of priority. The supreme court found (38 W. Va. 400, 434, 18 S. E. 611) that the loan of \$6,500 was fictitious, being only intended to help defendant Heatherly to put that much of his property beyond the reach of his creditors; the identical money, in the same packages (except \$475), being returned to defendant Crim on the 8th of January, 1891. He contemplated, when it was loaned, that some of it should be used

by Heatherly in satisfying certain liens against the property embraced in the deed of trust, but for some reason this purpose was not carried out; perhaps because, before all the money loaned was paid over to Heatherly, this suit assailing the deed of trust was instituted. The cause was remanded to the circuit court, and proceedings had therein whereby the land was sold, and sale confirmed by decree of May 23, 1896, in which the debts due to the creditors were decreed to be paid to them, and the question reserved for the future order of the court whether the said Crim should be required to pay into court for the benefit of the plaintiffs the said \$6,025, theretofore received by him on the 8th day of January, 1891, from Helen A. Heatherly. At the January rules, 1897, the Zell Guano Company and other creditors of Heatherly filed their bill, praying that it be treated as an amended bill in the original cause, setting forth the whole transaction and the proceedings thereon, and alleging that said \$6,025 was the property of Samuel J. Heatherly; that it was in custodia legis at the time it was received by Crim from Mrs. Heatherly, on January 8, 1891, and that it was a trust fund, which the said Crim had no right to receive and apply upon a debt which was charged to be fraudulent, and was adjudged to be fraudulent and fictitious, and that the application thereof upon the said debt of \$8,100 was a flagrant disregard of the process of the court, and a contempt of its decrees, and, in effect, allowed said Crim to have priority of payment upon the \$8,100 debt for \$6,025 out of the estate of said Samuel J. Heatherly, and praying that said Crim be required to pay to plaintiffs so much of said sum of \$6,025, with interest thereon, as might be necessary to satisfy their several debts; that the said money so in his hands might be treated as a trust fund in the custody of the court, subject to its orders; and that the application thereof sought to be made by the said Crim be set aside, and for general relief. On the 27th day of February, 1897, the defendants J. N. B. Crim, Samuel J. Heatherly, and Helen A. Heatherly entered their demurrer to said amended bill, in which plaintiffs joined, and the demurrer, being argued, was sustained by the court, and the said bill was dismissed, and judgment rendered for defendants for their costs. On the 28th of April, 1897, plaintiffs caused notice in writing to be served on the defendants S. J. Heatherly, J. N. B. Crim, Helen J. Heatherly, wife of S. J. Heatherly, James E. Heatherly, and M. Peck, trustee, reciting the decree of June —, 1896, ascertaining the amounts due them, respectively, on their claims, after the application of the proceeds of the sale of all real and personal property owned by said two Heatherlys, and that it was contended by the plaintiffs that a certain fund of \$6,025, received by said Crim during the progress of the suit, from the wife of Samuel J.

Heatherly, was the property of said Samuel J. Heatherly, and was received by said Crim in fraud of the rights of his creditors, and that said fund, with interest thereon from January 8, 1891, constituted a trust fund in the hands of Crim, justly applicable in equity to the payment of plaintiffs' claims; and that by said decree of the 6th of June, 1895; and on the — day of June, 1896, the court reserved for future determination and decree all questions touching their right to compel Crim to pay said fund into court to be applied to the payment of their claims, as to which questions the said cause was still pending in said court, said questions undetermined, and their claims yet unpaid, although said fund in the hands of Crim was applicable to their relief, and they were notified that on the 29th of May, 1897, plaintiffs would move said circuit court of Barbour county, then in session, to decide and determine said reserved questions, and compel the said Crim, by a proper decree, to pay said fund, with interest, into court, to the relief of plaintiffs, together with costs in said suit. On the 4th day of June, 1897, the cause was heard upon the papers heretofore read; former orders and decrees; the amended bill and the decrees therein; upon the notice and motion of plaintiffs and assailing creditors mentioned therein, to compel the defendant J. N. B. Crim to pay into court, to the relief of the assailing creditors mentioned in the said notice, the \$6,025, with interest thereon, obtained by said Crim from Helen A. Heatherly on the 8th of January, 1891, together with the costs of the original cause; and upon the demurrer of J. N. B. Crim, M. Peck, trustee, Samuel J. Heatherly, Helen A. Heatherly, and James E. Heatherly to the said notice; and upon argument of counsel,—when the court held that plaintiffs and assailing creditors mentioned in the notice were not entitled to the relief therein sought, and that said Crim was not liable to them, or any of them, for the said \$6,025, or the interest thereon, but that said Crim and Samuel J. Heatherly were liable to plaintiffs and assailing creditors for the costs of the original cause and petitions in that court, and decreed accordingly; from which decree the plaintiffs appealed to this court, assigning the following errors: "First. It was error in the court below to refuse them relief or to pass on the question at the time as to their right to charge the \$6,025 by the decree of May 30, 1896, and to reserve the same for the future order of the court, when the pleadings were then made up, and the trust estate all sold and reported to the court, because in the meantime two years elapsed, and it was too late to appeal from that decree. Second. It was error in the court below to sustain a general demurrer, no grounds being assigned, to the amended bill, and to dismiss the same, denying them, and each of them, any and all relief as to their right to charge the \$6,025

Third. It was error in the court below to refuse them, and each of them, any and all relief in the original cause upon the notice given in respect to their right to have the \$6,025 brought into court and charged with their respective debts."

It is earnestly contended by appellants that, when this money (the \$6,500) was sent to Mrs. Heatherly, it became at once the property of Samuel J. Heatherly, and he could have used it as was contemplated by Crim when he let him have it. As stated in the opinion in 38 W. Va. 434, 18 S. E. 611: "He [Crim] contemplated that when it was loaned some of it should be used by Heatherly in satisfying certain liens against the property embraced in the deed of trust, but for some reason this purpose was not carried out; perhaps because, before all the money loaned was paid over to defendant Heatherly, this suit assailing the deed of trust was instituted." Yet he did not use it in this or any other way, nor treat it as his own property, but kept it intact, and returned the identical money to Crim, which he received from him, in the same paper in which he received it, as shown by plaintiffs' amended bill and by the record. If the money had been so applied, under the decisions, such use of it would have redounded to the interest and benefit of the assailing creditors; and very properly so, because the payment by Crim would have been a voluntary payment, in furtherance of a fraudulent transaction, intended to defeat the creditors who were entitled to the benefit of all the property of the debtor, and Crim could not have been subrogated or substituted to the rights of such lien creditors. *Bank v. Wilson*, 25 W. Va. 242; *Fullerton v. Viall*, 42 How. Prac. 294. But it was not so applied, and can the creditors of Heatherly complain that it was not? The creditors being entitled to all the property that Heatherly owned, the transfer of it to prevent them having the benefit of the proceeds thereof was illegal and it was so held by the court, the trust deed was set aside, all the property sold, and the proceeds paid to the parties entitled to receive it. Crim was engaged with Heatherly in attempting to defraud his creditors. They were overtaken in their scheme. Their efforts came to naught. The property they were seeking to place beyond the reach of the creditors of Heatherly was all subjected to the debts for which it was liable, and Crim and Heatherly adjudged to pay the costs in undoing what they had vainly attempted to do, and the claim of Crim was removed from its place in the order of priority, and remitted to the foot of the list, to be last paid of all claims secured.

This case is different from any case cited by counsel for appellants (which I have carefully examined), or which I have been able to find, in that it is a contest over the thing itself, given in consideration of the execution of the fraudulent deed of trust, for its security, after the setting aside as fraudulent of

the trust deed, and all the property conveyed in said trust deed has been disposed of and applied to the benefit of the just creditors. The cases cited go no further than to restore to the creditors the property attempted to be placed beyond their reach, or, in case it has gone into the hands of an innocent purchaser, its value. *Hinton v. Ellis*, 27 W. Va. 422; *Ringold v. Sulter*, 35 W. Va. 184, 18 S. E. 46. In *Baldwin v. June*, 68 Hun, 284 (Syl.), 22 N. Y. Supp. 852, it is held that "when a conveyance by a judgment debtor is set aside as in fraud of creditors, in an action in the nature of a creditors' bill, it should be retained as security to the grantee (although said grantee is affected with knowledge of the fraudulent intent with which it was executed) for so much of the consideration therefor as is represented by land conveyed to the grantor in exchange therefor, which, by reason of such conveyance to the judgment debtor, is made subject to, and the proceeds of which are applicable in satisfaction of, plaintiffs' judgment. Such security, however, is not to be extended to an antecedent indebtedness of the grantor to the grantee included in the consideration for the conveyance." In this opinion, the judge who rendered it says: "I am aware that it has been frequently held that payments made by a fraudulent vendee upon the purchase of property cannot be recovered back or be allowed to him in a judgment setting aside a conveyance which was fraudulent; that he, being a guilty participant in the fraud, was entitled to no relief from the court. But these decisions are founded upon the theory that the rights of the creditors would be impaired by the allowance of such payments.

* * * The refusal to reimburse for moneys paid in such a case is not for the purpose of punishing a party because of his wrongdoing, but is for the purpose of preserving the rights of the creditors to the extent that they would have been, had the conveyance not been made." In *Bank v. Halsted*, 134 N. Y. 520 (Syl.), 31 N. E. 900: "Where a transfer of personal property is set aside as fraudulent as against the creditors of the transferor, in an action brought by them, and it appears that prior to the transfer the property was pledged to secure a valid debt to a party in no wise connected with the fraud, and that the fraudulent transferee simply received the surplus of the avails of the sale of the property after deducting the amount of the debt, the creditors are not entitled to recover of him the full value of the property, but simply the value of the interest transferred, i. e. the value of the property, deducting the amount of the debt. However scandalous the fraud may be, a court of equity has no power to award judgment for a sum exceeding that value in order to punish the party for his wrongdoing."

In the case at bar it is insisted that not only the property fraudulently conveyed shall be restored to the pursuing creditors, as has

been done, and the proceeds all applied to their debts, and Crim adjudged to pay the costs of their proceeding to set aside the trust deed, but that the money loaned by Crim to Heatherly, and secured by the trust deed, shall be forfeited to their benefit; thus not only having the benefit of all the property they were ever entitled to, to satisfy their debts as far as it would, but having their security increased by this sum of \$8,025, which came to the possession of Heatherly without consideration, which he never converted to his own use, and which never entered into or became a part of his estate. Suppose the court had required this sum to be paid into court, how could it have been disposed of? Surely, it could not have been paid out to the creditors of Heatherly, for they had already received the benefit of all his property, and they had no claim against Crim, after defeating his claim, to any interest in Heatherly's property; and the money having been placed in the hands of Heatherly by Crim in their fraudulent effort to place the property of Heatherly out of the reach of his creditors, and Heatherly not having converted it to his own use, but kept it intact, it was hardly a subject-matter to be disposed of by decree of the court. I see no error in the decree, and the same is affirmed.

(45 W. Va. 473)

PARSONS v. AULTMAN, MILLER & CO.
(Supreme Court of Appeals of West Virginia.
Dec. 8, 1898.)

JUSTICES OF THE PEACE — PROCEDURE — CONTINUANCE — ABSENCE OF JUSTICE — JUDGMENT — VACATING — CERTIORARI.

1. If a justice fail to attend to try a case pending before him at the hour set, and no other justice appears to try the case at that time, when the hour has elapsed the case stands continued, by operation of law, for one week. After such continuance has become consummated by the necessary lapse of time, one of the parties to the suit, in the absence of and without the consent of the other, cannot call in another justice to proceed with the trial of the case. If he does so, his judgment is without jurisdiction, and void, and may be set aside by the original justice, in custody of the docket and papers on motion, after notice to the opposing party.

2. If such justice refuse to set aside such judgment and rehear such case, an appeal will lie from his judgment to the circuit court, as in other cases, and, if he refuse to grant the same within 10 days, the circuit court of the county, or judge thereof in vacation, may grant the same on application.

3. The statutory remedy of certiorari to judgments of justices in civil cases is merely a form of appeal.

(Syllabus by the Court.)

Error to circuit court, Jackson county; V. S. Armstrong, Judge.

Action by E. B. Parsons against Aultman, Miller & Co. before a justice of the peace. Judgment for plaintiff. From an order of the circuit court quashing a writ of certiorari, defendant brings error. Reversed.

John H. Riley, for plaintiff in error. W. A. Parsons and J. A. Woddell, for defendant in error.

DENT, J. On the 30th day of April, 1895, E. B. Parsons commenced an action before W. P. Kerwood, a justice of Jackson county, for the recovery of \$300, against Aultman, Miller & Co., a foreign corporation. An attachment was issued, and several persons were summoned as garnishees. On the 1st day of July, 1895, without service of process or appearance on the part of defendant, a judgment was rendered for \$300 against defendant, and several judgments against garnishees, aggregating \$290.08, and certain property attached was ordered sold. On the 10th of December, 1895, the defendant appeared, and obtained a rehearing, which was fixed for 27th December, 1895. On that day it was continued until the 25th January, 1896, at 10 o'clock a. m. On that day it was continued on motion of plaintiff, and at his costs, until the 29th day of January, 1896, at the same hour. On that date it was continued until the 6th day of February, at the same hour by agreement of parties. On the last-mentioned day Justice Kerwood was ill, and remained away from his office; and at 2 o'clock p. m., another justice, J. D. Clinton, having been called in to try the case, a jury was impaneled and a trial had, resulting in a verdict of \$300 for plaintiff, on which said Justice Clinton entered judgment in Justice Kerwood's docket. On the 13th day of February, 1896, Justice Kerwood appears to have been still ill; and on the 20th day of February, 1896, between the hours of 10 and 11 a. m., the defendant appeared, filed the affidavits of John H. Riley and Justice Clinton, and having served notice on the plaintiff, and his attorney, William A. Parsons, being present, moved Justice Kerwood to rehear said action, to which motion the plaintiff objected, and the justice, on consideration thereof, overruled and disallowed the motion; and on the same day defendant filed an appeal bond, and demanded an appeal from the refusal of the justice to rehear the action, but the justice refused to allow the appeal. On the 4th day of March, 1896, the circuit court, on application of the defendant, granted a writ of certiorari. And on the 8th day of November, 1896, on motion of the plaintiff, the circuit court quashed the writ as improvidently awarded, and dismissed the petition.

The first question presented is as to whether the order entered by Justice Kerwood on the 20th day of February, 1896, refusing to grant a rehearing, is an appealable order. It is undoubtedly a final judgment, and is therefore a subject of appeal as to all questions then determined by the justice. It is provided in section 70, c. 50, Code, that "when the defendant does not appear and judgment is rendered against him in his absence, the justice may set aside the judgment within fourteen days thereafter on motion of defend-

ant and payment of costs." The judgment of Justice Clinton was rendered on the 6th of February, 1896; hence the motion was in time.

The next question is, was the motion before the proper justice? Justice Kerwood issued the summons, he was the custodian of the papers, and the judgment was on his docket. The motion was made, not on the grounds of any defect in the judgment itself or the conduct of the jury trial, but because the justice who rendered it was without authority of law to hear and determine the case, was a mere voluntary intermeddler, and the judgment was therefore void, and did not oust the jurisdiction of Justice Kerwood to hear and determine the case. This was a proper question to present to Justice Kerwood. If a voluntary intermeddler, without authority of law, took possession of his office during his illness and absence, and entered judgments on his docket on suits pending before him, such judgments would not be binding, and he would have the right to disregard and disannul the same. The record shows that by agreement the trial of this case was set for 10 o'clock a. m., the 6th day of February, 1896; that Justice Kerwood was ill; and that a jury trial was had in the absence of the defendant, at 2 o'clock p. m.; and the affidavit of Justice Clinton, which was made part of the record on the motion for rehearing, shows that he was not called into the case until the afternoon, and that he did not know of its pendency until 12 o'clock noon. It is therefore plain that he was not present at 10 o'clock a. m., the hour set for trial, nor until two hours thereafter. Section 64, c. 50, Code, provides: "No action shall be discontinued on account of the absence of the justice. If he fail to attend on the return day of the summons or at the time to which the action stands continued, any other justice of the same county may attend and try the case, or continue it for not exceeding thirty days; and if he do so shall make and sign an entry thereof on the docket of the absent justice. If not tried or continued by another justice as aforesaid, it shall stand adjourned for one week, and so on from week to week until disposed of." In the absence of either party, to make the action of the attending justice legal, the record must show that his attendance was at the time or hour set for trial by the previous order; for a party to a suit cannot wait until the hour for trial has passed, and the case is continued by operation of law, and his opponent has gone away, and then, without notice to him, call in another justice, have the case taken up for trial by a jury, and thus obtain a nonappealable judgment. Such practices should be thoroughly condemned. Justice Clinton is free from blame, as he was imposed upon by the plaintiff, not being cognizant of the facts in the case, yet his action was none the less illegal and void. A judgment rendered by a justice without

jurisdiction is void, and it may be reversed by certiorari at common law. *Crandall v. Bacon*, 20 Wis. 639. In the continuance of causes, the statute must be strictly conformed to; otherwise the justice loses jurisdiction. *Doctor v. Hartman*, 74 Ind. 225. If a cause is not tried at the appointed time, or within one hour, as a general rule it stands continued by operation of law, unless the justice at the time is engaged in the trial of another action. *Hunt v. Wickwire*, 10 Wend. 102. The power is inherent in every court or tribunal to vacate entries in its record of judgments, decrees, or orders rendered or made without jurisdiction. 1 Black, Judgm. 307. The justice having refused to grant the defendant an appeal within 10 days, he had a right, after that time, to apply to the circuit court for an appeal, under section 174, c. 50, Code. *Lowther v. Davis*, 33 W. Va. 132, 10 S. E. 20. This case is not subject to either the case of *Barlow v. Daniels*, 25 W. Va. 512, or *Hickman v. Railroad Co.*, 30 W. Va. 296, 4 S. E. 654, and 7 S. E. 455, for the reason that it is not an attempt to re-examine a fact tried by a jury, but to nullify a judgment rendered by a justice not having jurisdiction. The defendant, instead of applying for an appeal, applied for the statutory writ of certiorari; both being the same, in effect, as to questions of law raised, except that certiorari is said not to lie where an appeal is the proper remedy. In the case of *Fouse v. Vandervort*, 30 W. Va. 327, 4 S. E. 298, the word "appeal" was held to mean certiorari; and in the case of *Long v. Railroad Co.*, 35 W. Va. 333, 13 S. E. 1010, the present statutory certiorari was held to be, in effect, an appeal. The two have therefore become, so far as applied to the review of civil cases before justices, synonymous terms, except that the certiorari appeal is granted as a matter of sound discretion, and the appeal certiorari is granted as a matter of right. The matter involved here is purely a question of law. The court should have disregarded the language of the petition, as it sufficiently appears on its face what remedy is sought, and granted an appeal, with certiorari to remove the proceedings. If it was regarded as a mere petition for certiorari, it would have to show good cause why it was not applied for in 10 days. This requirement, however, is satisfied with the fact that an appeal lay and was refused by the justice. *Lowther v. Davis*, cited. This being true, it was not necessary to show any other cause for not having presented the petition in 10 days, treated as a petition for an appeal or certiorari, or both, as it really is in effect.

On the motion to quash the writ and dismiss the petition, it was improper to hear ex parte affidavits tending to show that there was some arrangement between the attorneys that the case was not to be taken up until a certain railroad train arrived, and that such train did not arrive until about noon. Such matter, if at all admissible,

should have been presented before the justice on the motion to rehear the judgment; but it is probable that when the defendant's agents heard of the illness of Justice Kerwood they took it for granted that the case would be continued, and not tried. If there was such arrangement, the previous continuance should have been in accordance therewith. The plaintiff was undoubtedly endeavoring to take an unfair advantage of the absent defendant, and the circuit court should have avoided the judgment thus obtained as a nullity, set aside the verdict of the jury, and directed a rehearing of the case on its merits. The judgment complained of, dismissing the defendant's petition, is reversed, the judgment of Justice Kerwood overruling his motion is reversed, the judgment of Justice Clinton is vacated and annulled, and the verdict of the jury is set aside, and this cause is remanded to the circuit court, to be therein tried and disposed of as the law requires.

(45 W. Va. 516)

HUNDLEY v. CALLOWAY.

(Supreme Court of Appeals of West Virginia.
Dec. 7, 1898.)

CHATTEL MORTGAGES — REMOVAL OF PROPERTY — DETINUE — DAMAGES — JUDGMENT.

1. R. executes a deed of trust on two mules to H., trustee, to secure Y. in the sum of \$165. The deed is recorded in R. county November 23, 1895, the day of its execution. The property is removed to C. county, and the deed recorded there December 5, 1895. The property is removed to F. county, and the deed recorded there November 28, 1896. On November 30, 1896, action is brought by H., trustee, in detinue for the mules, before a justice, in F. county, against C., who is in possession. At the trial the deed of trust is given in evidence, mules identified, possession is proven with C., and that \$100 on the trust lien is still due and unpaid. H., the trustee, has shown superior title, and is entitled to recover, unless C. shows that he purchased the mules without notice, and for valuable consideration, without C. and R. counties, three months or more prior to the recordation of the deed in F. county.

2. In such case, if plaintiff establish his right to recover, the measure of his damages would be the amount proved to be due and unpaid on his trust lien, for which he should have alternate judgment against the purchaser.

(Syllabus by the Court.)

Error to circuit court, Fayette county; J. M. McWhorter, Judge.

Detinue by G. W. Hundley, trustee, against A. N. Calloway. A judgment of a justice of the peace in favor of defendant was set aside by the circuit court on certiorari, and defendant brings error. Affirmed.

St. Clair, Walker & Dillon, for plaintiff in error. Payne & Payne, for defendant in error.

McWHORTER, J. E. E. Runion conveyed by deed of trust, November 23, 1895, to G. W. Hundley, trustee, two mules, to secure to

S. J. Young the payment of two notes, of \$65 and \$100 respectively, which deed was recorded in Roane county on the day of its date. The property was removed to Calhoun county, and the deed there recorded December 19, 1895. On the 28th of November, 1896, it was recorded in Fayette county. Two days thereafter (November 30th), the trustee, G. W. Hundley, instituted his action in detinue before Justice A. C. Barton, in Fayette county, against A. N. Calloway, for the possession of the two mules, describing them, and alleging their value at \$112.50 each, summons returnable on the 5th day of December, 1896, on which day the defendant, by counsel, appeared only for the purpose of quashing the summons and the return thereon, and made such motion, which was overruled, to which ruling the defendant excepted. Defendant demanded a jury, which was summoned, impaneled, and sworn. Evidence was adduced by the plaintiff, who introduced the deed of trust, showing the recordation thereof in the three counties of Roane, Calhoun, and Fayette, as above stated, to the introduction of which defendant objected. The objection was overruled, and defendant excepted. S. J. Young testified that there was still due him on the debt secured by the trust deed \$100, with 1½ months' interest, and identified the mules in possession of defendant as the same conveyed in the trust deed, and stated that, according to his best information, the mules were removed from Calhoun county about the 1st of October, 1896, and that Runion took them out of the county; that he supposed the property came into the possession of the defendant about the 17th of October; that the property was with the show, and it was advertised to be at Fayetteville the 17th of October, and he supposed the defendant traded for it then; he had been told so. Defendant, by his counsel, moved to exclude the answers of witness in relation to when the property came to Fayetteville, and when defendant traded for it, which the court overruled, and the defendant objected and excepted. Witness further stated, by permission of the court, over the objection and exception of the defendant, that defendant said to him he did not dispute their being the same mules. On cross-examination, witness said he could not give the date when he last saw the mules in Calhoun county; did not know of his own knowledge the exact date of their leaving Calhoun county; said it had been pretty near a year since he (witness) had been in Calhoun county. Witness T. G. Walker testified, on behalf of plaintiff, that the show was in Fayetteville in October; had seen the mules several times in defendant's possession since the show; never saw them in his possession before the show; and defendant told witness that he traded for them at that time. And this was all the evidence offered in the case. Defendant moved the court to strike out the evidence so offered, which motion was overruled; and defendant excepted to said ruling, and the jury returned

a verdict for the defendant. Plaintiff moved to set aside the verdict, and grant him a new trial, for the reason that the verdict is contrary to the law and the evidence, which motion the justice overruled, and gave judgment for the defendant, to which ruling the plaintiff excepted. Plaintiff applied for, and secured from the circuit court of Fayette county, a writ of certiorari.

On the 10th of March, defendant, by counsel, moved the court to quash the writ and return thereon, and the petition filed in the case, on the ground that the writ of certiorari was improvidently awarded, for the reason that the justice did not err in overruling plaintiff's motion to set aside the verdict of the jury, and in refusing to grant him a new trial, which motion the court overruled, and held there was error in the record judgment of the justice, and set aside the said judgment and verdict, and granted plaintiff a new trial, and retained the case in the said circuit court for trial; to which rulings of the court the defendant excepted, and tendered his bill of exceptions, which was duly signed and saved to him, and defendant obtained from this court a writ of error and supersedeas, assigning as error that, "in order to make out this case, it was necessary to prove that not more than three months had elapsed from the date of the removal of the property from the county of Calhoun or the county of Roane next preceding the institution of the suit, or that the conveyance thereof had been on record in the county of Fayette within that period. There is no proof in the record to show that the property in question was removed from the county of Calhoun or the county of Roane within three months prior to the institution of the suit, and this must appear affirmatively before the action can be maintained, since the deed does not appear to have been recorded in Fayette county until the 28th of November, 1896." By the deed of trust, the property being fully identified upon the trial, the plaintiff clearly showed himself to have the superior title, and entitled to recover possession of the same, unless the defendant showed his right by having purchased the property for valuable consideration, without notice, and without Calhoun and Roane counties, three months or more prior to the 28th of November, 1896, the date of the recordation of said deed. The defendant did not attempt to show that he had any right whatever. He may have simply borrowed the mules from Runion, or was bailee of Runion, the owner.

Defendant contends that, unless it was shown that the trust deed was recorded in Fayette within the period of three months from the time the mules were removed from Calhoun, then the defendant was a purchaser without notice of the existence of said lien. He failed to show that he was a purchaser at all. It is also contended that plaintiff, not having proved the value of the mules, was not en-

titled to recover because of the provision of section 6, c. 102, Code, that the verdict shall be for the possession of the property claimed, if it can be had; if not, that he recover the value thereof as found by the verdict. While the plaintiff did not prove the value of the mules, he did prove the exact amount of interest he had in them, which amount paid to him by the defendant, or real owner of the mules, would have entitled him to hold them free from said trust deed. The plaintiff only held the legal title to the mules for the benefit of Young, and only to the amount of his lien upon them, and their value to him would be limited to the amount yet unpaid on his lien, as in *Chamberlin v. Shaw*, 18 Pick. 283, where Shaw, C. J., in rendering the decision of the court, says: "If the case is so situated that the plaintiff can be indemnified by a sum of money less than the full value, there seems to be no reason why it should not be done, as where the plaintiff has a special property, subject to which the defendant is entitled to the goods. For instance, a factor has a lien on goods to half their value. The principal becomes bankrupt, and the property vests in his assignees, subject, of course, to all legal liens. The assignees, denying and intending to contest the factor's lien, get possession of the goods, and convert them. The factor brings trover, establishes his lien, and recovers. How shall damages be assessed? If he recover the full value of the goods, he will be responsible directly back to the defendants themselves for a moiety of the value. To avoid circuity of action, why should not damages be assessed to the amount of his lien? He is fully indemnified. The balance of the value is in the hands of those entitled to it, and the whole controversy is settled in one suit. If the plaintiff is responsible over to a third person, or if, for any cause, the defendant is not entitled to the balance of the value, a very different rule would prevail, and justice would require that the whole value of the property should be assessed to the plaintiff." When the plaintiff has only a special property in the thing sued for, as a pledgee, and not the absolute property, and it is shown on the trial what is the exact amount of his lien against the property, a verdict for that amount as alternate value would not be error. Nor would a verdict for the possession of the property without ascertaining the value be error, under the statute. *Brownell v. Hawkins*, 4 Barb. 491; *Chadwick v. Lamb*, 29 Barb. 518, 522; *Spoor v. Holland*, 8 Wend. 445; 2 Tuck. Comm. c. 6, p. 81. Plaintiff in error seems to have overlooked the last clause of section 6, c. 102, which says: "If the verdict omit price or value, the court may at any time have a jury impaneled to ascertain the same." The circuit court did not err in setting aside the judgment and verdict, and retaining the case for a fair trial of the rights of the parties in that court, and the same is affirmed.

(45 W. Va. 290)

WATSON v. WATSON.

(Supreme Court of Appeals of West Virginia.
Nov. 23, 1898.)

RES JUDICATA—UNLAWFUL DETAINER—TITLE INVOLVED—DISMISSAL—EQUITY.

1. A bill in equity dismissed generally, without any reservation to the plaintiff to sue thereafter, is conclusive between the parties, and those claiming under them, of all the issues made up in the cause, even though there was no jurisdiction in equity because of adequate remedy at law.

2. On the trial of a warrant issued by a justice in unlawful detainer, if answer of title is filed by the defendant setting forth therein the facts showing that such title will come in question on the trial thereof, which answer shall be properly verified by his affidavit or that of his agent or attorney, if the justice be of opinion that the facts therein stated show that the title to real property will so come in question he shall dismiss the action at the costs of the plaintiff, unless the plaintiff or his agent or attorney shall file an affidavit denying the truth of such facts.

3. If an appeal be taken from the judgment of a justice in such case to the circuit court, and it there appears by answer filed that the title to the property will come in question, it will be the duty of the court to dismiss the action.

4. When a court of equity takes jurisdiction of a cause for one purpose, it will go on and dispose of the questions involved to avoid a multiplicity of suits.

(Syllabus by the Court.)

Error to circuit court, Barbour county; John H. Holt, Judge.

Action by William E. Watson, executor of Thomas F. Watson, against J. C. Watson. From a judgment dismissing the action, plaintiff brings error. Affirmed.

John J. Davis and W. T. Ice, for plaintiff in error. Samuel V. Woods, for defendant in error.

ENGLISH, J. This was an action of unlawful entry and detainer, brought by William E. Watson, executor of Thomas F. Watson, deceased, against J. C. Watson, before a justice of the peace of Barbour county, on the 23d of November, 1896. The parties appeared, and the defendant filed his answer denying that he unlawfully detained the premises mentioned, or that any damages had been sustained by the plaintiff by reason thereof or otherwise; also claiming that in the trial of said action the title to the premises described in the warrant would come in question, and for that reason the justice had no jurisdiction thereof. In his answer the defendant also set out the following facts tending to show that the title would come in question, to wit: That in the year 1894, when the land in question was bought and conveyed to plaintiff's testator, the same was bought by him for defendant, who was his relative; that defendant was placed by him in possession thereof, which he had since held under said purchase; that testator was a wealthy man, who had reared defendant, was unmarried, and about the time of said purchase defendant had come to West Virginia from his home in Kansas to take pos-

session of said land under a parol gift to defendant of same; that testator gave the land to defendant, and under the gift he took possession of it as his own, used it, paid the taxes thereon, and is in undisturbed possession of it, save by this suit and a chancery suit then pending in the circuit court of Barbour county styled "Wm. E. Watson, Ex'r, v. J. Creed Watson," which was made part of said answer and defense; that of all these facts the plaintiff, by himself and his agent, had full and complete notice, and had had from the date of said purchase by testator and the conveyance to him by Worthington Ward by deed dated March 13, 1894, of the land in controversy. The defendant also tendered a special plea in writing, which was rejected by the justice, and, all the evidence having been heard, judgment was rendered for the plaintiff for the possession of the land described in the summons, and \$20 damages and costs. From this judgment the defendant appealed to the circuit court. When said appeal was called in the circuit court, the appellant tendered a plea in writing, marked "No. 1," to which the appellee objected and moved the court to reject same, which motion was overruled, and said plea allowed to be filed, and the appellee excepted. This plea claimed that the plaintiff ought not to maintain said action because on July 14, 1896, said William E. Watson, executor, etc., instituted a suit in chancery in the circuit court of Barbour county against the appellant in which he alleged, among other things, that at the time of the death of his testator he was the owner of said land, called the "Worth Ward Farm"; that soon after the same was conveyed to him he placed appellant in possession thereof as his tenant, until about April 6, 1896, when plaintiff and defendant entered into a written contract under which defendant surrendered the said farm, and the plaintiff, by his agent, took possession thereof; that in June, 1896, plaintiff learned that defendant was on said farm claiming its possession, and was about to cut grass, etc., and otherwise control the same; charging that defendant was insolvent, and if he cut the grass and pastured the land it would work plaintiff irreparable damage; praying an injunction to restrain defendant from the acts and claims aforesaid, and for general relief,—which injunction was awarded and made effective on July 14, 1896. To this bill defendant demurred and answered, putting in issue every material allegation of the bill, and claimed that he was in possession, and had so continued, of said land since the execution of the deed therefor to Thomas F. Watson on March 13, 1894, and that he was entitled to its possession; also averring that the title to T. F. Watson was not such as passed to the executor, a title in fee, and that his title thereto was disputed by respondent, and that said decedent did not in terms nor by implication undertake to devise said land to

the plaintiff or with intention to vest him with the title thereto; further averring that respondent was the owner of said farm which was purchased by said Watson for him; that defendant was put in immediate possession, and the title to said land was vested in trust only in the said decedent, who supposed the title was in respondent,—to which answer the plaintiff replied generally. Such proceedings were had that the injunction was dissolved, the bill dismissed at the costs of plaintiff, as shown by exhibits filed with said plea, and the defendant said that the parties to said suit in chancery, and the parties to this action of unlawful detainer, are the same persons, suing in the same rights, touching the same subject-matter, to wit, the right to possession of said land; and, the same having been adjudicated in said chancery cause, the plaintiff is estopped thereby to prosecute this action brought on the 18th of November, 1897. On November 2, 1897, the defendant filed his answer of title, and gave notice that upon trial of the action he would read the depositions of V. Goff and others, filed in the clerk's office to be read in his behalf. On March 2, 1898, the plaintiff moved the court to strike out defendant's special plea, and also to reject his answer of title filed before the justice and his supplemental answer filed in open court, which motion the court overruled. The plaintiff excepted and replied generally to said plea, and issue was joined thereon. The defendant pleaded not guilty, and issue was joined thereon. On the same day the cause was submitted to the court in lieu of a jury, and the court, having heard and considered all the evidence adduced, found for the defendant upon the plea of *res adjudicata*, and also found for the defendant upon the evidence adduced upon the general issue, and dismissed the plaintiff's action with costs. The plaintiff took several bills of exception to the rulings of the court, and obtained this writ of error.

The question presented for our consideration and determination in this case is whether the defendant at the date of the summons unlawfully withheld from the plaintiff the possession of the premises in controversy. Defendant, by his pleadings, claims that this question is *res adjudicata*; that it has already been heard and determined by a court of competent jurisdiction, in a suit between the same parties and in regard to the same subject-matter, and exhibits with his plea the record and proceedings in a chancery suit which was instituted and prosecuted to a termination in Barbour county, in which said William E. Watson, executor, of the last will and testament of Thomas F. Watson, was plaintiff, and J. Creed Watson defendant; and it appears that in the bill filed in said cause the plaintiff claimed that the defendant was wrongfully in possession of a portion of said land, and that it was his intention to take absolute control of said farm in possession of the plaintiff, and to cut the grass and pasture the land;

that his title as executor of said T. F. Watson was undisputed, and he prayed for an injunction restraining the defendant from cutting the grass, etc., or interfering with the stock then on said land by consent of the plaintiff,—which injunction was granted. The defendant answered and put in issue every allegation of the bill as to title or possession of said land, and such proceedings were had in the cause that the injunction so obtained was dissolved and the bill dismissed, with costs. Now, this bill certainly claimed that the plaintiff was entitled to the possession, and that the defendant was trespassing on the premises, and was insolvent; and plaintiff obtained his injunction on these allegations. What was the effect of the dismissal of the bill and dissolution of the injunction?

In the case of *Schoonover v. Bright*, 24 W. Va. 698, this court held that: "(1) An injunction will be dissolved on the hearing, if the answer fully, plainly, and positively denies all the material allegations of the bill on which the injunction was founded, and there is no proof to establish said allegations. (2) To warrant the interference of a court of law to restrain a trespass two conditions must co-exist: First, the plaintiff's title must be undisputed or established by legal adjudication; and, second, the injury complained of must be irreparable in its nature." In the above chancery suits, as we have seen, every material allegation of the bill was denied, and we must also infer that there was no proof to support said allegations; secondly, it appears that the plaintiff's title was disputed, and nothing was brought forward to properly establish it. The bill asserted the right of the plaintiff to possession of the property, and there was a prayer for general relief, and while equity will not, as a rule, determine disputes in regard to the possession of real estate, yet it has been held that where a court of equity has jurisdiction for one purpose, it will go on and give relief between the parties upon proper allegations. So, in the case of *Chrysler v. Teter*, 48 W. Va. 356, 27 S. E. 288, this court held that, "when a court of equity takes jurisdiction of a cause for one purpose, it will go on and dispose of the questions involved to avoid a multiplicity of suits." See, also, *Hanly v. Watterson*, 89 W. Va. 214, 19 S. E. 536; *Western M. & M. Co. v. Virginia Cannel Coal Co.*, 10 W. Va. 250, syllabus. As we have said, the plaintiff claimed in his bill to be entitled to the possession, and that the defendant was trespassing thereon. The answer denied this allegation. This pleading made an issue upon the question as to the right to the possession. What, then, is the effect of the dismissal of the bill? In *Taylor v. Yarborough*, 18 Grat. 183, the Virginia court of appeals held that: "A bill in equity dismissed generally, without any reservation to the plaintiff to sue thereafter, is conclusive between the parties and those claiming under them of all the issues made up in the cause." See, also, *Durant v. Essex Co.*, 7 Wall. 107.

in which it is held that "a decree dismissing a bill in an equity suit in the circuit court of the United States which is absolute in its terms, unless made upon some ground which does not go to the merits, is a final determination of the controversy, and constitutes a bar to any further litigation of the same subject between the same parties." The same principle is announced in the case of *Carberry v. Railroad Co.*, 28 S. E. 694, 44 W. Va. 260. The fourth point of syllabus holds that "a decree on full hearing dismissing a bill generally, without reservation of right to the plaintiff to sue at law, is conclusive upon all the matters involved in the case, even though there was no jurisdiction in equity because of adequate remedy at law. Unless it otherwise appear from the decree, it will be taken that the dismissal was on a hearing of the merits." Upon this point see, also, *Wandling v. Straw*, 25 W. Va. 692, and *McCoy v. McCoy*, 29 W. Va. 794, 2 S. E. 809. Now, it is earnestly contended by counsel for the plaintiff in error that the court below erred in not sustaining his motion to reject plea No. 1, tendered by defendant in error, which raises the question of res adjudicata. This plea included as exhibits the bill, answer, and exhibits in said chancery suit, the latter being considered part of the bill, and the decree dissolving the injunction and dismissing the bill, and I think that the right of the plaintiff in that suit to the land in controversy was involved in that suit. The exhibits mentioned in said plea were used in the suit in support of the right of possession, and they, having been before the court, had already been passed upon in the chancery cause. In view of the authorities above cited, and for the reasons before stated, I conclude that the circuit court did not err in overruling the motion to reject plea No. 1, and the plea of res adjudicata should have been, and was, properly sustained.

There is another ground upon which I believe the circuit court was right in dismissing the plaintiff's action. The suit was instituted before the justice and appealed to the circuit court, an answer of title was filed before the justice, and a supplemental answer of title was filed after the case came on the docket in the circuit court. Neither the plaintiff nor his agent or attorney filed an affidavit denying the truth of such facts, either before the justice or in the circuit court,—which state of facts made it the duty of the justice to dismiss the action, and, he not doing so, it was the duty of the circuit court on appeal to have dismissed the action when such fact was brought to its attention by the supplemental action of title. This was held in the case of *Hughes v. Mount*, 23 W. Va. 130, which was a warrant of unlawful detainer issued by a justice. Answer of title was filed which was replied to by affidavit of the plaintiff, and the warrant was dismissed by the justice. On appeal to the circuit court the action of the justice was approved, and from that decision a writ of error was obtained, and the case

brought to this court, which held that: "If in such a case the justice has so dismissed such warrant, and an appeal be taken from his judgment to the circuit court, and the same state of facts appear to the satisfaction of such court, either by the defendant's answer or upon the trial of such warrant upon such appeal, it is the duty of such court to dismiss the said warrant for want of such jurisdiction, without prejudice to the plaintiff's right to institute any other action at law or suit in equity which may be necessary or proper to determine his right to the land in the warrant mentioned." In the case under consideration the justice found for the plaintiff, but when the case came to the circuit court, and it appeared that the title to the land was brought in question, it was the duty of that court under the above decision to have dismissed the case. For these reasons, the judgment complained of is affirmed, with costs and damages.

(45 W. Va. 548)

VINTROUX v. SIMMS.

(Supreme Court of Appeals of West Virginia.
Dec. 7, 1898.)

APPEAL — REVIEW — BOUNDARIES — ADVERSE POSSESSION.

1. Where the verdict of a jury is wholly without evidence on a point essential to a finding, or the evidence is plainly insufficient to warrant such finding by the jury, the same should be set aside and a new trial awarded.

2. Where the claims asserted by adjoining landowners as to their respective boundaries are such as to cause an interlock, and either of the parties is in actual adverse possession of a part of the land claimed by him under his deed outside of the interlock, and the other is in actual adverse possession under color of title of the land embraced in the interlock or land in controversy, claiming under and to the limits of his deed, the latter will, in contemplation of law, be regarded as being in the actual adverse possession of all the land in the interlock, not simply that actually occupied or inclosed by him.

3. If such party actually in adverse possession of the interlock under color of title retains such possession for 10 years, he will be entitled to hold the same, although the other party may be in possession of his land outside of the interlock.

(Syllabus by the Court.)

Error to circuit court, Putnam county; F. A. Guthrie, Judge.

Ejectment by C. A. Vintroux against W. H. Simms. There was a judgment for plaintiff, and defendant brings error. Reversed.

Warth & Briggs, for plaintiff in error. Brown, Jackson & Knight, W. R. Gunn, and Rufus Switzer, for defendant in error.

ENGLISH, J. This was an ejectment action brought in the circuit court of Putnam county by C. A. Vintroux against W. H. Simms to recover a certain tract of land described in the declaration as containing 384 acres and described by metes and bounds. The question is one of boundary, and its solution requires the ascertainment of the true locality

of the division line between the lands of the plaintiff and the defendant. On the 27th of May, 1896, it was ordered, by consent of parties by their attorneys, that G. F. Anderson, of Putnam county, and Thomas Matthews, of Kanawha county, be appointed to go upon the lands and do such surveying as either party might require, and return three fair plats and reports of said survey. On September 30, 1896, the general issue was pleaded, and on the 27th of May, 1897, the cause was submitted to a jury, which resulted in a verdict for the plaintiff. The defendant thereupon moved the court to set aside the verdict as being contrary to the law and the evidence, and to award a new trial. This motion was overruled by the court, defendant excepted and took a bill of exceptions, judgment was rendered upon the verdict, and the defendant obtained this writ of error.

The defendant claims that the court erred in rejecting instruction No. 4 asked by him to be given to the jury upon the trial, which reads as follows: "The court instructs the jury that in an action of ejectment the plaintiff cannot establish his own lines by running and locating the lines of the defendant's land, unless the plaintiff also shows, to the satisfaction of the jury, that the plaintiff's and defendant's lands join along the disputed line or lines, and that unless they believe from the evidence on this case that the line from A to C, as laid down on the Matthews map in this action, is the line of the plaintiff's land as called for in her deed, they cannot find that as the true line between the plaintiff and the defendant." Now it surely was necessary as a prerequisite to recovery that the plaintiff should not only show a good title in herself, but that she should show by competent evidence that the calls of her deed embrace the land in controversy. The line on the map run by said Anderson and Matthews from A to C is claimed by the plaintiff to be the true line between herself and defendant, and the witness Anderson, in giving his testimony, states that A represents a known corner, and that he ran by the calls of plaintiff's deed from A to C; that he went to the corner at A, and, reversing the call of plaintiff's deed N. 5 deg. E. to S. 5 deg. W., and adding the variations, he ran the course given, and it took him to C, and, having previously stated that he calculated the variation in the courses since 1838 and found it 2 deg. 54 min., and that by beginning at the dogwood corner at A and reversing the call N. 9 deg. 3 min. E. to S. 9 deg. 3 min. W. and following that course it brought him to C on the map, and, when asked on cross-examination to explain how he was able to make the line called for on the plaintiff's deed when run at a variation of S. 8 deg. W. from the dogwood corner at A bring him to the same point as the line of the defendant's deed which he ran S. 9 deg. 3 min. W., he replied, "I can't explain how or why it is, but it is so." His attention was also called to the fact that the

earliest deed in plaintiff's chain of title giving the same course and distance as the plaintiff's deed along the line in controversy was the deed made in 1853 by Sam Lewis to W. T. and L. E. Vintroux. He was asked if he calculated any of the variations used by him in making his survey of the A-C line from that deed, and he replied, "I didn't know anything about such a deed; I was not shown it;" and, when asked what would be the proper variation calculated from the difference of time between the date of the deed from Lewis to Vintroux and the date of the survey of 1894, he replied that the variation would be about 8 minutes per year, or 2 degrees and 8 minutes for the whole time, and that if the line of the plaintiff's deed arriving at the dogwood A should be reversed and run according to the mathematical variation, it would run to the left or east side of the point C, but he could not say just where, without instruments, as he had not run the line on that variation and did not know just where it would go; and when handed instruments, and asked, if the line from A to C was correctly laid down on the map as S. 9 deg. 3 min. W., to show on the map approximately where a line would run on a course S. 7 deg. 3 min. W., he replied that he could not do it without additional instruments, and, when handed the instruments called for, replied he did not think they were sufficiently accurate, and for that reason he could not tell where the line would run. When asked if it would not run near the red line or the green line (the red being claimed by defendant as the true line), he replied he thought it would run somewhere a little to the left of the red line, but he could not tell exactly where. When asked if the corner established at K was not a compromise corner between the plaintiff and Mr. Kirtley, who owned the adjoining land, he said the corner at K was gone, "and I ran the two lines I have spoken of from A to K and from J to K, and they both agreed to the corner which I established at the point where I brought the lines together." Now, it was a matter of vital importance, in properly adjusting the controversy between the plaintiff and defendant, that the plaintiff's line running south from the point A should be correctly and accurately established, and yet the jury was asked to determine this question, and did so in favor of the plaintiff, reaching their conclusion as to the locality of the plaintiff's line influenced largely, as we must believe, by listening to testimony of the character above detailed by the county surveyor, who assisted in executing the order of survey, who had been upon the land, and whose evidence we must presume had a controlling influence upon their verdict. Considering, then, the character of this testimony upon this vital point as to the proper location of said line, I regard said instruction No. 4 which was rejected by the court as pertinent and proper, and hold that the court erred in rejecting it. The testimony in the case shows

that marked trees were found along the line as run from A to C by Anderson, but nothing is shown as to the age of the marks, or by whom made, although other lines had been run in that locality at former periods. Can we, then, say there was any testimony before the jury of such character as would warrant them in definitely fixing and determining the true division line between the lands of plaintiff and defendant? This may be said to be a matter for the jury to determine, but can a jury ascertain matters of this kind in the absence of proper testimony? Surely not. In the case of *Beall v. Railway Co.*, 38 W. Va. 526, 18 S. E. 729 (Syl. point 2), it was held: "Where the verdict of a jury is wholly without evidence on a point essential to a finding, or the evidence is plainly insufficient to warrant such finding by the jury, the same should be set aside, and a new trial awarded." This, I think, states the law correctly.

Again: The uncontradicted evidence of the defendant shows that for more than 10 years he and those under whom he claims had held open, notorious, and uninterrupted possession of the land in controversy under color of title, which of itself would prevent the plaintiff from recovering in her action. On this question *Snyder, J.*, delivering the opinion of the court in the case of *Core v. Faupel*, 24 W. Va. 242, says: "The effect of the statute is to render a continued adversary possession for 10 years conclusive in the action of ejectment, not only against the possession, but the title, of the true owner. The result is so absolute that such adversary possession operates as a transfer of the legal title, and is not only a sufficient defense on the part of the defendant, but a sufficient ground for the plaintiff to recover the land to which he has so acquired title, against the strongest proof of better title." At this point we may call attention to the evidence of *Pat Miner*, whose testimony is short, and who says: "I know where the clearing is out there on the hill next to the line between Mr. Simms and Mr. Vintroux. I cleared up the ground and built the cabin and fence, myself, under a contract with Mr. Joe Simms, the father of W. H. Simms. He let me stay there two years, for the work I done. I left there and went to St. Albans to live. Mr. Simms showed me where to put the fence, so as not to get over the line, and I put the fence right where he showed me." This testimony clearly shows that *Joseph Simms* in his lifetime claimed to the red line, which the map shows near the cabin that *Pat* built, and just outside of the inclosure. *John Grieser* states in his testimony that he is acquainted with the clearing and improvement claimed by *Simms* in this suit; that he has known it for a long time,—he thinks about 16 years; that the house and fence have been there ever since he has known it. *Joseph Simms*, as we have seen, was not only in possession of this land, but claimed it under color of title, and he would not there-

fore be limited to his inclosure. Section 18, c. 90, of the Code provides that: "In a controversy affecting land, when a person claiming under a patent deed or other writing shall enter upon and take possession of any part of the land in controversy under such patent deed or other writing, for which some other person has the better title, such adversary possession under such patent deed or other writing shall be taken and held to the boundaries embraced or included by such patent deed or other writing, unless the person having the better title shall have actual adverse possession of some part of the land embraced by such patent deed or other writing." See *Oney v. Clendenin*, 28 W. Va. 35 (Syl. point 4); *Ketchum v. Spurlock*, 34 W. Va. 597, 12 S. E. 832; *Industrial Co. v. Schultz*, 43 W. Va. 471, 27 S. E. 255 (Syl. point 5); *Garrett v. Ramsey*, 26 W. Va. 345; *Congrove v. Burdett*, 28 W. Va. 220 (Syl. point 1),—in the latter of which the law is thus stated: "Where there is a lap or interlock of two deeds whereby both embrace the land in controversy, and the person having the elder deed or the title to the land is in actual possession of a part of his land outside of the interlock, and the person having the junior deed or color of title is in the actual adverse possession of the interlock or land in controversy, claiming under and to the limits of his deed, the latter will in contemplation of law be regarded as being in the actual adverse possession of all the land in the interlock, not simply that actually occupied or inclosed by him." The same law would apply if the party holding the elder title was in possession claiming the interlock in the same manner. In view of the facts shown to have been proven in this cause, and considering the authorities above cited, my conclusion is that the circuit court erred in refusing to set aside the verdict of the jury. The judgment complained of is therefore reversed, the verdict set aside, and a new trial awarded.

(45 W. Va. 554)

BOGGS' EX'R v. HARPER'S ADM'R.

(Supreme Court of Appeals of West Virginia.
Dec. 10, 1898.)DEATH—PRESUMPTION—VENDOR AND PURCHASER
—DESCRIPTION—DEFICIENCY—COMPEN-
SATION—FRAUD.

1. A person who absents himself from his home, and is unheard of by those who, had he been alive, would naturally have heard of him, for seven years, will be presumed to be dead, and treated as such in any litigation in which he is concerned, in the absence of proof to the contrary.

2. Where a party, by an agreement in writing, contracts to sell a tract of land, describing it by a general local description, and as being the same land conveyed to him by a third party, the vendee has a right to look to the records for a description of the land; and if it there appears that the land is described by metes and bounds, and containing a certain number of acres, such vendor will be regarded as representing the land to contain the number of acres mentioned in said recorded deed.

3. Where a party, by written agreement, sells a tract of land at a specified price, upon an unqualified statement that it contains a definite quantity or specified number of acres, it will be held prima facie that the vendee was influenced to pay or agree to pay the price specified because of such statement; and if it is afterwards established that there is a deficiency in the quantity, in excess of what may be rightfully attributed to the usual inaccuracies in surveying, the vendor, in the absence of all other proof, will be presumed to have committed a fraud on the rights of the vendee by such statement of the quantity, and a court of equity will for this reason grant relief to the vendee for such deficiency.

4. The general rule in such cases is that the compensation allowed for the deficiency in quantity shall be at the rate of the average price paid or agreed to be paid for the entire tract purchased.

(Syllabus by the Court.)

Appeal from circuit court, Pendleton county; R. W. Dalley, Jr., Judge.

Bill by John Boggs against Elijah Harper. Pending the suit, the parties died. A decree was rendered, from which Isaac P. Boggs, executor of the original complainant, appeals. Reversed.

F. M. Reynolds, for appellant. Charles P. Jones, for appellee.

ENGLISH, J. By an agreement in writing, dated November 28, 1860, Elijah Harper contracted to sell to John Boggs certain tracts of land, namely, all the lands deeded to him by Philip Harper, Sr., deceased, lying on both sides of the North fork, in Pendleton county, W. Va., for the sum of \$2,018; and said Elijah Harper, on his part, bound himself, his heirs, etc., to make or cause to be made a good, lawful warranty deed, and free it of all incumbrance, giving peaceable possession of all the land, except the field seeded in grain on March 1, 1861, and possession of the dwelling house the 1st of April, 1861, all in the same order it then was, and possession of the seeded field when the crop was off; said deed to be made, and the above obligations complied with, on or before April 1, 1861. John Boggs paid in cash \$500, and after deducting the amount of vendor's lien on the land, which Boggs subsequently paid, a balance of \$518 was left, for which Boggs executed his single bill, dated November 28, 1860, payable October 1, 1861. In December, 1869, Elijah Harper instituted an action at law on said single bill. This suit was continued until October, 1876, when Boggs withdrew his defense to said action at law, reserving to himself all rights in equity; and a judgment was rendered against Boggs on said single bill for \$984.46, with interest from October, 1876. On December 25, 1876, said Boggs obtained an injunction to said judgment, on the ground that there was fraud and misrepresentation as to the quantity of land sold by Harper, and on the ground that there was a large deficiency in one tract of land described in one of the deeds from Philip Harper to Elijah Harper. The plaintiff, Boggs, in his bill, praying for

an injunction, stated these facts, and also that some time in 1876 said Harper sued out an execution against him on said judgment, which was then in the hands of the sheriff; also alleging that, at the time he purchased said lands, Elijah Harper represented to him that they consisted of four tracts,—one tract of 104, one of 10, one of 40, and the remaining tract 28 acres,—which representations were false, but that they were relied on by him, and that it was by reason of these misrepresentations he was induced to purchase as aforesaid, especially the representation as to the 104-acre tract; that this tract, instead of 104 acres, contained only 52 acres; that said Harper did not have any title or right to more than 52 acres in the 104-acre tract, nor did Philip Harper, Sr., have any title thereto; that on May 15, 1848, Reuben Harman and Joseph Lantz, executors, or Thomas Miller, deceased, conveyed to Jonas Miller and George Miller a tract of land of 52 acres on the North fork, in Pendleton county, lying wholly within, and forming a portion of, said 104 acres; that, by a survey made by the county surveyor, it fully appeared that Harper or said Philip Harper, Sr., had no title to any portion of said 104 acres, except that part not covered by said deed to Jonas and George Miller, above mentioned; and that the portion of said 104-acre tract embraced in the Miller deed is of great value, to wit, \$1,400, and if he had known that Elijah Harper had no title to, and could not have conveyed to him, that valuable portion of the 104 acres, he would never have made the purchase; that, by reason of the defendant Harper's failure to convey him this valuable portion of said tract, he has suffered damage to a greater amount than the judgment above mentioned; that he has never given plaintiff possession of said land, or, at least, the most valuable portion thereof, and has never made him a deed for any part of said land. Plaintiff further alleged that, at the time of said sale, said Philip Harper, Sr., had a vendor's lien on said land, to secure the payment of the purchase money still due on his sale to Elijah Harper; that in 1868 the executor of Philip Harper, Sr., brought a suit in equity to enforce said lien, and, under a decree in said suit, H. H. Masters, as special commissioner, sold said lands, at which sale the plaintiff became the purchaser, at the price of \$1,369, and paid the money; that it was understood between plaintiff and the defendant Harper, at the time of said sale, that the vendor's lien aforesaid should be discharged by complainant, and that he should have credit for the amount thereof on said \$2,018, but that, failing to get any deed for said land from Harper, he suffered a sale of said land under a decree of court, in order that he might receive some title thereto; that Harper left Pendleton county soon after the war, and has not yet returned, and it is not known where he resides; that, if compelled to satisfy said judgment, it

would be impossible for him to be reimbursed for the loss sustained by Harper's failure to comply with his contract; that he only desired a good legal deed for all the land the defendant Harper sold and agreed to convey to him; and that, until such deed is made and delivered, he should not be compelled to pay the balance of purchase money represented by the judgment aforesaid; and he prayed that the sheriff of said county and Elijah Harper might be restrained by injunction from the collection, by execution or other process, of said judgment, and for general relief. An injunction was awarded as prayed for, and perfected. The bill was answered by D. G. McClung, administrator of Elijah Harper, deceased, denying that, at the time plaintiff purchased said land of Harper, he represented to said Boggs that it consisted of four tracts, containing, respectively, 104, 10, 40, and 28 acres; but, on the contrary, he alleged that on November 28, 1860, said Elijah Harper had all of his lands put up for sale in gross at public auction, and employed Boggs to make the sale, and he cried it off to one Jonas Miller, who owned the adjoining land, at the price of \$2,018 for the whole, in gross, and not by the acre; that, after said Miller bought said land at said sale, he agreed that Boggs might take the land at the same price at which it had been knocked to him, and then said agreement was executed between Elijah Harper and plaintiff; that the 51 $\frac{1}{4}$ acres claimed by plaintiff was part of said 104-acre tract, was highly improved, and had been in the possession of Jonas Miller and his heirs for 75 or 100 years, and had on it a dwelling house only about 40 yards from the line; that the sale of said land by said Harper to Boggs was in gross, and not by the acre; that Boggs got all the land he thought he was buying, and that his knowledge thereof was nearly, if not quite, equal to that of Harper; that the land, exclusive of said 51 $\frac{1}{4}$ acres, was in 1850 worth more than Boggs agreed to pay for it; that it was then worth \$2,500 or \$3,000; and he prayed that the injunction be dissolved. Depositions were taken, and among them that of John Boggs, the plaintiff, which was excepted to; and on November 12, 1894, the court sustained exceptions to the testimony of said Boggs in so far as related to transactions formerly had with said Harper, and leave was given plaintiff to take other depositions. On the 20th of April, 1897, the cause was finally heard, the injunction dissolved, and it was decreed that said McClung, administrator of Elijah Harper, deceased, recover against Isaac P. Boggs, executor of John Boggs, deceased, \$3,172.64, with interest from April 20, 1897, till paid, but directed that, before any execution on said judgment should be issued, the widow of Elijah Harper, with her husband and Philip C. Harper, Job D. Harper, and John D. Harper, heirs of Elijah Harper, deceased, should file in the papers of the cause a suffi-

cient deed, with general warranty, conveying said land to the heirs of John Boggs, deceased, which deed should be delivered when the amount therein decreed should have been paid. Isaac P. Boggs, executor, etc., thereupon obtained this appeal.

The second error claimed and relied on by appellant is as to the action of the court in sustaining the exception to the deposition of John Boggs, so far as it related to transactions with Elijah Harper, because there was no sufficient evidence that he was dead when said John Boggs was examined and his evidence taken. The said deposition was taken on the 11th of August, 1877. At that time the whereabouts of said Harper had not been known for 12 years. His wife had married again. An administrator had been appointed of his estate, who filed his answer as such to plaintiff's bill, to which the plaintiff replied generally; and on November 12, 1894, the court sustained the exceptions to the deposition of said John Boggs so far as it related to transactions held formerly with said Elijah Harper. In determining questions of this character where positive proof is lacking, the court is compelled to rely on presumption. At the time the deposition was taken, more than 12 years had elapsed, and, when the exception was sustained, nearly 20 years had passed, since Harper had been definitely heard from; and the court was well warranted in presuming him dead when the deposition was taken. In *Davie v. Briggs*, 97 U. S. 628, the supreme court held that "a person who for seven years has not been heard of by those who, had he been alive, would naturally have heard of him, is presumed to be dead; but the law raises no presumption as to the precise time of his death." The same thing was held in *Evans v. Stewart*, 81 Va. 724. We also find that sections 44, 45, c. 130, Code, provide that "if any person who shall have resided in this state go from, and do not return to, the state for seven years successively, he shall be presumed to be dead in any case where his death shall come in question, unless proof be made that he was alive within that time." So, also, in *Hoyt v. Newbold*, 45 N. J. Law, 219, it was held: "A person who absents himself from this state for seven successive years is presumed to be dead, and the party asserting he is living must prove it." See, also, 1 Am. & Eng. Enc. Law, 37, and note. This case was continued from time to time, and frequent opportunities were allowed the plaintiff to overthrow the presumption that Elijah Harper was dead, but the proof was not forthcoming; and I conclude that the circuit court acted properly in excluding the testimony of Boggs as to transactions and communications had with said Harper.

Was this a sale in gross, or a sale by the acre? It appears from the evidence that the plaintiff was well acquainted with the land; that he sold it as agent of said Harper, at auction, to Jonas Miller, for \$2,018,

who agreed that said Boggs might take it off his hands at the same price, and then the agreement in writing was entered into with Harper. At the time Boggs offered said land for sale at auction, he offered the four tracts together, and sold them in that way to Miller; and, when Miller consented to allow Boggs to take the lands at the same price, he contracted for the land with said Harper in the same way. Now, when the testimony of Boggs was excluded as to transactions and communications had with said Harper, there remained no evidence as to any representations made by him as to the quantity of land in either of said tracts; but, when we look to the title bond itself, we find that the land is therein described as "certain parcels of land, namely, all the lands deeded or conveyed to him, Elijah Harper, by Philip Harper, Sr., deceased, lying on both sides of the North fork, in the county and state aforesaid, for the sum of \$2,018; and said Harper bound himself and his heirs, etc., to make or cause to be made a good, lawful warranty deed, and free it of all incumbrance. It appears from exhibits filed with the bill that on the 19th of January, 1860, Philip Harper conveyed to said Elijah Harper a tract of land by metes and bounds, containing 104 acres, less 10 acres, which was admitted to record on the 10th of April, 1860, which deed fixes the number of acres in said so-called "104-acre tract" at 94 acres, which land was conveyed to Elijah Harper, with covenants of general warranty; and said Harper, in said title bond, by his warranty therein contained, must be considered as warranting the land described in said deed from Philip Harper to him, and thereby representing it to contain 94 acres; and, while said Boggs had an opportunity of informing himself as to the number of acres by reference to the deeds, yet it appears that as early as the 15th of May, 1848, Jonas Miller and George Miller acquired title to the 52 acres included within the boundaries of said 94-acre tract, which fact did not appear in any way on the face of the deeds from Philip Harper. So, Elijah Harper, by referring to the source of his title, represented the number of acres in the tracts of land sold. In the case of *Crislip v. Cain*, 19 W. Va. 441 (fifteenth point of syllabus), the court held that "as the vendee of land has a right to rely on the statement of the vendor as to the number of acres in a tract of land which he sells, and naturally does rely upon it, and as the quantity of land is generally a material matter in the purchase of a tract of land, it ought *prima facie* to be regarded that the vendee was induced to pay or agree to pay the price named in the contract or deed, because of the statement in it by the vendor of the number of acres, which statement, if positive, should be regarded as a statement made on the personal knowledge of the vendor, and therefore, in the absence of all other proof, the vendor

must be regarded as guilty of fraud on the vendee; and a court of equity should, for this reason, require the vendor to make a proportionate abatement from the purchase money." And, in point 20 of syllabus in the same case, the court holds that "a court of equity has clearly jurisdiction to abate from the purchase money due from a vendee for the deficiency in such a sale of land by which the vendee was injured, through the fraud of the vendor in misstating the quantity of the land in the face of the contract or deed, or orally." Also, in the case of *Heavner v. Morgan*, 41 W. Va. 428, 23 S. E. 874, this court held that "where a party, by his title bond, covenants to sell a tract of land with general warranty, describing it as containing a certain number of acres, and the vendee executed to him his bond for the purchase money, and it is subsequently ascertained that there is a material deficiency in the quantity of the land, and it further appears that the vendor is insolvent, a court of equity will not require such vendee to complete his purchase by paying his bonds, and to rely upon the hazard of recovering the money so paid from his insolvent vendor." Again, in the case of *Kelly v. Riley*, 22 W. Va. 247, in the third point of syllabus, it was held that "where a person has made a sale of land in gross, at a specified price, upon an unqualified statement that it contains a definite quantity or specified number of acres, it will be held *prima facie* that the vendee was influenced to pay or agree to pay the price specified because of such statement; and, if it is afterwards established that there is a deficiency in the quantity in excess of what may be rightfully attributed to the usual inaccuracies in surveying, the vendor, in the absence of all other proof, will be presumed to have committed a fraud on the rights of the vendee by such statement of the quantity, and a court of equity will, for this reason, grant relief to the vendee for such deficiency." And in point 4 it was held: "The general rule in such cases is that the compensation allowed for the deficiency in quantity shall be at the rate of the average price paid or agreed to be paid for the entire tract purchased." To the same effect, see *Sine v. Fox*, 33 W. Va. 521, 11 S. E. 218.

The evidence in this case clearly shows that there was a deficiency in said 94-acre tract of 52 acres, which portion was held by an older and better title; and, applying the principles announced in the decisions above quoted to the facts of this case, I must hold that the circuit court erred in dissolving the injunction awarded in this cause, and that the estate of John Boggs, deceased, is entitled to an abatement in the purchase money, to be ascertained by multiplying said 52 acres of deficiency in said land by the average price per acre of said 94-acre tract. The decree complained of is therefore reversed, and the cause remanded.

(45 W. Va. 673)

KEARFOTT v. DANDRIDGE et al.

(Supreme Court of Appeals of West Virginia.

Dec. 14, 1898.)

FINALITY OF DECREE—EQUITY—TRUSTS—DISTRIBUTION OF FUNDS—RIGHTS OF DISTRIBUTUTES.

1. A decree providing for the distribution and payment of money is a final decree, and subject to the statute of limitations relating to appeals, bills of review, and motions to correct nonappealable errors.

2. If a court of equity takes charge of a large fund brought into a chancery cause, and enters a general decree providing for the proportionate distribution of such fund among the distributees entitled thereto, and in subsequent and intermediate decrees relating to portions of such fund it apparently departs from such apportionment, in its final distribution of the residue of such fund it should so equalize the same as to make such final decree, including all intermediate decrees, conform to the general decree.

3. If one of a number of distributees purchases a portion of the property subject to such fund in such suit, she is entitled to have her distributive share applied as a credit on her purchase-money notes in the final distribution of the fund, and the court may make such application without her consent.

(Syllabus by the Court.)

Appeal from circuit court, Jefferson county; E. Boyd Faulkner, Judge.

Bill by John P. Kearfott, trustee, against A. S. Dandridge and others. A decree was rendered, from which Serena C. Dandridge appeals. Reversed.

McDonald & Beckwith, for appellant. Joseph Trapnell, for appellee.

DENT, J. In the case of John P. Kearfott, trustee, against A. S. Dandridge and others, from the circuit court of Jefferson county, Serena C. Dandridge, appellant, presents some intricate questions of law relating to the management, control, and distribution of the fund brought into said cause, and of which she was one of the distributees. By a general decree, which is not made a part of the record, the circuit court settled the principles of the cause, determined the rights of the distributees, and fixed the basis on which the fund thereafter to be brought under the control of the court by the sale of certain lands was to be apportioned among them. From time to time certain several creditors of the several distributees, in addition to the creditors originally made parties to the suit, filed their ex parte petitions, and, together with all other lienors, were allowed their debts against the several distributive shares liable thereto. The lands were sold, and from time to time intermediate decrees were entered disposing of the fund as it accumulated. The appellant became a purchaser of the one of the tracts of land sold, paid the down payment, and executed her notes for the residue of the purchase money. When she was finally called on to pay her last purchase-money note, never having received her distributive share of such fund, she filed her petition, asking that the same might be applied in satisfaction of such note according to the origi-

nal decree of apportionment. The circuit court refused to grant her prayer for the reason, as stated in the decree, "that there are no errors apparent in the said decrees of November, 18, 1896, and February 24, 1897, or any of the former decrees, which it is in the power of the court to correct;" and a decree was rendered requiring her to pay the balance on the purchase money without giving her credit for her distributive share which, according to the report of Commissioner Brown, deducting therefrom wrongful costs upon her, was more than sufficient to satisfy such balance of purchase money. This presents the anomalous case of a court of chancery, if Commissioner Brown's report be true, taking charge of a fund, and so distributing it from time to time, by its intermediate decrees, in such manner as to defraud one of the distributees. All the decrees are not before the court, but only such as the appellant deemed proper, so the court is deprived of information it should have, contained in those missing decrees. The principal matter of contention, however, in the circuit court, was over the decree entered December 12, 1889, which is as follows: "This cause came on again this 12th day of December, 1889, to be further heard upon the papers formerly read, and the reports of Special Commissioner Blackburn Hughes,—one filed November 28, 1888; and also the one filed March, 1889; and the other this day filed by leave of the court,—showing the collection of the balance of purchase money due by the purchasers, Joseph Fiscus, Mrs. Isabella L. Dandridge, and John Burns, amounting to \$1,543.98; and upon the report of Commissioner Cleon Moore returned and filed November 12, 1889, ascertaining the distribution of the fund heretofore collected and disbursed; and the report of said Commissioner Moore returned at this term, apportioning the fund in the hands of the special commissioner; and was argued by counsel; and, there being no exception to said report, the court doth affirm the same, and doth adjudge, order, and decree that said Special Commissioner Hughes, after deducting his commissions of \$65.31, and retaining \$20 for unpaid costs of suit, etc., \$5 for writing deed to purchaser, do distribute the balance in his hands as follows: Taxes, \$79; to Miss Sarah P. Dandridge, \$200; to Miss Serena C. Dandridge, \$122; to surveyor's fees, \$21; to commissioner's fee, \$4.50; to Colin C. Porter's executors, \$53.79, balance of debt, which is a lien upon the interest in the fund of said Sarah P. and Serena C. Dandridge; and to Joseph Trapnell, attorney of Houser & Drawbaugh, \$969.35, on account of the debts audited in favor of said H. and D., which is a lien upon the interest of Lemuel P. Dandridge in the fund; leaving a balance of \$3.93 in the special commissioner's hands; and make report to the next term. Said special commissioner is also directed to deliver a deed to John Burns, the purchaser, who has paid in full as above re-

cited, reserving through his land the road from the land sold Serena C. Dandridge. Upon motion of Flick & Westenhaber, attorneys for some of the creditors, it is further adjudged, ordered, and decreed that a rule be issued, returnable to the first day of the next term of this court, against Serena C. Dandridge, the purchaser of the 307-acre tract, to show cause why said real estate shall not be resold to pay the two deferred payments of purchase money due from her thereon."

The appellee contends that this is a final decree, and has passed beyond the power of the court as to the disposition of the fund thereby made. A decree for the payment of money is a final decree, and is conclusive as to the questions thereby determined. Code 1891, c. 135, § 1, cl. 7; *Core v. Strickler*, 24 W. Va. 689. The decree itself must show its conclusiveness.

As to the sum of money brought into court by its commissioner, and the payment and distribution thereof to the various parties named, it is final and conclusive; but as to the basis of distribution it is not, for it does not pretend to settle this question, already determined by a former decree of the court. The apparent distribution of the fund is not made in accordance with said decree, but according to some equitable basis presented to the court by the commissioner. This report being lost, it is impossible for the court to say what it was, but it is compelled to accept the decree as it finds it. By the decree, Sarah P. Dandridge is allowed \$200, Serena C. Dandridge \$122, and \$53.79, balance on debt of Colin C. Porter, paid for their benefit, and Lemuel P. Dandridge \$969.35, to be paid on the debt of Houser & Drawbaugh. These sums, if allowed as distributive shares, are entirely variant to the apportionment provided in the original decree, and the court must have departed therefrom for some reason apparent to itself, with the intention of equalizing it in future management of the fund. According to the original decree, appellant was entitled to a little less than one-sixth, while Lemuel P. Dandridge was entitled to a little less than twice as much as appellant, yet by this decree he is allowed over six times as much; showing plainly that the court, for some reason, was not following the original apportionment. It may have been from the reason that she had not paid her purchase-money notes, and that she would be allowed her due proportion out of them as a credit thereon. If the original apportionment had been carried out after two of the distributees had received their portion, and dropped out of the distribution, as it appears they early did do, by the absorption of their shares in the payment of their debts, the fund should have been divided, one-fourth to appellant, one-fourth to Sarah P. Dandridge, and two-fourths to L. P. Dandridge. This \$122 may have been some charge or debt allowed her as against the other distributees,

to be credited on her notes, about which, however, it is useless to conjecture in the absence of proof. The decree shows she was to receive \$122 out of this fund, and to this extent it is final and conclusive. She denies its receipt by her, and presumptively it was not paid, but, in accordance with the rules of equity, was retained by the commissioner as a credit on her notes held by him, and is still among his effects, or was paid out by him for the benefit of the other distributees, unless since his death it has been received by his successor.

On the 19th day of December, 1890, the court entered the following decree: "This cause came on again this 19th day of December, 1890, to be further heard upon the papers formerly read, and was argued by counsel; and it being suggested to the court that Special Commissioner Blackburn Hughes has departed this life since the rendition of the last decree of December 12, 1889, in the cause, it is adjudged, ordered, and decreed that Joseph Trapnell be, and he is hereby, appointed special commissioner in the stead of the said Blackburn Hughes, deceased, with instructions to demand and receive from the personal representative of the said Hughes any balance remaining in his hands under the said decree of December 12, 1889, and the bonds on the deferred payments on the parcel of land purchased by Serena C. Dandridge; but, before receiving any money hereunder, said special commissioner will execute a bond before the clerk, with security to be approved by him, in the penalty of \$2,000. It is further adjudged, ordered, and decreed that a rule issue, returnable to the first day of the next term, against the said Serena C. Dandridge, the purchaser of the said tract of 307 acres, in the proceedings mentioned, to show cause why the said real estate shall not be resold to pay the two deferred payments of purchase money due from her thereon."

By this decree said commissioner was authorized to receive from the personal representative of his predecessor said \$122, if still in his hands to the credit of the fund. The appellant could not enforce its payment while her purchase-money notes remained unpaid. This is a matter for judicial inquiry for the court. If this sum, with or without the consent of the appellant, was retained in the hands of Special Commissioner Hughes as a credit on her notes, it became a part of the funds of the suit, which his successor had the right to demand and receive under the order of the court, and she would be entitled to credit therefor. Whatever the determination as to this fund may be, the decree of the 12th of December, 1889, does not bar or in any way prevent appellant from demanding and having assigned to her, as a credit on her purchase money, her rightful apportionment of the whole fund on the original basis fixed after the payment of the debts with which her share was charged. The various decrees entered in the case must show this,

without resort to any of the reports made by the different commissioners, for no funds brought into the cause could be paid out without a proper decree therefor. The decree must show the amount applied to the benefit of each of the distributees, and therefore which of them have received their full shares, and which of them are entitled to the residue of the fund arising from appellant's purchase and still under the control of the court. Sarah P. Dandridge, afterwards Hughes, has never received her just apportionment of the fund, so far as the decrees show; yet a creditor of L. P. Dandridge, one of the distributees, is permitted to take the whole balance of the fund, without any consideration of the rights of the two unpaid distributees. The creditors of the other distributees have no right to subject the share of the appellant to the payment of their debts, but her right to the fund in controversy for the satisfaction of her distributive share is entitled to priority, by reason of the original decree settling the principles of the cause, to which all the subsequent decrees, being merely in extension of the principles therein settled, must, as a whole, be made to conform by the decree entered as a finality. Such being the case, the circuit court was not called upon to review the former decrees, but, using the original decree as a basis, and the intermediate decrees as evidence of what had been done in pursuance thereof, to so equalize the distribution of the balance of the fund as to carry out the rightful apportionment provided for in the beginning. This is equity, and this is what this appellant had the right to demand. It is a mere matter of statement and calculation from the various decrees, and does not need the assistance of the lost reports. Out of a certain fund she and others are to receive certain proportions. She has never received anything except certain sums applied on her liabilities by the court, and now it is claimed there is nothing due her. This, if true, the decree should show; otherwise she is entitled to such proportion of her share as they fail to show was applied for her benefit. The real question in dispute is whether the fund in controversy belongs to the distributive share of L. P. Dandridge, Serena C. Dandridge, or the estate of Sarah P. Hughes, deceased. If his creditors have already received L. P. Dandridge's full share, they are entitled to no more, although their debts remain unpaid. The decrees are the best evidence of this, as well as to all the other distributees, and the court should be able to trace the full disposition of the fund from them, so as to arrive at a correct conclusion and disposition of this case.

Appellant's petition fails to make necessary parties thereto all parties claimants to such fund, and should be amended in this respect. *Railroad Co. v. Vanderwerker*, 33 W. Va. 191, 10 S. E. 289; *Marshall's Ex'r v. Hall*, 42 W. Va. 641, 26 S. E. 300.

The decree of the 9th day of March, 1898,

is reversed, at the costs of Craven Trussel's executor, representing the distributive share of L. P. Dandridge, and the cause is remanded to the circuit court for further proceedings according to the rules of equity.

(45 W. Va. 521)

KENNEWEG v. SCHILANSKY et al.

(Supreme Court of Appeals of West Virginia.
Dec. 7, 1898.)

PARTNERSHIP—ASSIGNMENT OF SOCIAL ASSETS— INSOLVENCY—PARTNERSHIP ASSIGNMENT.

1. A partner has no individual assignable interest in the social assets until the social debts are satisfied.

2. An assignee of a partner's individual interest in an insolvent firm cannot successfully attack an alleged partnership assignment, made to secure a just partnership debt, as the latter is a lien on the social assets superior to the claims of the individual partners or their creditors.

3. A verbal assignment of an open account in consideration of future credit and merchandise sold and delivered is a good equitable assignment, although not afterwards reduced to writing, as promised.

(Syllabus by the Court.)

Appeal from circuit court, Tucker county; J. H. Holt, Judge.

Bill by C. F. Kenneweg against B. Schilansky and others. Decree for plaintiff, and the H. B. Claflin Company appeals. Affirmed.

Dayton & Dayton and O. O. Strieby, for appellant. Cunningham & Stalling and E. D. Talbott, for appellee.

DENT, J. C. F. Kenneweg filed his bill of complaint in the circuit court of Tucker county on the 9th day of July, 1895, against the Columbia Lumber Company and others, alleging that himself, B. Schilansky, G. Schatz, Camden Lipscomb, and P. J. Sullivan were the only stockholders in said company, which had forfeited its charter, and ceased to do business; that it owed no debts except about \$9,000 to the firm composed of B. Schilansky and G. Schatz, which had been assigned to the plaintiff for the benefit and use of the defendant in Kenneweg Company, to be applied on the indebtedness of said Schilansky & Schatz to said Kenneweg Company; that the said Columbia Lumber Company is still the owner of a sawmill and fixtures, and a lot of sawed lumber, and that the same was being fraudulently disposed of and misappropriated by said Schilansky, and praying the appointment of a receiver, that said corporate affairs might be wound up, and said debt paid. A receiver was appointed to take charge of, preserve, and sell the property. On the 15th day of August, 1895, the H. B. Claflin Company filed its petition in said cause, seeking to prevent the sale of the property by the receiver, and alleging, among other things, "that on the 11th day of July, 1895, B. Schilansky sold, transferred, assigned, and set over unto your petitioner as collateral security all his capital stock, all claims, choses in action, accounts, and demands of every character and

nature he had against the said Columbia Lumber Company, which petitioner is reliably informed and believes amounts to more than \$7,000 in excess of the capital stock, which is for the sum of \$2,400," and it denies any indebtedness to C. F. Kenneweg or the Kenneweg Company, or that said company is entitled to the debt of Schilansky & Schatz. Kenneweg answered this petition, reasserting the assignment set up in his bill, denying petitioner's rights, and demanding the relief prayed. On the 31st day of December, 1895, the cause was referred to Commissioner Jeff. Lipscomb to report the assets and liabilities of the Columbia Lumber Company. On the 24th day of November, 1896, the commissioner returned his report, in which he found the assets of the corporation in the hands of the receiver amounted to \$1,177.22, which was not a sum sufficient to pay the claim of Schilansky & Schatz, the only debt against the corporation, and which was now being held by the Kenneweg Company by assignment, and that said Kenneweg Company was entitled to the funds aforesaid. He further reported "that he has used his best efforts to get proof of the claim of the H. B. Claflin & Co.'s debt, if they have any, but has wholly failed." The H. B. Claflin Company filed numerous immaterial exceptions to this report, the principal one being as to the finding in favor of C. F. Kenneweg. The commissioner's report was fully justified by the evidence before him, and the exceptions were therefore properly overruled. After the report was filed, the H. B. Claflin Company took several depositions to prove the allegations of its petition, and finally took the deposition of B. Schilansky, to the reading of which the plaintiff objected, for the reason that it was taken too late. Neither Schatz nor Schilansky, either as partners or individuals, answered the bill, but it was taken as confessed as to them. At the March term, 1897, a final decree was entered, overruling the exceptions to the commissioner's report, sustaining the exception to the deposition of Schilansky, disbursing the fund to C. Kenneweg for the use of the Kenneweg Company, and dismissing the petition of the H. B. Claflin Company, and from this decree said company appeals, assigning numerous errors, which are unnecessary to repeat here, as none of them appear to be prejudicial to the appellant's rights.

By its petition, appellant only claimed the assignment of Schilansky's interest, and this allegation it sustained by its proof. But it neither alleged nor proved that it was the owner of the Schilansky & Schatz debt, the bone it was apparently contending about, and in which it acquired no interest by virtue of the assignment of Schilansky until the partnership debts were paid. The assignment on which it relies is as follows: "For a valuable consideration from the H. B. Claflin Company, a corporation formed and doing business under the laws of the state of New Jersey, I hereby sell, set over, transfer, and assign unto the

said H. B. Claflin Co., as collateral security for the payment of certain notes and open account which the firm of Schilansky & Schatz owe to said company, all my capital stock in, all claims, choses in action, accounts of every character or nature against the Columbia Lumber Co., which was incorporated in the state of West Virginia, and operated in the village of Mackleville, Tucker county, W. Va., shipping from Hulings, in said county, where some of its property now is, but which charter was forfeited in the year 1894 for the reason that the state license was not paid thereon. It is understood that this assigns every interest of every nature before and after the said charter was forfeited. Given under my hand and seal this 11th day of July, 1895. B. Schilansky. [Seal.]" This is nothing more than an assignment of Schilansky's individual interest, and does not purport to assign the claim of Schilansky & Schatz, although made to secure a debt of that firm. One partner has no assignable interest in the debts of the firm until the firm debts are paid, but one partner can assign firm assets to pay firm debts. This latter Schilansky, for some reason, did not undertake to do, and his assignee only took his interest in the firm claim against the Columbia Lumber Company after payment of the firm debts; and the Kenneweg Company, being a firm creditor, and claiming under an alleged firm assignment, Schilansky's individual assignee would have no equity as against a firm creditor by virtue of his assignment, and no right to attack the alleged firm assignment. *Conaway's Adm'r's v. Stealey*, 44 W. Va. 163, 28 S. E. 793. If this were a suit to settle up the partnership of Schilansky & Schatz, the H. B. Claflin Company, being a firm creditor, would have the right to attack the alleged assignment of the firm to the Kenneweg Company; but such an attempt or claim is not made in its petition, and, if it were, as the proof now stands, it is most favorable to the Kenneweg Company. Mr. Schatz testifies: "We intended to assign this [meaning the claim in controversy] to Mr. Kenneweg, as I stated before, to credit our account for merchandise shipped by Mr. Kenneweg to us;" and he acknowledged writing the following letter to Mr. Strieby: "Thomas, W. Va., July 7, '95. Mr. C. O. Strieby—Dear Sir: We made a transfer to the Kenneweg Co. of our shares and stock in the Columbia Lumber Co., Hulings, and of our account against same Lumber Co., on June 1, '95, for the security of their account in Hulings against us. Mr. Kenneweg desires to confer with you in regard—our matter. If you can, please come over here to-morrow morning with Mr. Kenneweg. Respectfully, S. & Schatz." Mr. Kenneweg testified as follows, to wit: "About May, 1894, Schilansky & Schatz, of Hulings, owed us for goods furnished the Hulings store, which bills were then due. (When I say 'us,' I mean the Kenneweg Company.) Schilansky & Schatz claimed that they could not pay us, as they were heavy

creditors of the Columbia Lumber Company, and, in lieu of the payment of the bill of Schilansky & Schatz, agreed to and made over to us collateral security for our claim all their interest in the Columbia Lumber Company, and their account against said company, and further agreed that this arrangement should continue as security for any goods we would subsequently ship them, and that their account, as it increased against the Columbia Lumber Company, should be our collateral security. On the strength of this agreement we continued to ship them goods without their paying us anything on their Hulings account. About May or June, 1895, their account having increased very much, and we again refused them more goods. Mr. B. Schilansky then came to Cumberland, to learn the reason of our refusal to furnish goods, and I told him we must have some money. He said that they had no money, but that it was tied up in the Columbia Lumber Company, and, as we had their account against the Columbia Lumber Company for collateral security, and our account against them, we should feel perfectly safe. I replied that we had no written agreement, only a verbal one. He answered, as soon as he could do so after returning, he would prepare a document showing the transfer to us of their account against the Columbia Lumber Company, on the strength of which promise we gave them more goods." Mr. Schatz, on the witness stand, did not attempt to deny this arrangement, but simply claimed that no formal assignment had been made. The testimony of J. D. and C. J. Griffith as to admissions made by Schilansky tends to corroborate Mr. Kenneweg. Schilansky, after the case has been closed, gives his testimony, denying any assignment to the Kenneweg Company, and claims an assignment was made to the H. B. Claflin Company, which is the one before copied herein, being an assignment of his individual interest. This was made after suit brought, and he was deprived of the possession of the property of the Columbia Lumber Company, and the whole transaction on his part shows an evident desire to prevent the Kenneweg Company from being paid its debt for having interfered with his management of the affairs of the Columbia Lumber Company. Hence his evidence, under the circumstances, is not sufficient to open up the case anew, but the preponderance of the evidence fully establishes a parol equitable assignment, sustained as it is by the written paper bearing the partnership signature. On page 1058, 2 Am. & Eng. Enc. Law (2d Ed.), the law is stated to be, "A valid parol transfer of an account may be made without a delivery of a copy or transcript thereof." The claim of Schilansky & Schatz was an open account against the Columbia Lumber Company, which, for the purpose of gaining further credit, was pledged as security to the Kenneweg Company, they promising to make a written assignment thereof. This they never did other than the Strieby note,

although they secured the goods for which the account was pledged. This was the evidence of Kenneweg on which the commissioner's report was founded. There is no evidence disputing the justice of the Kenneweg Company's debt against Schilansky & Schatz, although it is alleged in the petition that Kenneweg is largely indebted to the Columbia Lumber Company. The proof does not sustain the allegation. The H. B. Claflin Company assignment being subsequent, both in law and time, to that of the Kenneweg Company, the court committed no prejudicial error in overruling the exceptions to the commissioner's report, and dismissing the petition. The decree is therefore affirmed.

(45 W. Va. 527)

LAMBERT v. NICKLASS et al.

(Supreme Court of Appeals of West Virginia.

Dec. 7, 1898.)

AGISTERS' LIEN.

1. One who keeps a horse or other live stock for compensation has a lien thereon for such compensation by Code 1891, c. 100, § 15.

2. An innkeeper or keeper of live stock who has a lien on the property does not lose the lien by levying an attachment upon the property.

(Syllabus by the Court.)

Appeal from circuit court, Berkeley county; E. Boyd Faulkner, Judge.

Suit by Walter J. Lambert against B. Nicklass and others. Decree for defendants, and plaintiff appeals. Reversed.

W. H. Travers and Wisner & Woods, for appellant. Fleck, Westenhaver & Baker, for appellees.

BRANNON, P. Lambert kept a horse and buggy for Brown, claiming a lien for the keeping, refusing to let Brown take them without payment. Brown agreed that they should stand good for their keeping. Brown became insolvent, and assigned for the benefit of creditors, but did not include this property in his assignment. Lambert sued for keeping the property, levied an attachment on it, the officer leaving it in his possession. The attachment was quashed, but personal judgment was rendered for the debt. Afterwards, Nicklass Bros. & Co. levied an execution against Brown on the property, and Lambert procured an injunction against selling, and the court held that Lambert had no lien, dissolved the injunction, and gave the execution preference over Lambert's lien, and Lambert appealed.

Lambert claims a lien for keeping a horse and buggy at his stable belonging to Brown, under section 15, c. 100, Code, that "persons keeping live stock for hire shall have the same rights and remedies for the recovery of their charges therefor as inn-keepers have." It is questioned by counsel whether Lambert ever had any lien. Counsel say that agisters and liverymen have no lien at common law, as is true. 13 Am. & Eng. Enc. Law (1st

Ed.) 943. They say that an innkeeper has a lien on the goods of his guest, as he has sole and exclusive possession, not concurrently with the owner; but that one who merely feeds and takes care of a horse has not sole possession, but one concurrent with the possession of the owner; that only exclusive possession gives a lien. Now, I see little difference as to possession. The transient guest sometimes takes his horse and uses him during his stay at the inn, as does one who merely keeps his horse at the stable. It is the keeping the guest and the keeping the horse that gives rise to the lien, not alone possession, that being only the means of enforcing pay. It is very plain to me that the statute intended to remedy the defect of the common law, and give any one keeping live stock for compensation a lien for such compensation,—a lien like that of the innkeeper. Of course, it does not mean one who keeps stock to be hired, as there the compensation goes to the other party for use of the stock; but it means to give a lien to any one who, for hire or compensation, keeps stock. Lambert clearly had a lien.

But it is said Lambert waived or forfeited his lien by bringing action for the same demand before a justice, and levying an attachment upon the property. First, it is argued that judgment in this action merged and destroyed the lien. Judgment does merge the cause of action, so that it cannot be sued on again; but I understand that in law the debt is one thing and its lien on given property another thing, and that judgment does not destroy the lien. The creditor may enforce both, and his election of one does not exclude the other as a remedy. "Though the debt is merged in the judgment, its nature is not destroyed or affected; and, if the debt was one for which a lien was given at common law or by statute, the lien continues after judgment." 1 Jones, Liens, § 1032a.

But it is claimed with more confidence by counsel for appellees that the lien given by this statute is like that given an innkeeper by common law, and that, as loss of possession destroys the innkeeper's lien, so the levy of the attachment took away from Lambert the possession, and gave the officer possession, and thus lost Lambert's lien. There is quoted to us the passage from Jones on Liens (section 1014), saying: "An attachment of goods by one who claims a lien on them, to secure the same debt for which the lien is claimed, is a waiver of the lien. The attachment is in effect an assertion that the property belongs to the defendant. Having made the attachment, he is estopped from afterwards asserting the contrary." Also Hermann's Law of Executors (section 172), saying: "Taking property in execution at the suit of a party having a lien thereon destroys the lien by changing the possession from the bailee to the officer, though the property is left with the party. The possession must of necessity vest in the officer in order to enable

him to sell the property." And citations from 18 Am. & Eng. Enc. Law, 586, and Jones, Liens, § 328, to the effect that a carrier's lien is lost by his attaching property. As to the clause from Jones, that "the attachment is an assertion that the property belongs to the defendant," I will say that there is no force in it, because by claiming a lien the plaintiff asserts that it belongs to the defendant as much as by attaching it. He asserts the same thing by both lien and attachment, and no estoppel can, therefore, be based upon any contradiction between the two. Very little authority is cited for the above-cited doctrine; the same is cited for all the propositions above given. Regarding it unreasonable, I have sought to trace its origin, and find it in an English decision in 1828 (Jacobs v. Latour, 5 Bing. 130), holding that where one entitled to a lien as stable keeper and trainer sued, and sold and bought the horses under execution, he could claim, in trover against him by an assignee in bankruptcy, only under the execution, not under his lien, his lien being waived by the execution. Legg v. Willard, 17 Pick. 140, seems to hold that when one has a lien, and attaches for the same debt, his lien is gone; but it is a mere assertion, and no discussion of any authority. Wingard v. Banning, 39 Cal. 543, is cited for the proposition; but there the affidavit declared the creditor had no lien, which was an express renunciation of it. It seems only three out of five judges concurred in the opinion. In Arendale v. Morgan, 5 Sneed, 703, the question is considered, and the court refused to follow that doctrine, and held that where one has property in pledge for debt, and parts with possession with intent to abandon the lien, as if he agrees that it be attached at the suit of a third person, it is gone; but not so where he attaches for his own debt. This is the true position.

To sustain this loss of lien we must place it on one or the other of two ideas,—intentional waiver, or from loss of possession. As to the first, authority is abundant to show that one will not be held to waive a lien unless the intent be express or very plain and clear. The presumption is always against it. Merely taking a new security does not. Bansom v. Fell, 39 W. Va. 448, 19 S. E. 545; Hopkins v. Detwiler, 25 W. Va. 734, 748; Hess v. Dille, Id. 97. So with the innkeeper's lien, 11 Am. & Eng. Enc. Law, 49.

And as to loss of lien by loss of possession: An innkeeper having a lien has no right to sell the property without a judicial proceeding. If he does, he is liable to an action of trover for its unlawful conversion, besides losing his lien. His only remedy is to hold it till payment. Unreasonable this is; but, where no statute can be found providing for a sale, it is so, by much authority. 11 Am. & Eng. Enc. Law (1st Ed.) 46; Jones, Liens, § 523. In fact, on the mere strength of lien, he can sue neither at law nor in equity, if there is no statute to allow it. It is different

from a pledge or pawn. 13 Enc. Pl. & Prac. 127; 1 Jones, Liens, §§ 1033, 1038. The horse is in the innkeeper's stable eating its head off, and he has no remedy. Suppose, however, by reason of nonresidence or other cause, the innkeeper can sue out an attachment, why shall he not do so? He is not thus waiving, but enforcing, his lien. Why it should be said that, when the officer levies on the property to enforce this lien, the innkeeper loses his lien because he gives up possession, I cannot see. The officer is his agent for this purpose. To say so is technical in the highest degree, and defeats justice. The innkeeper is not surrendering possession to the owner, nor to an officer acting in furtherance of his demand. He could bring a suit, as shown above, without forfeiting his lien; and by resorting to an attachment he simply availed himself of a fact giving him right to attachment to enforce a debt for which there was a lien, using a cumulative remedy. Houck on Liens (section 6) says, "If possession is relinquished after the lien attaching, the lien is gone; for, by parting with possession, the creditor shows that he trusts to the personal credit of the debtor," and cites numerous authorities. This is so where he lets the owner or an officer under process for debts of others have possession. Then you can fairly say that he looks to the debtor only; and that, as Houck says, is the reason why surrender of possession destroys the lien. But how can we say that Lambert intended to look to the personal credit of Brown by an act which told the very reverse, and told that he looked to the property for pay, not to Brown? Furthermore, Brown expressly pledged the horse to Lambert for his keep. Lambert could sell it as a pawn. This he could do by agent, and the agent's possession would be his. Is the officer anything but his agent? He is responsible for the officer's trespass, because he acts for him. Judge Story condemns this doctrine as not well established, and says the Massachusetts ruling was local to it. Story, Bailm. § 366. In *Townsend v. Newell*, 14 Pick. 332, one had goods, with right to lien, and an attachment was levied in favor of a creditor, and he refused to give them up, but kept possession, and gave a receipt to the officer for them. Later he levied an attachment for his own lien debt, still retaining possession, but receipting to the officer for the goods. It was held that the lien was not lost. There, as in this case, the officer let the lien owner keep the goods in his custody. In that case, it is true, he expressly claimed his lien; but who imagines that Lambert intended to give up his lien? His attachment itself speaks the negative. In that case, after levy, it was as much the officer's possession as in this, and the court did not give it the force of forfeiture of lien, but said, as the party did not intend to surrender it, it still held good. There is no evidence that Lambert intended to give up his lien, and if it

stands on intention, and not on loss of possession, he who asserts such intention must make it clear. In *Whitaker v. Sumner*, 20 Pick. 399, where one having a pledge allowed a levy for a debt once owned by him and debts of strangers, he was held to have lost the lien; but Chief Justice Shaw was careful to say, "We would not be understood hereby to hold that an attachment under all circumstances, though made by the party holding the pledge, or by his consent, would be a waiver of the lien." I have not said anything about jurisdiction in equity, as the question was not raised or discussed. Decree reversed, and the case is remanded, with direction to the circuit court to enter a decree allowing Lambert's debt as a lien, to be paid out of the proceeds of the property, in preference to the execution of *Nicklass Bros. & Co.*

(45 W. Va. 690)

RALPHSNYDER v. SHAW et al.

(Supreme Court of Appeals of West Virginia.
Dec. 14, 1898.)CONTRACTS—PUBLIC POLICY—ENFORCEMENT—SALE
OF REALTY—STATUTE OF FRAUDS.

1. Where a trustee is proceeding to make sale of real estate at public auction, and R. and B., after competing as bidders for some time, enter into a verbal agreement that R. shall desist from bidding, and B. should proceed as advised from time to time, and, if B. became the purchaser, he was to divide the property purchased with R., such an agreement is a fraud upon the vendor, and, if B. refuses to comply with the agreement, it cannot be enforced by R.

2. A contract of this character is void, as being contrary to public policy.

3. Where a sale of real estate is made by a trustee, and no memorandum is made in writing by the trustee, such sale is void under the statute of frauds.

(Syllabus by the Court.)

Appeal from circuit court, Preston county;
J. H. Holt, Judge.

Bill by J. C. Ralphsnyder against Leroy Shaw and another. Decree for plaintiff, and defendants appeal. Reversed.

P. J. Crogan and James A. Brown, for appellants. R. W. Monroe and C. P. Guard, for appellee.

ENGLISH, J. On the first Monday of May, 1897, J. C. Ralphsnyder filed his bill in the circuit court of Preston county against Leroy Shaw and Henry Clay Hyde, trustees, William G. Brown, and James A. Brown, basing his claim for relief on the following facts, to wit: That said James Brown, on the 1st of March, 1897, made an assignment under a deed of trust to said Hyde and Shaw, trustees, purporting to convey all his estate, real and personal, in trust to said trustees for the benefit of his numerous creditors; that said trustees advertised said property for sale on the 5th of April, 1897, and in pursuance of said advertisement said trustees, on said 5th of April, proceeded to sell said property, Leroy Shaw acting as auctioneer or crier of

the property at said sale, and, not having completed sale on the 5th, the same was adjourned until April 6th, said Shaw continuing to act as auctioneer, and said Hyde as clerk; that, after many articles had been offered and sold, said trustee offered certain portions of the real estate in parcels or lots, and also the brick dwelling house in the town of Kingwood, together with the lawn surrounding the same, and the garden and orchard adjacent thereto, and the pasture field and wheat field contiguous and adjacent thereto, with the understanding that the aggregate price of said real estate by lots and parcels should bring as much as it brought as a whole; that said trustee offered said real estate first in parcels, and it brought the aggregate price of \$4,453; afterwards it was offered by them as a whole, and brought \$4,475. The plaintiff further alleged that he had an arrangement with the defendant W. G. Brown by which he and Brown were to buy said property jointly; that said Brown was to do the bidding, and buy the property in, and plaintiff was to stand by for the purpose of indicating to said Brown how much to bid on said property, and Brown was to stop when so directed by plaintiff; that under this agreement said Brown bid the property up to \$4,475, which bid was acquiesced in by plaintiff, and the property was knocked down to Brown; that he notified said trustees that the sale was made to himself and Brown jointly, and that he was ready to comply on his part with the terms of sale, and that he would see Brown, and fix it up; that he did call on Brown, and notified him that he was ready to comply with the terms of sale, and suggested that they do so at once; that said Brown made some excuse, and asked for delay, and said they could fix it next morning; that he saw Brown next morning, who stated then that he had concluded not to comply with the terms of sale, but that, if plaintiff desired to do so, and wanted all the property, he was perfectly satisfied; that he (plaintiff) went at once to said trustees, and notified them of the facts, and of his intention to take the property himself, and of his readiness to comply with the terms of sale, but the trustees refused to permit him so to do; and he charged that said trustees were colluding and combining with the defendant W. G. Brown to cheat and defraud him, and wholly deprive him of the benefits of his said purchase, and that they were proposing to re-offer the property for sale, and had given notice that on the 12th day of April, 1897, they would again offer said property for sale at public auction, without regard to the rights of plaintiff; that said sale to Brown was fairly made, and for a sufficient price, and was, in effect, a sale to complainant after Brown voluntarily retired therefrom, and notified the trustees that he would not comply; that he had a right to have the sale made to him by said trustees specifically enforced, and he tendered his

notes, with good security, in accordance with the terms of sale, and prayed that Shaw and Hyde, trustees, be enjoined from selling or offering said brick dwelling house, the lot, or any of the other property sold as aforesaid to W. G. Brown for complainant, and that said trustees may be required to convey said property to him. The defendant W. G. Brown answered the plaintiff's bill, and alleged that the allegations in said bill relating directly to the actions, conduct, and alleged understandings and agreements of respondent with the plaintiff by which they were to buy said property (meaning the brick house and lands and lots contiguous thereto) jointly, and that by said contract and agreement respondent was to do the bidding and buy the property in, and the plaintiff to stand by for the purpose of indicating to respondent how much to bid on said property, and that he was to stop bidding when so directed, and under said arrangement the property was knocked down at \$4,475 to them, were not true; that he bid for himself only, and the property was knocked down to him at \$4,475; that the sale was made to him alone, and he denied he had any such arrangement, before or after said sale, that he and plaintiff were to hold said property jointly, or at any time asked for delay or time to consider the settlement of said joint bid or ownership, or giving joint notes with the plaintiff for said property, as he never had any such arrangement; that while respondent was bidding on said property he was approached by plaintiff, who said to him at the time respondent had a bid of \$3,500 on the brick house, which was then being offered separately, "There is no use of us bidding against each other; can't we make some arrangement?" or words of like import, and respondent replied that, if he got the property, then no doubt he and plaintiff could deal; that thereupon, there being no higher bid, said brick house was knocked down to respondent for \$3,500, but only conditionally, as said house was then to be offered with the adjoining lands, and, if they brought more as a whole, then respondent was not to have said brick house at his bid of \$3,500, and thereupon, said property being offered as a whole, he bought it for \$4,475. On the following evening plaintiff came to respondent's office, and set up a claim of partnership or joint ownership in said property, which respondent denied, but told plaintiff he might have the property at his bid if he would step in and comply with the terms of sale. Plaintiff replied he would let respondent know the following morning. This was on Wednesday evening, and respondent saw no more of plaintiff until the next Saturday morning, when he came again to the office, and proposed to comply with the terms of said sale. On the preceding Thursday, the plaintiff not having come in as he agreed to do, respondent notified the trustees that he would not comply with the terms of sale, and said trustees again offered said property on Friday of

that week, and, not receiving a sufficient bid, adjourned the sale until the following Monday. Said trustees also answered plaintiff's bill, denying every material allegation with reference to any collusion with said Brown, or knowledge that plaintiff was a purchaser; that, after the sale was made, the plaintiff claimed to said trustees that he was a partner in the purchase with Brown, and offered to comply with his part of the purchase, which the trustees declined, and, when notified by W. G. Brown that he would not complete the purchase, they offered the property again for sale. Said trustees also pleaded and relied on the statute of frauds, and demurred to plaintiff's bill. On the 12th of April, 1897, an injunction was awarded as prayed for in plaintiff's bill. Depositions were taken by both parties. On September 18, 1897, the cause was heard, the injunction perpetuated, and the court further held that the plaintiff was entitled to demand of said trustees, Shaw and Hyde, specific performance of the contract of purchase set out in this bill, and the plaintiff was given 10 days from the rising of this court in which to comply with the terms of said sale, and, upon his complying therewith, requiring said trustees to convey to said Ralphsnyder, by deed of special warranty, the property so purchased, and further directing a writ of possession in favor of said Ralphsnyder on his compliance with the terms of sale. From this decree said trustees obtained this appeal, claiming seven points of error: First, as to the action of the court in overruling the defendants' demurrer; second, in dissolving the injunction and dismissing the bill; third, in not excluding certain depositions that were excepted to; fourth, in refusing to hear the cause at the July term, 1897; fifth, in directing a conveyance to plaintiff; the sixth and seventh assignments being the same as the fifth and second.

Do the circumstances shown by the pleadings and proof in this case entitle the plaintiff to the relief prayed for, or to that afforded him by the final decree? His bill alleges that he had an arrangement and understanding with W. G. Brown by which they were to buy the property jointly,—Brown to do the bidding, and plaintiff to stand by and indicate when he should stop. Brown, in his answer, says that while he was bidding on this property he was approached by plaintiff, who said: "There is no use in us bidding against each other. Can't we make some arrangement?" Now, to what motive can we attribute this language? It is evident there was a desire on the part of the plaintiff to prevent further competition, in order that the property might be purchased for less money than it would have brought had Brown and plaintiff continued to bid against each other; and it would appear from Brown's answer that he was willing, if he could get the property, to deal with the plaintiff. The circumstances

immediately attending the sale are detailed by J. P. Neff, a witness examined by the plaintiff. He says: "Mr. J. C. Ralphsnyder asked me to bid on the property for him [the brick house and the surrounding real estate]. He stood by and superintended the bidding upon my part. W. G. Brown and myself bid it up. I bid it up to \$3,400; Ralphsnyder standing by. W. G. Brown bid \$3,500. Then Brown took me to one side, and inquired who I was bidding for. I then told him that I was bidding for J. C. Ralphsnyder, and pointed Mr. Ralphsnyder out to him. I told Mr. Ralphsnyder that Mr. Brown wanted to see him, and they walked off together, and had their conversation to themselves. When they came back, Mr. Ralphsnyder told me not to bid any more until he would let me know, for him and Mr. Brown had arranged the matter to buy the property together, and Mr. Brown would do the bidding. W. G. Brown was present. He did not say anything. He acquiesced in it. I then ceased bidding." On the third day, when the property was offered as a whole, this witness says the plaintiff asked him to be present, but not to bid without further orders from him. When the trustee was selling the property, Brown and plaintiff would converse, and then Brown would bid; plaintiff would make gestures to Brown, and then Brown would bid; and the property was knocked off to Brown at \$4,475. The plaintiff also states in his deposition the same in substance as stated by witness Neff in regard to the arrangement between him and Brown to prevent further competition in the way of bidding on said property, which arrangement was made when the brick house was offered separately, and was continued on the next day, when the property was offered as a whole, and bought in by Brown; that, after this arrangement was made, neither plaintiff nor his agent, Neff, made any other bid. W. G. Brown, in his testimony, speaking of his conversation with Neff during the progress of the sale, says: "During this conversation Mr. Ralphsnyder stepped up to me, and neither he nor Squire Neff informed me that plaintiff was the opposing bidder. Plaintiff then said there was no use bidding against each other, and I told him I did not think there was, and, if I got the property, he and I could deal. * * * My intention was to buy the property as cheap as I could, and sell it to plaintiff at an advance, and in this way make something for myself. After this the plaintiff put no further bid on it. I did all the bidding myself, and it was knocked off to me." Now, then, the pleadings and evidence clearly show that an agreement was entered into between the plaintiff and W. G. Brown, which was not only intended to, but which actually did, prevent competition in bidding upon this property, to the injury and prejudice of those interested in the property on sale, whether as owner or creditors. Will a

court of equity enforce an agreement made under such circumstances? On this question, Tucker, in his Commentaries, speaking of frauds upon auctions, says (volume 2, p. 423): "Connected with this subject is the fraud of two persons agreeing not to bid against each other, in order to buy the articles cheap, and share them; which agreement has been decided in New York to be against public policy, and void,"—citing *Doolin v. Ward*, 6 Johns. 184, the syllabus of which case is as follows: "Certain articles being advertised for sale at public auction, which A. and B. were desirous to purchase, it was agreed between them that they would not bid against each other, but that A. should buy the articles, and afterwards divide the same equally with B. A. made the purchase, but refused to deliver B. the one-half of the goods. In an action brought by B. against A. to recover one-half of the profits of the purchase, it was held that the agreement was without consideration, and void, and against public policy,"—citing *Hawley v. Cramer*, 4 Cow. 717. In the case of *Underwood v. McVeigh*, 23 Grat. 409, which was a proceeding by way of attachment against real estate, in which there was an order of sale, and a sale and conveyance to the purchasers, it was held that: "If the purchaser combined with others to purchase the property at the attachment sale at a sacrifice, and if, in pursuance of such combination, they so acted as to prevent competition at said sale, or to prevent said property realizing a fair value, then such combination and action were fraudulent, and the deed of the sheriff passed no title to the purchaser." The same principle is announced in *Whitaker v. Bond*, 63 N. C. 290, the syllabus in which case reads as follows: "Where a bidder at auction offered one, who also proposed to bid, that, if he would desist, she would divide the land with him, held to be fraud upon the vendor, and so to violate the contract of purchase afterwards made by her as the only bidder." The law is thus stated in 1 Am. & Eng. Enc. Law, 997: "Agreements not to bid at public auction are, in general, void, and against public policy, and tending to fraud, and vitiate the sale; but this rule extends only to combinations having for their objects to stifle fair competition with the design of purchasing at a price less than the fair value of the property." Authorities might be multiplied in support of this proposition, but those above quoted clearly indicate that this sale was void, as contrary to public policy. This sale was also void as contrary to the statute of frauds, which was pleaded and relied upon, there being no conveyance or memorandum in writing of the sale and purchase. See *William & Mary College v. Powell*, 12 Grat. 372; *Fleming v. Holt*, 12 W. Va. 143. So far as the evidence shows, there was no note of entry made by the trustee of this sale at the time it was made. See *Smith v. Jones*, 7 Leigh, 165;

Brent v. Green, 6 Leigh, 16. Looking to the entire record, including the pleadings and the evidence, it is clear to my mind that there was a combination between the plaintiff and the defendant W. G. Brown to prevent competition between them as bidders upon said property, and, as Brown says in his deposition, to buy the property as cheap as he could, and sell it at an advance. It was to effect this object that Brown approached Neff, who was bidding for plaintiff, and to carry out the same intent Neff was ordered by plaintiff to cease bidding. Any combinations of this character, which have the effect of preventing a fair sale, will prevent a purchaser who makes such an arrangement, and carries it out, from acquiring title as a purchaser; and a court of equity will not lend its aid in enforcing a contract of this character against the party with whom the combination is made, but will leave the parties where it finds them. My conclusion therefore is that the circuit court erred in perpetuating said injunction, and in holding that the plaintiff was entitled to a specific performance of his contract against said trustees, Shaw and Hyde. The decree complained of is reversed, and plaintiff's bill dismissed.

(45 W. Va. 311)

BROWN et ux. v. MILLER'S EX'RS et al
(Supreme Court of Appeals of West Virginia.
Nov. 19, 1898.)

WILLS—CONVERSION—ELECTION BY BENEFICIARIES.

1. Where a will directs land to be sold and divided among legatees, it is, in equity, a conversion of land into money.

2. The beneficiaries may generally prevent actual conversion by sale, and take the land; but all those entitled must unite in such election. One cannot force an election upon others. (Syllabus by the Court.)

Appeal from circuit court, Marshall county; John A. Campbell, Judge.

Bill by John W. Brown and Mary J. Brown against Henry Miller's executors and others. Decree for defendants, and plaintiffs appeal. Affirmed.

Ewing, Melvin & Ewing, for appellants. Henry M. Russell and Meighen & Oldham, for appellees.

BRANNON, P. Miller by his will devised a tract of land to his wife for life, and directed that at her death it be sold and its proceeds divided among his children. A daughter, Mary J. Brown, owning her tenth and a share which she had purchased of another child, and her husband, who had purchased interests, so that they owned one-half, filed their bill asking that the tract be partitioned in kind, and not sold as directed by the will, and stated that two sons of the testator, who were executors, refused to allow a partition, and were going to sell the land, and prayed that they be enjoined from selling.

The executors demurred to the bill, and the court held that the plaintiffs had no right to partition, and refused the injunction and dismissed the bill, and the plaintiffs appeal.

This is a bill to enforce what is called an election. Have the plaintiffs a right to an election? It is well known that where a will or deed directs land to be sold and converted into money, or money to be invested in land, it operates as a conversion, the land assuming the character of personalty, and the money that of land, before actual conversion, and it passes to those taking under the will or deed as personalty or realty, according as the conversion is from the one to the other. *Pratt v. Talliaferro*, 3 Leigh, 419. But the party entitled to the beneficial interest may frustrate actual conversion by the exercise of the right of election, under circumstances. Being entitled to the subject, he may take the land or money in its original shape. That excellent late work, *American & English Decisions in Equity*, in volume 2, in the case of *Ingersoll's Estate*, at page 76, and elaborate note, fully discusses the subject. There is one fact, if not others, that denies the plaintiffs such right of election. Their bill shows a distinct direction by the will to the executors to sell the land, and does not show that all the beneficiaries are willing to take the land instead of money. The will having thus directed a sale and conversion into money, every child had a right to have a sale, and no one could exercise this right of election without the affirmative consent of all the others. *Harcum's Adm'r v. Hudson*, point 2, 14 Grat. 869, 876; 2 Am. & Eng. Dec. Eq. 95; 2 Lom. Ex'rs, 294. So, without saying whether or not other provisions of this will as to pecuniary legacies would demand a sale, and deny a right of election and partition in kind, the want of consent of all, which must, but does not, appear, will deny partition in kind. The bill itself shows that two sons refuse to elect to take land in kind, and thus shows a want of equity to sustain the bill, and it was properly dismissed. Affirmed.

(45 W. Va. 347)

JARVIS v. MARTIN'S ADM'R et al.

(Supreme Court of Appeals of West Virginia.
Nov. 28, 1898.)

**BILL IN EQUITY — DISMISSAL — STALE DEMAND —
PRESUMPTION OF PAYMENT.**

1. "The defenses of the statute of limitations and laches and stale demand" being proper grounds for demurrer, a bill setting up a stale demand, without alleging any reasonable excuse for delay in the assertion thereof, should be dismissed for want of equity, unless properly amended.

2. Where the presumption of payment arises by reason of the lapse of 20 years' time, a bill seeking enforcement of such stale demand must set up facts and circumstances sufficient to rebut such presumption, or it will be demurrable. *Jackson v. Hull*, 21 W. Va. 601.

(Syllabus by the Court.)

Appeal from circuit court, Harrison county; J. M. Hagans, Judge.

Suit by Lemuel D. Jarvis against Jesse V. Martin's administrator and others. Judgment for plaintiff. Defendants appeal. Reversed.

Clifford & Sperry, for appellants. John Basel, for appellee.

DENT, J. L. D. Jarvis filed a bill in chancery against Jesse V. Martin and others in the circuit court of Harrison county, at April rules, 1894, seeking to enforce a vendor's lien retained in a certain deed executed by Edwin Maxwell and Burton Despard, trustees, to Jesse V. Martin, bearing date the 4th day of March, 1871. Before appearance therein, Jesse V. Martin died, and the suit was revived against his administrator and his devisees, some of whom were infants. By the final order it appears that Hugh Martin, a party in his own right and as administrator, and Ettie Martin, the only other adult devisee, demurred to the bill, and their demurrer was overruled. They also filed a joint answer, relying on the statute of limitations, laches, and presumption of payment by reason of the lapse of upward of 20 years' time. The note given for the purchase money had long been barred, and 23 years had elapsed from the date of the deed until suit was brought. This all appears on the face of the bill, and there is no reason or excuse alleged why the suit was not sooner instituted. In the case of *Thompson v. Iron Co.*, 41 W. Va. 574, 23 S. E. 795 (Syl. point 5), this court held the settled law of this state to be that "the defenses of the statute of limitations and laches and stale demand may be made by demurrer." Such being the case, it devolves upon the plaintiff who seeks the enforcement of a stale demand to allege such facts as will entitle him to the aid of a court of equity; otherwise, relief will be denied him. His claim, having been rendered inequitable by lapse of time, will be regarded as no claim at all, in the absence of reasonable excuse for the nonassertion thereof. *Jackson v. Hull*, 21 W. Va. 601.

For the foregoing reasons, the decree is reversed, and the demurrer of Hugh M. Martin and Ettie Martin is sustained, and the cause is remanded, with leave to the plaintiff to amend his bill if he desires to do so; otherwise, to be dismissed.

(45 W. Va. 460)

GRIFFIN v. HAUGHT.

(Supreme Court of Appeals of West Virginia.
Dec. 3, 1898.)

**JUDGMENT—VALIDITY—JUSTICES OF THE PEACE—
RECORD—PLEADING.**

1. A judgment rendered by two justices sitting together is not void for that reason.

2. When two justices sit together at the trial of a case, and no objection is made thereto at the time, the validity of the judgment cannot afterwards be questioned on that account.

3. When there is no note in the record of the filing of complaint or answer in an action originating before a justice, but there is copied into the record both a complaint by the plaintiff and an answer by the defendant, signed by them respectively, with which the evidence of the parties adduced on the trial is entirely consistent, and the record shows there was a full and fair trial, the court will presume that the pleadings were so made up.

(Syllabus by the Court.)

Error to circuit court, Doddridge county; Thomas P. Jacobs, Judge.

Action by H. O. Griffin, assignee of M. Chapman, against M. L. Haught. Judgment for plaintiff, and on appeal to circuit court judgment was again rendered for plaintiff and on the appeal bond. Defendant brings error. Affirmed.

J. V. Blair, for plaintiff in error. G. W. Farr, for defendant in error.

McWHORTER, J. On the 20th of October, 1893, H. C. Griffin, assignee of M. Chapman, sued out a summons before C. A. Trough, justice of Doddridge county, against M. L. Haught, returnable November 7, 1893, at which time the parties appeared, and the defendant filed his affidavit for a continuance, which was granted until November 14, 1893, on which last-mentioned day (T. J. Haskins sitting with C. A. Trough, justice) the parties appeared by their attorneys, and the defendant moved to quash the summons in the case for irregularities, which motion was overruled, and the case put on trial; and, the evidence being heard, judgment was rendered for the plaintiff for \$143.55, and \$10.15, costs of the action, from which judgment the defendant appealed to the circuit court of Doddridge county, and filed his bond in the penalty of \$300, with Harvey Smith as his surety. On the 28th of November, 1894, a jury was impaneled in said court, and, having heard the evidence, the jury, on the 29th of November, returned a verdict for the defendant in the sum of seven dollars, when the plaintiff moved the court to set aside the verdict of the jury, and grant him a new trial, because the verdict was contrary to the law and the evidence, of which motion the court took time to consider; and afterwards, on the 27th day of November, 1895, the court sustained the motion, on condition that plaintiff pay the costs of the former trial. On the 24th of November, 1896, another jury was impaneled, and, having heard the evidence and arguments of counsel, returned a verdict for plaintiff for \$168.98, when the defendant moved the court to set aside the verdict and grant him a new trial, because the verdict was contrary to the law and the evidence, of which motion the court took time to consider; and on the 2d day of December, 1896, the court overruled the motion, and entered judgment against said Haught, and Harvey Smith, his surety, on the appeal bond, to which action of the court the defendant excepted, and tendered three several bills of

exception, which were signed and made a part of the record.

Defendant applied for, and obtained from this court, a writ of error to said judgment, on the following assignments of error: (1) That the trial had on the 14th day of November, 1893, before C. A. Trough and T. J. Haskins, justices of the peace, was without authority of law; that jurisdiction of the case was then lost; that the said judgment of said justices was null and void, and the circuit court obtained no jurisdiction to hear and determine said action by trial, and the same should have been dismissed by said court. (2) That said circuit court erred, on the 27th day of November, 1895, in setting aside said verdict theretofore rendered in favor of said defendant. (3) The court erred in giving to the jury the instructions embraced in bill of exceptions No. 1, especially the last section thereof, which wholly ignores the answer or plea of defendant, alleging fraud and deception, and the evidence showing misrepresentation as to and suppression of the fact of payment of said oil-lease rental or forfeit money, and because said last clause conflicts with the other parts of the instruction, and had a tendency to confuse and mislead the jury. (4) The court erred in refusing to give the instruction asked for on behalf of the defendant, and set forth in the second bill of exceptions. The contract and deed show that said Haught was entitled to all the yearly rental under said oil lease, except for 45 days; and, if the contract had not so specifically fixed this, the statute does. (5) The court erred in overruling said motion to set aside said verdict, and in rendering said judgment for \$179.14, with interest thereon at 10 per cent. from the 24th day of November, 1896, until paid, and costs.

On the day the summons was returnable (November 7th), the defendant appeared, and moved for a continuance. On the 14th of November, when the case was called for trial, the defendant moved to quash the summons, for the reason that it was addressed "to L. G. Duff, a special constable," and no appointment was noted in the docket, in compliance with sections 30 and 31, c. 50, Code. The object of service of process is to bring the party into court; and the appearance to the action in any case for any other purpose than to take advantage of the defective execution or nonexecution of process places a defendant in precisely the situation in which he would be if process were executed upon him, and he thereby waives all objection to the defective execution or nonexecution of process upon him. *Mahany v. Kephart*, 15 W. Va. 609; *Bank of the Valley v. Bank of Berkeley*, 3 W. Va. 386; *Venable v. Coffman*, 2 W. Va. 310. The defendant's first appearance was on the return day, so that when he moved to quash, on the 14th of November, the day to which he had it continued, his motion could not be entertained, under the authorities above cited; but, if that had been

his first appearance, it must have been a special appearance for the purpose only of quashing the summons or return, and it must be so stated in submitting his motion. *Layne v. Railroad Co.*, 35 W. Va. 438, 14 S. E. 123; *Blankenship v. Railway Co.*, 43 W. Va. 135, 27 S. E. 355.

It is insisted that Justice Trough lost jurisdiction because Justice T. J. Haskins sat with him at the trial. The constitution (article 8, § 28) provides that "the jurisdiction of justices of the peace shall extend throughout their county." It is admitted that Haskins was a justice of the peace of that county. He had concurrent jurisdiction with Justice Trough; and, in case it be for any reason improper for the justice issuing the summons to try the case, another justice of the same county may attend and hear it in his place. Code, c. 50, §§ 14, 15. There is no statute providing that two justices may sit together in the same case, nor is there any prohibiting it. At most, it could be nothing more than an irregularity, which, unless taken advantage of at the time by motion or objection, must be held to be waived. A judgment rendered by two justices sitting together would not be void. The only case I find in which a judgment was rendered by two justices is that of *McClain v. Davis*, 37 W. Va. 330, 16 S. E. 620. While the question of the right of two justices to act together is not raised in the case, the fact of their joint action is referred to, not only in their opinions (there being a dissenting opinion), but in the syllabus of the case, without criticism on that point. It is no uncommon occurrence for the trial justice to invite a brother justice to sit with him at a trial. Having commenced an action properly within his jurisdiction, the same cannot be ousted by irregularities or errors, but the same may be corrected by appeal. 1 Black, Judgm. § 244, says: "In any case where the court has jurisdiction of the subject-matter of the action, and the parties are before it by due service of proper process, the jurisdiction is never ousted by the erroneous exercise of the power which it confers; and the judgment in the case, though it may be marked by error which will cause its reversal by a higher court, is not for that reason void," and cases there cited. Appellant cites *Hutch*, W. Va. Treatise, 12, and *Todd v. Gates*, 20 W. Va. 460, in support of his proposition,—want of jurisdiction. I fail to see wherein these authorities aid him. The constitution and statutes prescribe the jurisdiction of justices. The amount here claimed is clearly within his jurisdiction. While the note sued on was originally of greater amount than would be within his jurisdiction, it was reduced by legitimate payments before suit was brought, and the action was for the balance, and it is not claimed that the amount was reduced by feigned credits.

Appellant claims that no pleadings, either complaint or answer, were filed before the justice, and no oral pleading noted in the

transcript. The first order made in the case by the circuit court, as appears from the record, was on November 28, 1894, where parties to the action appeared by their attorneys, a jury was impaneled, and the case was tried without objection for want of pleadings, and a verdict rendered on the next day, November 29, 1894, for the defendant. The defendant raised no objection or question about the pleadings at any time while the case was pending in the circuit court. The record shows, by bills of exception taken by defendant after the last trial, that evidence was adduced by both plaintiff and defendant in support of their claims respectively, and "there was a full trial as if on plea and issue." *White v. Emblem*, 43 W. Va. 819, 28 S. E. 761. And, while the record fails to note the filing of either complaint or answer, there is copied into the record both a complaint and answer of plaintiff and defendant, signed by them respectively, with which the evidence of the parties adduced on the trial is entirely consistent; and, the record showing that there was a full and fair trial, the court will presume that the pleadings were so made up.

As to the second assignment, there is nothing in the record to show what evidence was given at the first trial in the circuit court, or what rulings of the court, if any, were to the prejudice of appellant; no exceptions being taken to enable this court to see whether the verdict was contrary to the law and the evidence, or not. "In the absence of a bill of exceptions making the evidence or facts proved on the trials a part of the record, this court will presume that the judgment of the court below was proper." *Todd v. Gates*, 20 W. Va. 464 (Syl. point 6).

Considering the third assignment, it is only the last clause of the instructions given by the court that is complained of, and which is as follows: "If the rental money was collected by Chapman before he sold his land to Haught, then the same did not pass to Haught, either by the contract of sale or assignment of the oil lease;" and viewed in the light of the contract between the parties, dated 22d of April, 1891, and of the deed of date August 18, 1891, and of the lease, let us see whether that clause of the instruction is bad or liable to objection. The said contract contains this provision: "It is further agreed that inasmuch as the land described in this article is leased for oil and gas purposes to the parties known as Koen and Millan, that the said M. L. Haught accepts the obligations of said lease, and is to have all the profits and benefits resulting therefrom from the date of this article." And the deed for the land to Haught from Chapman, dated 18th of August, 1891, and acknowledged on the 31st of the same month, contains the following provision: "It is further herein stipulated and agreed that said general warranty is not to operate as a warranty against a certain lease given on said land by the party of the first part for oil and gas purposes to the

firm of Koen and Millan; but the party of the second part, M. L. Haught, accepts the obligations of said lease so given by the party of the first part, and is to have all the profits and benefits resulting from said lease from the 22d day of April, 1891, and the said party of the first part, Maxfield Chapman, is to have all benefits and profits of said lease up to April 22, 1891." The lease is dated March 8, 1890. Under its provisions, a test well was to be commenced on the premises within three months, and to be completed within nine months from its commencement; and, in case of failure to complete it within the time specified,—i. e. within one year from March 8, 1890,—the lessees were to pay to the lessor a yearly forfeit thereafter of \$150, and the lessor was to accept said amount as satisfactory compensation for such delay until said well should be completed. Now, it is insisted by the appellant, because of the use of the word "thereafter," the forfeiture did not begin until March 8, 1891; and it might so appear but for a further provision in the lease, immediately following the other, that "said forfeiture shall be deposited to the credit of the first party, at Merchants' National Bank of Clarksburg, West Virginia, or paid directly to said first party, and a failure to complete such well or pay said forfeit within the above-specified time therefor, or within the ninety days thereafter, shall render this lease null and void." Notwithstanding the language that "a yearly forfeit thereafter" of \$150 should be paid, the first forfeit under the express provisions of the lease became due and payable at the end of twelve months from the date of the lease, and could only have been a forfeit for that year, as there was yet no default for any subsequent time. The lease was for a term of five years from its date, and as much longer as oil and gas should be found in paying quantities, or the rental paid thereon. So, there were continuing benefits arising from said lease from its date, at the rate of \$160 per year, which, under the express terms of the contract, and later under the deed of August 18, 1891 (which was accepted by appellant, and recorded by him November 20, 1891), were to go to the appellee up to April 22, 1891, and after that date to appellant.

The line of defense as disclosed by the testimony is strictly in harmony with the written contract of April 22d, the deed of August 18, 1891, and with the lease of March 8, 1890, except that the defendant claims the benefits of the lease prior to April 22, 1891, while the contract and the deeds say the benefits of the lease shall accrue to him from April 22, 1891. It is not claimed that appellee collected more than the first year's rental or forfeit, and that was, under the lease, payable before the parties began to negotiate for the sale and purchase of the land. The clause of the instruction excepted to is not inconsistent with the first part of the in-

struction, nor is it bad under the theory upon which the case seems to have been tried.

This also disposes of the fourth assignment,—that the court erred in refusing the instruction set out in the second bill of exceptions, as follows: "The jury are instructed that under the contract between M. Chapman and M. L. Haught, bearing date the 22d day of April, 1891, M. L. Haught was entitled to his proportional share of the yearly forfeit money of the \$150, under the lease . . . dated March 8, 1890, and assigned to the South Penn Oil Company, the proportional share being as 45 days to Chapman and 320 days to Haught." This instruction was properly refused, because it is clearly in conflict with a proper construction of the lease as above set out, and was evidently so construed by the trial court. It follows that the court did not err in overruling the motion to set aside the verdict of the jury, and grant a new trial; and the judgment rendered by the court for \$179.14, with interest at 10 per cent. thereon until paid, and costs, was authorized by section 172, c. 50, of the Code, and is affirmed.

(45 W. Va. 691)

BUTLER v. THOMPSON.

(Supreme Court of Appeals of West Virginia.
Dec. 14, 1898.)

FRAUDULENT CONVEYANCES—EVIDENCE—BURDEN OF PROOF—CONSIDERATION—FAMILY RELATIONS.

1. Where a suit is brought by a creditor assailing a transfer of property by his debtor as fraudulent and made with intent to hinder, delay, and defraud him in the collection of his debt, the proof of fraud rests on the party who alleges it, but circumstances may exist which will shift the burden of proof from the party impeaching the transaction onto the party upholding it.

2. A conveyance made by a party of his entire property during the pendency of a suit brought to recover judgment against him on a debt is a badge of fraud.

3. Where the creditor of a grantor assails in a chancery suit a deed made by a grantor as voluntary and fraudulent, the recitals of the deed that the grantee had paid the grantor a valuable consideration are not evidence against the creditor of such payment, and the burden of proving that a valuable consideration was paid by the grantee to the grantor is upon the grantee, but the burden of proving that the deed was fraudulent in fact is upon the creditor.

4. Where a creditor files a bill to set aside as fraudulent a deed executed by his debtor which recites the payment of a valuable consideration, and such creditor's debts are older than the deed, the burden is on the grantee to prove the payment of the purchase money, or, if the deed was executed for the payment of existing debts, to prove the validity of such debts.

5. Where a conveyance of property by an uncle to his nephew is assailed as fraudulent as to creditors, the parties are held to a fuller and stricter proof of the consideration and of the fairness of the transaction than if the conveyance was between strangers.

(Syllabus by the Court.)

Appeal from circuit court, Tucker county; Joseph T. Hoke, Judge.

Bill by J. P. Butler against J. F. Thomp-

son to set aside a fraudulent conveyance. From a decree dismissing the bill, complainant appeals. Reversed.

W. B. Maxwell and C. O. Strieby, for appellant. Dayton & Dayton and Mr. Blue, for appellee.

ENGLISH, J. On the 27th day of December, 1892, J. P. Butler obtained a judgment against John F. Thompson for the sum of \$410.60 before a justice of the peace of Tucker county, on which an execution was issued, and placed in the hands of a constable, and returned by him, "Money not made, and no property found." Said Butler thereupon filed his bill in the circuit court of said county, alleging therein that at the time he brought his suit before the justice said Thompson owned a very valuable shingle and board mill worth about \$1,500 situated in said county, and also owned another saw mill worth about \$1,000 situated in the town of Davis, and other valuable personal property, such as saw logs, shingles, boards, lath, and other lumber, and lumbermen's tools, of the probable value of \$2,000; and, in addition to said property, Thompson and his wife were joint owners of a valuable house and lot in said town of Davis, known as lot No. 305 on the plat of said town; that, during the pendency of said suit before the justice, Thompson, on the 15th of December, 1892, pretends to have sold the whole of said property to his nephew Frank E. Thompson, receiving \$600 cash for said house and lot in Davis; that he is not informed what said F. E. Thompson claims to have paid for said personal property, but that he now claims the whole thereof by the terms of his purchase; that the pretended transfer of said property, which was intended to cover all the property both real and personal owned by said John F. Thompson, was made for the purpose of hindering, delaying, and defrauding the creditors of said J. F. Thompson, and especially for the purpose of defrauding the plaintiff, and that said Frank E. Thompson had full notice and knowledge of his fraudulent intent and assisted and participated therein, and is now endeavoring to assist in the consummation of said fraudulent intent, and is endeavoring to prevent the plaintiff from recovering the amount of his said judgment; that J. F. Thompson and his family yet have possession of the house, and occupy the same, which was conveyed to F. E. Thompson as aforesaid; that said J. F. Thompson still manages and controls as his own the mills and personal property transferred by him to F. E. Thompson, and, so far as any visible sign of change of ownership goes, there has been none, except that F. E. Thompson claims the property as his, and J. F. Thompson claims to have sold the same; that, in their hurry to make transfers of all the property owned by said J. F. Thompson, a one-seventh interest in lot No. 20 in Davis was overlooked, and said J. F. Thompson is

the owner thereof, as shown by deed from S. Maude Thompson to said J. F. Thompson and others; that the plaintiff caused his said judgment to be promptly docketed in said county, and the same is a lien upon the one-seventh undivided interest in said lot No. 20; that the rents and profits of the interest of said J. F. Thompson in lot No. 20 would not satisfy plaintiff's judgment in five years; that there are no other liens by judgment or otherwise against said lot No. 20, and no reference would be necessary to ascertain the liens and priorities; that no part of said judgment has ever been paid; and he prayed that the interest of John F. Thompson in said lot might be sold to satisfy said lien, and in case it did not sell for enough to satisfy said judgment and costs that then the deed from John F. Thompson and wife to Frank E. Thompson be annulled, set aside, and canceled as fraudulent as to the one-half interest of said J. F. Thompson therein, and that the pretended sale and transfer of his personal property to Frank E. Thompson be set aside as fraudulent, the interest of J. F. Thompson in said lot sold, and F. E. Thompson required to account for the value of said personal property, or a sufficient amount to satisfy the plaintiff's demand and costs. The defendant, J. F. Thompson, answered the plaintiff's bill, suggesting that he should amend it and make the Davis Hardware & Furniture Company, a corporation, an additional party, for the reason that, at the time the lot mentioned in plaintiff's bill as No. 20 in Davis was purchased by respondent and six others, it was the purpose and intention of said parties to form said corporation for the purpose of carrying on a mercantile business, and respondent and six others were the promoters of said corporation, and said lot was purchased by them for said corporation before the charter was granted; that it was paid for by the promoters, but as soon as said charter was granted the same was by verbal contract turned over to said corporation, and said promoters were paid for their outlay in purchasing it; that said corporation took possession of said lot and improved it by the erection of valuable buildings thereon, and from that time, long before the recovery of plaintiff's judgment, said property has been in the possession of said corporation, and respondent has no interest therein; that the conveyance to respondent and six others was nothing but a trust for said corporation; that the possession and notorious claim of title by said corporation to the property was notice to said plaintiff, and no decree can be entered in this case affecting said property until said corporation is made a party. At February rules, 1894, the plaintiff filed an amended bill making said corporation a party, and repeated his allegation as to his being a creditor of said John F. Thompson, and his right to have his interest in said land subjected to sale to satisfy his judgment; and alleged that, while it might be true that said real estate was purchased

for and intended to be used by said corporation, it was never the intention that said real estate was to be conveyed to said corporation, but was intended to be held by the grantees; that while the agreement to form said corporation was made March 21, 1892, and recorded the 24th of March, the certificate was issued on April 2, and recorded May 11, 1892, and the deed to J. F. Thompson and others was acknowledged on the same day and was not delivered for more than 40 days thereafter, and was not recorded until June 22d, and said J. F. Thompson has never conveyed his interest in said land to said corporation, and he has the right to have the same sold to satisfy his judgment. Said corporation filed its answer denying that J. F. Thompson had any interest in said lot No. 20, and adopted the answer of J. F. Thompson thereto; and J. F. Thompson in his answer to said amended bill claimed that he made a bona fide sale to Frank E. Thompson for the purpose of paying his debts, and offered plaintiff his pro rata share, which he declined to receive; denied any interest in said lot, and claimed that he was only a trustee for said company. Frank E. Thompson also answered, denying the allegations of the bill as to himself, and denying that J. F. Thompson remained in possession of the property after the sale to him. These answers were replied to generally, depositions were taken on behalf of the defendant J. F. Thompson, and on March 14, 1895, the cause was heard, and the bill dismissed. The plaintiff obtained this appeal.

The only error assigned is as to the action of the court in dismissing the bill, which assignment is comprehensive and involves an examination of the entire case. Let us inquire first as to the right asserted by the plaintiff to subject the undivided one-seventh of lot No. 20 in the town of Davis to sale to satisfy his judgment. It appears from the testimony that the defendant, J. F. Thompson, and six others, promoters of a contemplated corporation chartered under the name of the Davis Hardware & Furniture Company, shortly before the same was chartered purchased said lot No. 20 for the use of said corporation, and a place on which it might erect such buildings as were needed in the transaction of its business, and they received the title merely as trustees for said corporation, and that some time before the plaintiff's suit was brought or his judgment obtained the parties thus having acquired the title and holding said lot by verbal contract turned the possession of said lot over to said corporation, and sold the same to it. This corporation at once paid for the lot and erected improvements upon it, and has been in open, notorious, and exclusive possession of it ever since. Although the contract was verbal, it was fully performed on the part of the corporation, and it had the right to call for a deed, the defendant and those who jointly hold the title being

merely trustees. Now, as between the appellant and the Davis Hardware & Furniture Company, the law appears to be clearly and definitely settled in the case of *Snyder v. Martin*, 17 W. Va. 276 (Syl. point 6), where the court held that: "A purchaser of land by parol contract which has been so far executed as to vest in him the right to compel his vendor to execute the parol contract in a court of equity has an equitable right in said land so purchased which a court of equity will fully protect against the lien of a subsequent judgment creditor of his vendor." The same is held in the case of *Pack v. Hansbarger*, Id. 313, Syl. Now, as to what is required to entitle a party to specific performance this court held in the case of *Vickers v. Sisson's Adm'r*, 10 W. Va. 12, that "where a plaintiff files his bill for the specific performance of a verbal contract for the purchase of land, setting forth specifically the contract, the amount of the purchase money, and that the same had been paid to the vendor, that the plaintiff was in possession of said land at the time of the purchase, and had made valuable improvements thereon upon the faith of said contract, these allegations, if sustained by satisfactory proof, will entitle the purchaser to a specific performance of the contract in a court of equity, notwithstanding the statute of frauds." These rulings, applied to the facts disclosed by the record in this case, lead me to conclude that the plaintiff had no right to have said lot No. 20 subjected to sale in satisfaction of his judgment.

Let us now consider the other transaction, which the bill charges to be fraudulent in this: that the transfer of the property in the bill mentioned and described as a valuable shingle and board mill worth about \$1,500 situated in the town of Bretz, in said county, another mill worth about \$1,000 in the town of Davis, and other valuable personal property therein described worth about \$2,000, also a house in the town of Davis on lot No. 305 held jointly by said J. F. Thompson and his wife, was made with intent to hinder, delay, and defraud the creditors of the defendant, J. F. Thompson, and especially to hinder, delay, and defraud the plaintiff. In determining a question of this character we must look at the facts and circumstances immediately surrounding the transaction, and in doing so we find the plaintiff's action before the justice was instituted on the 10th of December, 1892, the summons was made returnable to the 17th, and appears to have been served upon the defendant, J. F. Thompson, who appeared, and the case was continued until the 27th by consent. On December 15, 1892, J. F. Thompson and wife conveyed to his nephew Frank E. Thompson in consideration of \$600, by their deed of that date, lot No. 405 in the town of Davis, on which was J. F. Thompson's dwelling house, which deed was put on record on the 17th of December, the day said case was

continued. Now, it must be regarded as somewhat singular that after the plaintiff's suit was brought before the justice, and on the very day to which the process was returnable, the defendant, J. F. Thompson, should be seized with a sudden inclination to dispose of all his property, real and personal, even the roof over his head, with a view of paying off all his debts; and he alleges in his answer that he offered to pay the plaintiff his pro rata share, but the plaintiff declined to receive it. This answer was replied to generally, and the allegation is unsustained by proof. As to the payment of a valuable consideration by the grantee where the deed is attacked by a creditor as voluntary and fraudulent, several decisions of this court have announced the doctrine as follows: "Where the creditor of a grantor assails in a chancery suit a deed made by a grantor as voluntary and fraudulent, the recitals of the deed that the grantee had paid the grantor a valuable consideration are not evidence against the creditor of such payment, and the burden of proving that a valuable consideration was paid by the grantee to the grantor is upon the grantee, but the burden of proving that the deed was fraudulent in fact is upon the creditor." See *Rogers v. Verlander*, 30 W. Va. 619, 5 S. E. 847; *Cohn v. Ward*, 32 W. Va. 34, 9 S. E. 41; *Childs v. Hurd*, 32 W. Va. 100, 9 S. E. 362; *Himan v. Thorn*, 32 W. Va. 507, 9 S. E. 930. It has also been held in this state that where a creditor files a bill to set aside as fraudulent a deed executed by his debtor which recites the payment of a valuable consideration, and such creditor's debts are older than the deed, the burden is on the grantee to prove the payment of the purchase money, or, if the deed was executed for the payment of existing debts, to prove the validity of such debts. See *Knight v. Capito*, 23 W. Va. 639. Now, the defendant, F. E. Thompson, in his answer alleges that the purchases were made by him in good faith for a full and complete consideration, and without fraud or fraudulent intent. The general replication, however, puts this in issue, and there is no proof to sustain it; and besides, as we have seen, the burden of proof in the circumstances of this case as to payment of the purchase money is on the grantee; yet neither he nor his uncle takes the stand as witnesses to support the allegation. It is alleged in the bill, and not denied by the answers, that on the 15th of December, 1892, J. F. Thompson sold the whole of his property to his nephew Frank E. Thompson. The defendant, J. F. Thompson, in his answer admits that he sold all his property, real and personal, but says affirmatively, by way of excuse, that he was indebted to certain creditors in the North, and, being anxious to pay them, he sold his interest in said lot and personal property to F. E. Thompson, a man of large means then extensively engaged in the lumber business,

for a full consideration; but, so far as the proof goes, there is nothing to show that J. F. Thompson owed a dollar except to plaintiff; neither is there a particle of evidence tending to show that said F. E. Thompson was worth a cent or that he ever paid any consideration for the property. In the case of *Goshorn's Ex'r v. Snodgrass*, 17 W. Va. 717, it was held that "if the facts established afford a sufficient and reasonable ground for drawing the inference of fraud, the conclusion to which the proof tends must, in the absence of explanation or contradiction, be adopted"; also that "though the proof of fraud rests on the party who alleges it, circumstances may exist to shift the burden of proof from the party impeaching the transaction onto the party upholding it." Speaking of relationship, *Bump on Fraudulent Conveyances* (section 67) says: "Relationship is not a badge of fraud. Fraud, however, is generally accompanied with a secret trust, and hence the debtor must usually select a person in whom he can repose a secret confidence. The sentiments of affection commonly generate this confidence, and often prompt relatives to provide for each other at the expense of just creditors. Consequently relatives are the persons with whom a secret trust is likely to exist. The same principle applies to all persons with whom the debtor has confidential relations. Any relation which gives rise to confidence, though not a badge of fraud, strengthens the presumption that may arise from other circumstances, and serves to elucidate, explain, or give color to the transaction." And, in enumerating the relations to which the doctrine applies, uncle and nephew are mentioned, and he adds: "Whenever this confidential relation is shown to exist, the parties are held to a fuller and stricter proof of the consideration and of the fairness of the transaction." The same author (section 50) says: "The expectation or pendency of a suit is a badge of fraud, because a transfer tends to deprive the creditor of the means of enforcing his judgment when he obtains it. If an attorney who holds a claim for collection is induced to delay the institution of a suit at the request of the debtor, who thereupon takes advantage of the delay to make a conveyance, this is a badge of fraud the same as if the suit were actually pending. The pendency of a suit, however, is merely a badge of fraud." In the case under consideration the suit was pending, and on the 17th of December was continued by consent, and on that day the deed was recorded. As we have seen, the pendency of the suit at the time of the conveyance was a badge of fraud. *Bump, Fraud. Conv.* § 66, says: "The grantee need not prove the payment of the consideration until the fraudulent intent of the grantor is shown, but when that is shown it is incumbent on him to establish the payment by competent evidence, for the proof is almost exclusively within his knowl-

edge and power. * * * The facility with which a fictitious payment may be fabricated renders it necessary for him to produce all the proof which may reasonably be supposed to be in his power of the reality and fairness of the transaction, and the want of clear proof is evidence of fraud." As to notice of fraudulent intent on the part of the grantee the same author says in section 184, p. 212: "If the grantor and grantee are relations or are intimate, this is a fact from which it may be inferred that the latter knows the former's financial condition,"—citing *Castro v. Illies*, 22 Tex. 480. In the case of *Herzog v. Weller*, 24 W. Va. 189, it appears that an insolvent husband transferred to his wife's brother for an alleged valuable consideration all of his personal property. Soon afterwards the brother transferred the said property to another brother, and the latter transferred it to his sister, the wife of said insolvent husband, as a gift in consideration of fraternal affection. In a controversy between the wife and the husband's creditors to have said property subjected to the payment of debts contracted by the husband before the transfer by him, the court held that "the burden of proving the transfer by the husband to the brother was bona fide and for a valuable consideration rests upon the wife." The circumstances immediately surrounding this transaction—the pendency of the suit, the relationship of the grantee, the transfer of the entire property, real and personal, including the home of the grantor, when a judgment is about to be taken against him—are indications of a fraudulent intent. The near relationship or business relations of the grantee with the grantor are such as to cast the burden of proving the payment of consideration and the bona fides of the transaction upon said J. F. Thompson and his nephew Frank E. Thompson, and yet neither of them came forward as a witness to sustain the transaction or show that a valuable consideration was paid. These circumstances, in my opinion, stamp the sale of said house and lot No. 305 and personal property as fraudulent, and induce me to hold that the conveyance and transfer of them were made with intent to hinder, delay, and defraud the plaintiff in the collection of his debt, and that they are therefore void as to the plaintiff's judgment. The decree of the circuit court dismissing the plaintiff's bill is therefore reversed, and the cause remanded.

(45 W. Va. 468)

LAWYER v. BARKER et al.

(Supreme Court of Appeals of West Virginia.
Dec. 8, 1898.)

FRAUDULENT CONVEYANCES—DEED OF TRUST CREDITORS—PURCHASERS FOR VALUE.

1. The syllabus in the case of *Grocer Co. v. Williams*, 27 S. E. 345, 43 W. Va. 323, and in *Casto v. Greer*, 30 S. E. 100, 44 W. Va. 332, are affirmed.

2. Where an insolvent debtor conveys all the property owned by him, being the equity of redemption in a certain tract of land in trust to secure future repairs to be made thereon, and it does not appear that such repairs added to or enhanced the value thereof, such conveyance will be held void, under section 2, c. 74, of the Code, as to the preference thereby secured.

(Syllabus by the Court.)

Appeal from circuit court, Morgan county; E. Boyd Faulkner, Judge.

Action by Charles W. Lawyer against John H. Barker and others. From the decree rendered, defendant S. A. Westenhaver appeals. Affirmed.

Flick, Westenhaver & Baker, for appellant. T. W. B. Duckwall and M. T. Ingles, for appellees.

DENT, J. S. A. Westenhaver appeals from certain decrees of the circuit court of Morgan county rendered in the case of Charles W. Lawyer, trustee, against John H. Barker and others. The facts are as follows: John H. Barker, an insolvent, on the 13th day of December, 1893, conveyed his whole estate, consisting of an equity of redemption in a certain tract of land, to D. C. Westenhaver, trustee, to secure to the defendant S. A. Westenhaver, the payment of the sum of \$465, evidenced by note now held by the Citizens' National Bank of Martinsburg. This note was given in payment of repairs to be thereafter made by the payee on the property conveyed, and which were completed within about two months from the date of the transaction. The property sold under a prior deed of trust, and the surplus representing the equity of redemption, were brought into court for its disposition. Appellant claimed that the whole amount should first be applied to the payment of his trust debt, while the other creditors of Barker insisted that the trust deed, having been executed by an insolvent debtor, was an unlawful preference, and amounted to a general assignment for the benefit of Barker's creditors, and that the fund realized should be divided pro rata among all the creditors whose debts existed at the time of the execution of such trust. The circuit court took the latter view, and distributed the fund pro rata. Appellant insists that this was error, for the reason that his debt was not in existence at the time of the execution of the trust, and that, therefore, he is entitled to be regarded as a bona fide innocent purchaser, without notice, but, if not, that the limitations provided in Acts 1895 apply to his trust. To sustain either or both of these positions this court is asked to review the so-styled "hastily and ill considered" decisions of *Grocer Co. v. Williams* (W. Va.) 27 S. E. 345, and *Casto v. Greer* (W. Va.) 30 S. E. 100; yet no argument or principle of law is adduced which was not fully weighed and carefully considered before the above decisions were handed down. All deed of trust creditors are, under certain circumstances, to be regarded

as purchasers for value, but, generally speaking, they are nothing more than creditors. Because a person takes a deed of trust from a known insolvent, to secure future advances to be made by him, does not make him any more a purchaser for value than any other trust creditor; and his very action enables the debtor to place his property beyond the reach of his creditors, and throws upon such person the duty of showing the bona fides of the transaction; and this cannot be satisfied by merely showing that the advances were made, but it must also be shown, in case they were to be in the shape of repairs, that such repairs were necessary, and added to the value or preservation of the property. The question of fraud was not raised in this case, however; and it appears to be fully proven that repairs to the full extent of the note given were put upon the property; yet there is no evidence showing the character or necessity thereof, or that they in any degree enhanced the value of the property. A vendor's lien is a specific common-law lien, though modified by statute, while at common law no lien exists on real estate for borrowed money expended or repairs put thereon; hence they are not to be compared together in considering a statute forbidding illegal preferences. A mechanic's lien is purely statutory, had no existence at common law, and can be obtained only in the manner provided in the statute. A deed of trust cannot be made a substitute therefor. Both a vendor's and mechanic's lien can be had without the assistance and against the will of the debtor, and are protected by that clause of section 2, c. 74, Code, which provides "that nothing in this section shall be taken or construed to change, impair or affect any prior lien, priority or incumbrance acquired by a creditor on the real estate of such debtor in any manner now prescribed by law." This clause is limited to liens acquired by the creditor on the real estate of an insolvent debtor without the latter's assistance or in invitum. *Refining Co. v. Quinn*, 39 W. Va. 535, 20 S. E. 576.

A deed of trust for future advancements or repairs may enable the debtor to place his property beyond the reach of his creditors. The repairs may be fictitious, valueless, or injurious to the estate. The appellant simply proved by his own testimony that he made repairs to cover the amount of the note given. If he had shown that the equity of redemption conveyed as his security was of little or no value, or that the repairs put on the property enhanced the value thereof to their full extent, he might have good grounds to ask the interposition of a court of equity, for the reason that the trust only covered such repairs, and amounted, in effect, to a mere reservation of title or purchase-money lien on his own property, and was therefore, as held in the case of *Johnson v. Riley*, 41 W. Va. 140, 23 S. E. 698, not to the prejudice of existing creditors. Nothing of this kind

is attempted, and, so far as the record shows, the repairs did not enhance the value of the equity of redemption; but this subsequent creditor, simply because he is subsequent, asks that the fund be turned over to him, for the reason that he took the precaution, knowing the debtor was insolvent, to have him convey his property in security therefor before the repairs were made. "Ignorance of law excuseth no one." He undertook this matter fully advised as to solvency, and his legal rights in the premises; and, if the repairs did not add to or enhance the value of the land, he should not have made them. He did so at his own risk, with the statute before him. Having mingled his property with that of another, the burden is on him to distinguish between the two, and separate them; otherwise, he must be the loser. If he had been able to do so, and thus established the equivalent of a purchase-money lien secured by the reservation of title, he might possibly be held to have an equitable priority to the extent of his repairs or the enhanced value, and thus occupy the place of a preferred creditor, unaffected by the statute; but, as the matter now stands, he cannot be placed on any higher grounds than any other co-existing creditor of the insolvent. He loses; so do all the other creditors lose. His property would not be given to them for nothing, nor will their property be given for something which is a loss to him, but is valueless to them. If he had loaned the debtor the money, he could have placed it beyond the reach of his other creditors; thus, they would have been defrauded. Devoting it to apparently useless repairs, adding nothing to the real value of the property, is the same, in effect. The case of *Walker v. Burgess* (W. Va.) 30 S. E. 99, deals with a general statute of limitations, is further reaching, and approves the case of *Casto v. Greer*. The fact that other courts have legislated on the subject of the statute of limitations is not a good reason why this court should do so, especially in disregard of many of its own decisions to the contrary. No good reason appearing why the principles settled in the cases of *Grocer Co. v. Williams*, and *Casto v. Greer*, cited, should be overruled, the same are hereby approved; and the decree complained of, being in accordance therewith, is affirmed.

(45 W. Va. 438)

WEST VIRGINIA BLDG. CO. v. SAUCER.
(Supreme Court of Appeals of West Virginia.
Dec. 3, 1898.)

MECHANIC'S LIEN—PERFORMANCE OF CONTRACT—
EQUITY—DIRECTING ISSUE.

1. If a builder has completed his work according to contract in all material, substantial features, his mechanic's lien is not lost merely because there are minor, unsubstantial, unimportant omissions or defects.

2. The direction of an issue out of chancery is a matter of sound discretion. The mere omis-

sion to do so will not reverse a decree, unless it was asked for.

(Syllabus by the Court.)

Appeal from circuit court, Grant county; Robert Dalley, Judge.

Bill by the West Virginia Building Company against Thomas J. Saucer. Decree for plaintiff, and defendant appeals. Affirmed.

J. N. McMullan, for appellant. F. M. Reynolds and L. J. F. Forman, for appellee.

BRANNON, P. The West Virginia Building Company brought a chancery suit in the circuit court of Grant county against Thomas J. Saucer, to enforce a mechanic's lien for the construction of a building in the town of Bayard, under written contract with Saucer, which resulted in a decree in favor of the company to sell the property, and Saucer appeals.

It is claimed for Saucer that the bill was improperly held to be good on demurrer. It is claimed that the bill does not sufficiently set out the contract, whether verbal or written, and its terms and stipulations and conditions. It is true that it is always best to set out a contract with definiteness and particularity, so far as its stipulations are pertinent to the matter to be litigated, but other matters, though in the contract, need not be specified. A bill to enforce a mechanic's lien does not require very great particularity, because the account filed with the clerk, claiming the lien, itself has great effect. This bill alleges that Saucer contracted with the plaintiff to erect on certain lots a large building, and to furnish certain material for same in the construction thereof, and that, in pursuance of and under said contract, plaintiff erected the building, and furnished material therefor; that it was under contract between the parties, and that the contract price for labor and material used and furnished therein all amounted to the sum of \$4,837.17; that, after allowing all credits to which Saucer was entitled, there was due from him \$1,488.67; that plaintiff, on the 2d of February, 1896, ceased to labor on and furnish material for the building; and that the bill says that the work was done and material furnished and building erected under a contract taken the — day of 1895, not saying whether written or oral. The account, claiming the lien filed in the clerk's office under the statute, was exhibited with the bill. Surely, this bill charged all that seems essential,—the contract, the work done under it, the amount thereof, the date when finished, and the filing of the account. It is immaterial whether a contract be written or oral, to create a mechanic's lien. The account gives definite specifications of work, labor, and material.

It is claimed for Saucer that, when the mechanic's lien account was filed in the clerk's office, the work had not been fully completed, and therefore the account could not be filed, and created no lien. This objection goes to

the very root of the plaintiff's demand. The compensation to be paid the contractor was payable in installments as the work progressed, and it does seem to me that the builder may, before the completion of the work, file his lien. Our statute gives him a lien over other liens arising subsequent to the time "when such labor shall have been performed or material furnished"; that is, as to subsequent creditors, and surely so as to the owner. I think that this lien starts from the first moment when the work or delivery of material commences, even as to such creditors, and certainly as to the owner. Phil. Mech. Liens, § 216; *Oriental Hotel Co. v. Griffith*, 53 Am. St. Rep. 790. Suppose the builder files his lien after the lien starts, and afterwards completes the work; shall his lien be overthrown because his account is filed before completion? I would think not. I know that the Code does say that the lien shall be discharged unless the builder shall, "within 60 days after he ceases to labor on, or furnish material or machinery, file his lien account." But as said in *Luter v. Cobb*, 1 Cold. 528: "The limitation is intended for the benefit of creditors of the owners and purchasers, to protect them from fraud and injury by the operation of this secret lien." It gave that time to the mechanic to continue his lien,—that is, his last point,—but that does not say that he need wait until then if his lien has once commenced. He need not file his lien before that time. He may go on to work, and he has his lien from its commencement or when he began furnishing material, and the statute gives him a lien over any creditors whose liens arise after his lien commences, without any recordation, because the law gives notice to the world that the mechanic's lien attached to the building, which lien he may enforce by filing it within 60 days after completion. While the work is going on, no notice is necessary; the work itself is that. But if the mechanic, after completion, waits longer than 60 days, his lien is gone; certainly, as to creditors. *Bank v. Dashiell*, 25 Grat. 625.

As installments in this case were due before completion, I would think a lien filed before completion would be good. My idea is that a lien, though not necessary if filed at once after it commences, is good for the whole contract price when completed; and even if work be not completed, yet, if the party would be by law allowed to recover for what work he did or what material he furnished in an action of assumpsit upon a quantum meruit or quantum valebant, his lien would be good in equity for the same. But in this case it is not necessary to go so far, as this decision does not require it. The work was substantially completed before the account was filed. The defendant had made certain payments. He had taken possession of the house, and there remained to be done upon it very inconsiderable work, compared with the total. It certainly is true in law that if there be a substantially completed, though not perfectly

completed, contract, the claim may be filed, and the defendant may recoup or abate from the contract the value of the failure. He can claim damages for noncompletion. He has no right to forfeit all that the builder has done. If in an action at common law the builder would be allowed to recover any sum after the abatement to the owner of his damages, for the noncompletion of the contract, then in a suit in equity he would likewise recover. Justice is thus done to both parties. If the deficiencies are unimportant, and may be easily made up, the lien is still good. *Glacius v. Black*, 50 N. Y. 145; *Hayward v. Leonard*, 7 Pick. 181; *Stewart v. McQuaide*, 48 Pa. St. 191. But, in this case, Saucer accepted the building, took possession of it, rented it out; and surely, under such circumstances, he must pay what the material and work are worth,—in other words, the contract price, with such abatement as the shortcomings of the contractor called for. *Bell v. Teague*, 85 Ala. 211, 3 South. 861; *Vanderbilt v. Iron Works*, 25 Wend. 665. It is very clear that any recoupment or abatement to which the owner is entitled can be allowed in chancery, in a suit by the mechanic or builder on his lien. *Phil. Mech. Liens*, § 140. When the contract is entire, and the building substantially finished, and it is treated by all parties as completed, though some unimportant parts be not completed, if the time limited by the statute is suffered to elapse before these unimportant things are done, more especially if intervening rights in favor of a third party have attached, the lien cannot be successfully asserted. *Luter v. Cobb*, 1 Cold. 526. That treats the unimportant deficiencies as inadequate to keep alive the right to file the lien; that is, the date for filing does not run on till their completion. Conversely, it is true that those unimportant deficiencies did not prevent the builder from filing his lien, and recovering what was due him on it, less abatement for such deficiencies.

The claim is urged that the sum allowed Saucer for abatement is too small. It was \$153.21. The evidence shows that the items of work to fully complete the building were not important, but I have this to say under this head: that the recoupment depended upon a large number of witnesses, largely on their mere opinion, and this evidence conflicted, especially as to what allowances should be made for abatement. There was a great mass of evidence taken on this, and the allowance is based on mere estimate, and it cannot be expected that upon this mere question of fact, standing on conflicting evidence and inferences and deductions therefrom, this court should reverse the finding of the circuit court. I think it substantially right. *Hall v. Hall*, 30 W. Va. 780, 5 S. E. 260; *Richardson v. Ralphsnyder*, 40 W. Va. 15, 20 S. E. 854; *Dorr v. Dewing*, 36 W. Va. 466, 15 S. E. 93.

It is claimed that the court should have directed an issue out of chancery to pass upon the question of what allowances for abate-

ment should have been made. It is very difficult to reverse a decree for failure of the court to direct an issue, because a large discretion is given the court herein, and the rule when it should and should not do so cannot be well defined. Our Code (chapter 131, § 4) says that the court, when "there is such confliction in the evidence as in the opinion of such court to render it proper, may direct an issue." It prohibits it in any other case. This tells itself of a large discretion. *Powell v. Batson*, 4 W. Va. 610, holds that the proper criterion by which to test the propriety of such an issue is that, where in a given case, the decree rendered is sustained with reasonable certainty by the facts and circumstances, there would be no error in refusing to direct an issue to try any material matters put in issue therein. The evidence was conflicting. It was not so particularly as to any particular fact in issue, but on this mere estimate of the value of deficiency; and the evidence does, with reasonable certainty, sustain the court's finding, as much so as in such a case could be expected. A court can and should itself decide matters of fact, and even state an account, and save the cost and time of a protracted jury trial, if it have such data and evidence to enable it to do so properly. *Darby v. Gilligan*, 43 W. Va. 755, 28 S. E. 737; *Bart. Ch. Prac.* 848.

A further consideration in this case is that no issue was asked. I am impressed with the opinion that when a court has used its discretion, and gone on without an issue, it cannot be reversed for omission to direct one, unless it be asked. This is sustained by *Dorr v. Dewing*, 36 W. Va. 466, 15 S. E. 93, holding that, if a cause has been heard without order of reference asked or suggested, a party cannot, for the first time in the appellate court, assign the failure to direct a reference, unless it appear that manifest injustice has been done him thereby. I should think it would be much more so in the case of failure to direct an issue than as to a failure to direct a reference to commissioner. Judge Snyder says, in *McKinsey v. Squires*, 32 W. Va. 43, 9 S. E. 55, that the party should ask an issue if he wants it.

Complaint is made that there was no reference to a commissioner. I have already, by reference to the case of *Darby v. Gilligan*, answered this objection. There was no complicated account to be made before a commissioner; no ascertainment of liens and priorities. When the court, having the contract price before it for the building, made up the sum which the defendant should be allowed for recompense, the matter of account was ended. Why could not a judge do this, as well as a commissioner?

As to the complaint that the lien under the deed of trust in favor of the National Building & Loan Company was not ascertained and decreed: That company and its trustee were before the court. The decree gave the building company a first lien, and fixed its amount,

and then declared that the next lien was that of the National Building & Loan Company under its deed of trust, but did not fix its amount. Now, that company and its trustee are not complaining of this; only Saucer is. It is strange that he should complain of the failure of the court to declare that his property should be sold unless that lien, too, were paid. The decree is favorable to him in this respect, in not making him pay that deed of trust debt at once. Moreover, it was a subordinate lien. Moreover, it was a lien payable by monthly payments, as building loans usually are, and it would have been improper to decree its payment long before maturity. Of this, had it been done, Saucer could have complained; and, as to the amount of it, it could not have been fixed. It was not yet due. He certainly knew its amount. It was not necessary that the sale should raise an amount to cover it. He had the right to go on, and pay in in monthly payments.

Complaint is made that the property was not rented, instead of sold. Now, the mechanic's lien statute commands a sale, and does not require the mechanic to wait five years for his money. He is entitled, by the very letter of the statute, to a sale. The statute, in the case of judgment liens, says that, if five years' rental will pay them, no sale shall be made, but this case is governed by the mechanic's lien statute. We affirm the decree.

(45 W. Va. 670)

DEATON et al. v. MITCHELL et al.

(Supreme Court of Appeals of West Virginia.
Dec. 14, 1898.)

SUPREME COURT — JURISDICTIONAL AMOUNT — APPEALABLE DECREE.

1. Where a decree merely pecuniary, and for not over \$100, is reversed on bill of review or petition for rehearing, this court has no jurisdiction of an appeal from the decree of reversal.

2. A decree which adjudicates all the principles of a cause and settles the rights of the parties, leaving nothing further to be done but to execute it, is such a decree as will support an appeal from a decree which grants a rehearing of the first decree.

(Syllabus by the Court.)

Appeal from circuit court, Mercer county; R. O. McLaugherty, Judge.

Bill by C. A. Deaton & Co. against E. M. Mitchell and others. From the decree, plaintiffs appeal. Dismissed.

John A. Douglass, D. W. McLaugherty, and Jouch, Flournoy & Price, for appellants. Johnston & Hale, for appellees.

BRANNON, P. Before considering a case before it on its merits, this court must consider its jurisdiction, especially as it is in this case challenged. We have no jurisdiction of this appeal. It was a suit to enforce a judgment lien upon land. On reference to a commissioner to ascertain liens, only two were reported, and they were decreed against the

land, and it was decreed to sale; one being to the Bank of Bramwell, the other to C. A. Deaton & Co., and each less than \$100, that of Deaton & Co. being \$97.61. The debt of the bank was paid, as shown by a record entry, though this is not material. Afterwards, on a petition assigning errors in former decrees, filed by defendants, the decree of sale was set aside, and a rehearing allowed. Deaton & Co. obtained from a judge of this court an appeal. Deaton & Co., if aggrieved at all, are aggrieved in a matter purely pecuniary, and the amount is less than \$100, excluding costs, as the decree granting rehearing took away from them \$97.61. Where the controversy is purely pecuniary, the amount must exceed \$100, exclusive of costs. *Berry v. Cunningham*, 37 W. Va. 302, 16 S. E. 463; *McLaugherty v. Morgan*, 36 W. Va. 191, 14 S. E. 992. It is claimed, further, that for another reason we have no jurisdiction, and that is that the decree confirming the commissioner's report, decreeing the debts against the debtor and his land, is not a final decree; and that, while Code 1891, c. 135, § 1, cl. 9, gives a writ of error or appeal "in any civil case where there is an order granting a new trial or rehearing," without waiting for such new trial or rehearing, yet this is only where the decree reheard is a final one. That decree was likely, in full sense, a final one, as it only remained to execute it by sale; but certainly it was so far a final one as to come under said clause granting appeal where rehearing has been granted. That decree adjudicated the principles of the cause, fixed the rights of the parties as to all matters in the case on which relief could be granted, and is so far final that it is an appealable decree, and will support a bill of review. It left nothing to settle. *Core v. Strickler*, 24 W. Va. 689; *Rader v. Adamson*, 37 W. Va. 582, 16 S. E. 808; *Shumate v. Crockett*, 43 W. Va. 491, 27 S. E. 240; *Buster v. Holland*, 27 W. Va. 510; *Cocke's Adm'r v. Gilpin*, 1 Rob. (Va.) 20; *Rawling v. Rawling*, 75 Va. 83. Very clearly the same intention moved the enactment of clause 9, as respects new trial and rehearing, the one in law, the other in chancery; and that was to change the old law forbidding a writ of error or appeal till final judgment or decree, and, by anticipating them, allow a writ of error at law where a verdict is set aside, and a rehearing in chancery where there has been a decree settling the principles of a cause, so as to have the appellate court pass on the merits of the case without the delay and expense of new trial or rehearing. It was intended to let a party deprived of the jury's decision or the court's decision on the merits in his favor appeal at once. Strange that a decree so far final as to allow a bill of review or appeal should yet not be final enough to allow an appeal to test the right to grant a rehearing. This would defeat the manifest aim of the clause. If, therefore, a decree adjudicates the principles of the cause, so that it only remains to execute the adjudi-

cation, a rehearing gives right to appeal. Whether it must adjudicate all the matters involved, I do not say. This decree did so. Indeed, it may be that this clause was intended to go further, and give appeal from a rehearing where the decree is interlocutory, yet decides some principles directing and controlling further final decision, though not appealable or open to bill of review; in other words, where a petition for rehearing, properly so called, and not an appeal or bill of review, lies. But as this decree closed all the matters involved, that question does not arise, and I have not examined it. In fact, the decree being final, the pleading called a petition for rehearing is a bill of review, and it cannot be questioned that a decree disposing of a bill of review will support an appeal, if the requisite pecuniary amount is present, where the decree reviewed is merely pecuniary. The name given the paper is no matter. *Martin v. Smith*, 25 W. Va. 579; *Crumlish Case*, 40 W. Va. 659, 22 S. E. 90.

Dismissed for want of jurisdiction.

5 W. Va. 287)

GALLOWAY v. STANDARD FIRE INS. CO.
(Supreme Court of Appeals of West Virginia.
Nov. 19, 1898.)

**INSURANCE—CONTRACT—DELIVERY—ACCEPTANCE—
PAYMENT—LIMITATION OF ACTION.**

1. Where application is sent by an applicant or his agent from one state to an insurance company of another, and there accepted, and a policy of insurance is there issued, it is a contract of the state where issued.

2. Generally, the place of the acceptance of a proposal is the place of contract.

3. A deposit of a contract in a post office addressed to the party to whom it is to be delivered is a delivery at the post office.

4. A debtor must seek his creditor to pay him, unless the creditor be out of the state.

5. If a policy of insurance provides that it shall not be valid until countersigned by its agent at a certain place, it is a contract of the state where so countersigned.

6. Where a policy of insurance provides that suit must be brought upon it within six months after loss by fire, and there is a promise by the company, within the six months, to pay the policy, and the whole period runs out before the company refuses to pay, such promise is a waiver of the limitation, and estops the company from pleading it, and is not a mere suspension of time from the promise until the refusal to pay.

(Syllabus by the Court.)

Error to circuit court, Ohio county; Joseph R. Paull, Judge.

Action by O. F. Galloway against the Standard Fire Insurance Company. Judgment for defendant, and plaintiff brings error. Reversed.

White & Allen, for plaintiff in error. W. P. Hubbard, for defendant in error.

BRANNON, P. This is an action by Galloway against the Standard Fire Insurance Company to recover for a loss by fire of a stock of goods insured by a policy issued by the company, resulting in a finding by the

court trying the case in lieu of a jury in favor of defendant, and judgment for it. The plaintiff sued out a writ of error. The policy contained a clause that no suit upon it should be sustained unless commenced within six months after the fire, and the company pleaded this contractual limitation in bar of the action and the plaintiff tendered three replications, which were rejected. The case turns upon whether the circuit court was right in the rejection of those replications. Only two of them need be considered, Nos. 2 and 4.

Replication No. 2 seeks to meet the plea of limitation by stating that the policy was made in the state of Virginia; that it was countersigned at Wheeling, W. Va., but not then completed by delivery, but was later delivered to Rice, an insurance broker of Richmond, Va., and by him was delivered to Hutton, an insurance agent of Warrenton, Va., and was by him delivered to Galloway at Warrenton, and that it thus was a completed Virginia contract for insurance of property situated in Virginia, and to be performed in Virginia; and that the company was not a corporation created by Virginia; and that certain statutes of Virginia, specified, prohibited foreign corporations from doing business there without complying with certain regulations, one being the appointment of an agent upon whom process might be served, and that this the defendant had not done; and that, because there was no such agent, the plaintiff was prevented from suing within the six months. This replication would maintain that, the policy being a contract made in Virginia, its statute law requiring the appointment of such agent became a part of the contract, as if inserted therein,—just as much a part of the policy as if it had in words said that the six-months limitation should apply only “in case the company shall appoint, as required by the law of Virginia, an agent to accept service therein of process in actions against it.” This raises the question whether the policy is a Virginia or West Virginia contract, for, if not a Virginia contract, very plainly the Virginia statute cannot be an element in it. I think, for several reasons, it is a West Virginia contract. May, Ins. § 66, says: “It follows, from the rule that the contract is completed when the proposal of the one party has been accepted by the other, that the place of contract is the place of acceptance. If an agent, resident in one state, of an insurance company, resident in another, forwards the requisite papers to the home office, and a policy is issued, and mailed directly to the applicant, the contract is a contract made in the state where the home office is situated; and, since the acceptance is the term of completion, it would seem that a transmission of the policy by mail to the agent, to be delivered by him to the applicant, would have the like effect.” See 2 Para. Cont. 582. And 8 Am. & Eng. Enc. Law, 551, says that the general rule is that “the place of the contract

of insurance is the place where it was accepted." Tested by this law, when the proposal, if forwarded by an agent of the company, resident in Virginia, was accepted at the home office, and a policy issued and mailed to the agent in Virginia, to be delivered by him to the applicant, it would be a West Virginia contract, because the acceptance was there; but, to make this stronger, we may eliminate the consideration that the policy was sent to a Virginia agent of the company, to be delivered in Virginia to the insured party, as this replication does not aver that Rice or Hutton was agent of said company, and the policy has a clause declaring him not an agent of the company, and the policy is a part of the declaration; and thus we have simply the case of some one as plaintiff's agent sending to the Wheeling home office an application, and its acceptance there, and the issuance there of a policy, and its delivery to the applicant's agent in Richmond, which, under above law, makes it a West Virginia contract. The place of acceptance, not delivery, decides where the contract is made, as a general rule. And, if delivery were important, a delivery to the mail, addressed to the applicant or his agent, would be the final delivery. 2 Pars. Cont. 582; *Hartford Steam-Boller Inspection & Insurance Co. v. Lasher Stocking Co. (Vt.)* 29 Atl. 629; 4 Am. & Eng. Enc. Law (2d Ed.) 202, note 1. Nothing more remained to be done to complete the contract. By delivery to the mail, the company, in effect, delivered it to a third party to be delivered to the insured, and lost control over it. An excellent discussion of this subject is that by Justice Clifford. *Desmazes v. Insurance Co. (U. S. Cir. Ct. Mass.)* 7 Fed. Cas. 529. That it was completely signed and countersigned by the officers at Wheeling is recited in the policy. So it is, under the facts and law, a West Virginia contract. But, to make this plainer, it declares that it should "not be valid until countersigned by the duly-authorized agent of the company at Wheeling, W. Va." It shows that it was countersigned there. It then was completed and took effect. Judge Anderson, in *Insurance Co. v. Warwick*, 20 Grat. 628, says this shows it to be a contract where countersigned. The place of the performance of the final act, which is to give effect to the contract by its own word, is conclusive to show where the contract was made. A policy of insurance declared that the contract "shall not take effect until the first premium shall have been paid." It was held to be a Missouri contract, though signed by the company in New York, because the payment of premium was in Missouri. *Assurance Co. v. Clements*, 140 U. S. 226, 11 Sup. Ct. 822. A policy issued by a company in New York, and there signed, but not to be valid until countersigned by an agent in Massachusetts, was held a Massachusetts contract. *Heebner v. Insurance Co.*, 10 Gray, 131. Same doctrine, 3 Am. & Eng. Enc. Law (1st Ed.)

551. These principles are fully stated in *Ford v. Insurance Co.*, 90 Am. Dec. 663, 668. But if it were a Virginia policy, what then? The law requiring an agent's appointment would not be a part of it, because it is a law unto itself, prescribing its own limitation, and contains no exception based on failure to appoint an agent. It is settled that where a contract fixes a shorter limitation than that of the general law, the exceptions in the general statute of limitations do not apply, because the rights of the parties are tested by the contract; and, as it relieves them from the general law, it relieves from its exceptions. *Wilkinson v. Insurance Co.*, 72 N. Y. 499; *McElroy v. Insurance Co.*, 48 Kan. 200, 29 Pac. 478; *Riddlesbarger v. Insurance Co.*, 7 Wall. 386; 2 May, Ins. § 483. And again, if a Virginia contract, and the statute a part of it, it seems to me that the statute could only apply to a suit in Virginia. What has it to do with a suit in West Virginia? If the policy had in words said that suit should be within six months, "unless the company fail to appoint an agent in Virginia," how could it affect a suit here? So I conclude that the Virginia statute has no relation to this suit, and replication 2, setting it up as an excuse for not sooner suing, sets up immaterial, irrelevant matter, and is no answer to the plea of contract limitation. The facts which it states make the policy a West Virginia policy, and exclude the introduction of the Virginia statute. As suit could be brought in West Virginia, what excuse is there for not suing here? If, however, we could say that replication shows a Virginia contract, it would be bad, because the declaration files the policy, which shows itself on its face to be a West Virginia contract, and the replication showing a Virginia contract would be in conflict with the declaration, and be a departure in pleading, and bad under the law of pleading forbidding departure. 6 Enc. Pl. & Prac. 460.

The policy does not say payment of loss was to be at any particular place. Therefore, it is to be where the policy issued. 3 Am. & Eng. Enc. Law, 446; 2 Pars. Cont. 583. It is urged that the debtor must seek and pay his creditor, and, as the insured party lived in Virginia, therefore it is a Virginia contract. I think this court has, in some opinion, held that the duty of a debtor to seek his creditor to pay him does not call the debtor to go out of the state, and I find the law so stated in *King v. Finch*, 60 Ind. 423, and in *Littell v. Nichols' Adm'r*, *Hardin*, 66. But this does not seem to test the question of the place of the making of the contract. If a contract be made between parties, and the creditor should remove to Maryland afterwards, would that make it a Maryland contract?

Replication 4: It states that the goods insured by the policy sued upon were also insured in the Wytheville Insurance & Banking Company and the Petersburg Saving &

Insurance Company, and that, after the fire, agents of the three companies met, and sought to compromise the claims of plaintiff, and made an offer, which plaintiff rejected; and that afterwards, before the expiration of the six months, the defendant company promised him to pay him the full sum stipulated in the policy without suit, in case the Petersburg Company would pay him the full amount of its policy, on which promise he relied; and that the Petersburg Company did pay him the amount of its policy, but the defendant refused to pay the amount of its policy, and did not, until long after the expiration of said six months named in its policy as a contract limitation, refuse to pay or decline to do so, and did not notify him of any purpose not to pay. The circuit court rejected this replication, because it failed to show the date when the promise to pay ceased; that is, when the company notified plaintiff that it would not pay. This replication, as counsel for the company concedes, alleges that during the whole of the six months the company was promising to pay, and did not refuse to do so until after that period, and then did refuse. Then the position of the circuit court is not that the date of refusal to pay must be given, so we may see if a part of the six months remained which would afford a reasonable time for suit before its expiration, as held in *Steel v. Insurance Co.*, 47 Fed. 863. But even if the whole six months had gone before a refusal to pay, the promise to pay would be no waiver of the limitation, but suit might be, and must be, brought within six months after refusal to pay, not later, and that the date of refusal should appear, so it would appear if suit was in six months thereafter. This depends upon whether the promise of payment is a waiver of the clause of limitation, eliminating it thereafter from the policy, and estopping the company from pleading it, or merely operates to suspend the running of time under it, so long as the promise lasts, until refusal to comply with it. Now, whether such promise continuing unexecuted for a time, and then ended by a refusal to perform it, leaving a part of the period reasonably sufficient for suit, would be a waiver of the clause, or merely suspend it from the promise to the refusal to fulfill it, I need not—do not—say. I do say, however, that where such promise stands for the whole period of the limitation, it is not a mere suspension, but a waiver of the clause of limitation. The mere pendency of negotiations for settlement is no waiver. *McFarland v. Insurance Co.*, 6 W. Va. 425. But a promise to pay ends controversy, and by it the company says: "You need not sue at all. I will pay without suit." It admits of no other interpretation. *Thompson v. Insurance Co.*, 136 U. S. 287, 10 Sup. Ct. 1019, held that a promise to pay was a waiver, and barred the company from this defense. The court went further, saying that conduct of the company in-

spiring a hope and expectation on the part of the insured party that the loss would be amicably adjusted would operate as such waiver and estoppel. The court held it an estoppel against the plea, not a mere suspension. It said delay to sue would, in such case, be attributable to the company. It said the waiver need not be in writing. Assurances of settlement, which reasonably throw the insured party off his guard, and lull him into security, will waive the limitation clause, and bar its use by the insurance company. *Insurance Co. v. Peck*, 133 Ill. 220, 24 N. E. 538; *Bonnett v. Insurance Co.*, 129 Pa. St. 558, 18 Atl. 552; *Insurance Co. v. McGregor*, 63 Tex. 399; *Bish v. Insurance Co.*, 69 Iowa, 184, 28 N. W. 553; *Martin v. Insurance Co.*, 44 N. J. Law, 485; 2 May, Ina. § 488. *Banking Co. v. Myer*, 93 Ill. 271, holds a promise to pay a waiver. We must remember that this clause is for the benefit of the company, inserted by it to limit the period for suit shorter than the general law, and it would be unjust to allow it by its action to cause delay in suit, and then plead this clause. Being for its benefit, it may waive it. In determining whether such promise of payment is a waiver or a mere suspension of running of time, we must reflect that the limitation clause is only a matter of contract, not like the statute of limitations. It either operates or is entirely gone by reason of waiver. The statutory limitation fixes a period as a bar, and then says that when there is obstruction to the prosecution of the suit by absence or other cause the time of the obstruction does not count. The running of time stops for a time and then begins again,—opens and expands,—because the statute says so; but not so with this contractual limitation. *Semmes v. Insurance Co.*, 18 Wall. 158. But cases cited above treat the promise as a waiver of the clause, not a mere suspension.

After finishing this opinion, I meet with the case of *Insurance Co. v. Baker*, 153 Ill. 240, 38 N. E. 627, meeting the point squarely, holding that "hopes of payment held out to a plaintiff by an insurance company as an inducement not to sue within the time limited in the policy operate as a waiver of the limitation clause," and that, "when once so waived, the clause will not, after any substantial part of the time is lost, be revived by a statement to the insured that the company is insolvent, and he can make nothing by suit," and that "after such waiver the case rests upon the regular statutory limitation." Of course, if a lapse of part of the six months would be a waiver, all of it would. The leaning of the opinion is that it is a waiver regardless of time.

It is proper that I should allude to cases cited in the circuit court's opinion to sustain the contention that such promise only a suspension of time. *Black v. Insurance Co.*, 31 Wis. 74, seems to hold it a suspension. *Steel v. Insurance Co.*, 47 Fed. 863, was where there were assurances of settlement for a

time, but then repudiated, and seven months remained before the end of the period for suit, which the court held a reasonable time for suit. It admitted that, if all the time had gone, it would prevent the company from pleading the limitation. *Barnum v. Insurance Co.*, 97 N. Y. 188, not in point. There were proofs of loss, then negotiations as to amended proofs, and under all the cases the contract limitation could not start till proof of loss or time thereafter given for payment, and the court held that cause of action did not accrue until close of negotiations for amended proofs. It did not hold that promise of payment, after accrual of action, and within the period, would be a mere suspension. *Insurance Co. v. Fish*, 71 Ill. 621, does not decide this point. It decides that, pending negotiations, suit need not be brought; thus sustaining the proposition that conduct indicating adjustment will be a waiver, rather than holding it a mere suspension. It cites *Insurance Co. v. Chestnut*, 50 Ill. 116, which holds that an adjustment and promise to pay would waive the limitation clause,—an authority to sustain me. And it cites a case in 25 Ill. 466 (*Insurance Co. v. Whitehill*), holding the same. So the 71 Ill. case is no authority on the point, and, if it were, is overborne by older and later Illinois decisions.

By reason of the rejection of replication 4, we reverse and remand for further proceedings.

(45 W. Va. 654)

BENNETT v. PIERCE et al.

(Supreme Court of Appeals of West Virginia.
Dec. 14, 1896.)

**EQUITY PLEADING — VENDOR AND PURCHASER —
TITLE—PRIOR—MARRIED WOMEN—DEEDS
—ACKNOWLEDGMENT.**

1. If an answer presents no bar to the bill, or contains some matter not material, exception should be made to it, pointing out defects, and not a mere general objection should be made.

2. A purchaser who has accepted a deed of general warranty must generally pay the purchase money, and look to the warranty for indemnity against bad title; but if the grantor is insolvent, or the warranty not binding, he will not be compelled to pay, if the title is defective, though he has not yet lost from its defect.

3. A deed for land by a married woman alone, as one living separate and apart from her husband, must recite that fact, as also the fact that the land is her sole and separate estate; otherwise, the deed is void.

4. A certificate of acknowledgment of a deed for real estate made by a married woman alone, as one living separate and apart from her husband, must state that it has been proven to the satisfaction of the officer that the real estate is the sole and separate property of the woman, and that she was at the date of the deed, and still is, at the date of the certificate, living separate and apart from her husband; otherwise, the deed is void.

(Syllabus by the Court.)

Appeal from circuit court, Barbour county;
John H. Holt, Judge.

J. Hop Woods, for appellant. Dayton & Dayton and Mr. Blue, for appellees.

BRANNON, P. This suit was in equity, in the circuit court of Barbour county, to sell a tract of land for purchase money, for which a lien was reserved in a deed from Maggie Bennett, the plaintiff, to W. N. Pierce, defendant, resulting in a decree of sale, from which Pierce appeals.

Pierce tendered an answer, which was rejected. The court went on to decree on the bill as confessed. The appellant assigns the rejection of this answer as error. The answer was rejected on mere general objection, no cause of objection being specified. I suppose it was intended as, in effect, a demurrer, asserting that the answer presented no bar. I question whether, under strict equity practice, an answer can be thus rejected without exception. Likely, if the answer presents no bar to the bill, its rejection on a general objection would be good on appeal. It would be dangerous if the answer contained some good, some bad, matters, as the overruling of a general objection would not then be error. There is no demurrer to an answer. Objection must be made by exception. Exceptions are not formal, but must be written and point out grounds of exception. It is better practice to use them, though I think the practice is loose with all of us in this state under this head. We let answers go in for what they are worth, and go on to proof on both sides, and spend much time and cost, and at last the whole answer, or parts of it, are held to present no bar. The court would, at the start, have rejected the whole or parts of the answer if called on by exceptions, and thus saved much cost and delay. By exceptions, we eliminate from the case answers presenting no bar in law, or such parts as do not, and shorten the case. 1 Enc. Pl. & Prac. 895; *Richardson v. Donehoo*, 16 W. Va. 685. And I just notice that Judge Lucas entertained the same doubt I entertain, whether such an objection can avail a plaintiff, in *Arnold v. Slaughter*, 36 W. Va. 589, 15 S. E. 250. Such general objection may, under the liberal rules of equity practice, be good where it goes to the whole answer as presenting no bar, but will not avail where only some matters are objectionable.

Let us, then, see whether this answer presents a bar. It alleges that Mrs. Bennett derived title through certain deeds from parties who were heirs of John Dalton, some of them married women, and it points out that certificates of their privy examination were defective. One of these deeds, dated February 18, 1880, is fatally defective, in the fact that the certificate as to four married women omits the requisite statement, "and having the writing aforesaid fully explained to them." *Watson v. Michael*, 21 W. Va. 568. The deed of December 7, 1882, is bad because the justice certifies that Phebe Male and husband appeared together, and made a joint acknowl-

edgment,—bad under *McMullen v. Egan*, 21 W. Va. 238. And it is bad because in the second clause of the certificate it says: "And the said —, wi— of the said —, being at the time," etc., not giving name of husband or wife; rendering this second part, containing essentials, nugatory. The deed of February 6, 1884, is void as to Ary J. Barnes, as it does not show on its face that the land is her separate estate, and she living separate and apart from her husband. No authority is cited for this position, save section 3, c. 66, Code 1868; but that seems all-sufficient. I have not met with any case. It is not necessary to give authority to show that at common law a married woman cannot convey land, and can now convey only as statute allows. Under our statute, a wife cannot convey even her separate land without her husband in some way uniting in the deed, except that, if she is living separate and apart from him, she may alone convey; but she must do so in the mode pointed out, and that is that the deed shall recite that the land is her sole and separate property, and that she is living separate and apart from her husband; and, further, the certificate of acknowledgment must show that it was proven to the satisfaction of the officer making it that such were the facts. These matters are not recited in this deed. I think, too, the certificate is defective in not stating that it was proven "to his satisfaction" that the property was her sole and separate property, and that she was living separate and apart from her husband; and the Code says that the certificate must state that "all of said facts were shown to the satisfaction" of the officer. It requires him to say that the proof showed these facts to his satisfaction. It requires his finding on the evidence. Strictness is required, because it may turn out otherwise, and the deed be overthrown. The certificate merely says that Mrs. Barnes made affidavit that the land was her sole and separate estate, and hardly that she was living separate. As a married woman can only convey as statute points out, and the cases require close compliance with their requirements, I think this is a fatal defect. Every material fact must be stated in the certificate, to make a deed valid. 1 Am. & Eng. Enc. Law, 538. These are material facts. Deeds are not good if they do not exist. The justice must find them. These defects make these deeds null and void as to the married women. They never conferred their estates in the land.

Next comes the question, shall Pierce be compelled to pay the balance of purchase money with these grave defects in the title of his grantor? *Heavner v. Morgan*, 30 W. Va. 335, 4 S. E. 406, and *Id.*, 41 W. Va. 428, 23 S. E. 874, would answer "No," as those cases say that equity will not force a purchaser to complete an executory contract, and pay purchase money, when there is a defect of title. But that was a case of an executory contract; this is a case of a deed with general warranty.

Must the purchaser pay, and wait till he is attacked, and then resort to his warranty? There is a difference, but the subject is so trite that I will not rediscuss it, but simply refer to opinion in *McClaugherty v. Croft*, 43 W. Va. 270, 272, 27 S. E. 246, showing that, where one accepts a deed with general warranty, he will not be compelled to pay purchase money, and thus lose a fund in his own hands for indemnity, where the grantor is insolvent, and title defective. There are two reasons why that law should be applied in this case. The answer alleges Maggie Bennett's insolvency. Under the general objection to the answer, it must, as if on demurrer, be taken as true. But it alleges, and it is shown by the deed, that Maggie Bennett is a married woman, and therefore her warranty does not bind her to the personal covenant of warranty, but only to pass her estate in the land. Code 1891, c. 73, § 6; *Sine v. Fox*, 33 W. Va. 521, 11 S. E. 218. Counsel would here draw a distinction, saying that this rule does not apply where the land is separate estate, and that in such case the covenant does bind the woman as if single, and that *Sine v. Fox* was not the case of a deed of separate estate. But there is the positive provision that such covenant shall not bind the wife personally, and there is no exception of a deed for separate estate, though that section provides as to conveyance by a wife living alone, of her separate estate. Only the legislature can put such an exception in the statute. Here we must remember that by common law a married woman cannot contract. Whether, by law at the date of this deed (June 27, 1896), this covenant would bind her, if it were not for section 6, c. 73, limiting its effect, it is not necessary to say; but as to this particular contract that limitation stands in the Code unchanged.

Counsel argue that Pierce must wait till his title is attacked. Not so. He is a defendant seeking to keep in his pocket a fund for his indemnity.

Counsel for Mrs. Bennett also say that it has been 17 years since these defective deeds were made, and that the rights of these married women were barred by limitation and laches. As to limitation: If this land was not separate estate, limitation would not operate against the married women until the death of their husbands; otherwise, if it was separate estate. Code, c. 104, § 3; *Randolph v. Casey*, 43 W. Va. 289, 27 S. E. 231. The record does not tell us when John Dalton died, and the land vested in his children; whether it was before or after April 1, 1869. The husbands are presumed to be yet living. Moreover, there is nothing to show that Rolley C. Bennett, grantee in the defective deeds, or Pierce, grantee of Maggie Bennett, ever had actual possession. Deeds confer constructive possession; but, under the statute, actual possession must be shown by him asserting it. *Industrial Co. v. Schultz*, 43 W. Va. 470, 27 S. E. 255; *Kolner v. Rankin's Heirs*, 11 Grat

420; *Overton's Heirs v. Davisson*, 1 Grat. 211; Busw. Lim. § 236. It is unquestionable that where a purchaser takes actual possession under a deed purporting to convey legal title, and not under an executory contract, the possession of grantee is adverse to the vendor (*Core v. Faupel*, 24 W. Va. 238). Even if the deed is void (*Randolph v. Casey*, 43 W. Va. 289, 27 S. E. 231; *Swann v. Thayer*, 36 W. Va. 46, 14 S. E. 423; *Mullen's Adm'r v. Carpenter*, 37 W. Va. 215, 16 S. E. 527). So, if it should appear that John Dalton died after April 1, 1869, descent casting on his daughters a separate estate, and that Rolley C. Bennett and Pierce, taking their actual possession, had such possession for 10 years, the married women would be barred, and time would cure the vice in said deeds; but the facts on which this proposition rests are not before us. It is not necessary to discuss laches of these married women, as it is a question of statutory limitation. If the statute does not bar out their title, laches will not; and, if the statute applies, it is useless to consider laches. This rejected answer presented a good bar to the bill until it was repelled, and it was error to reject it. We therefore reverse the decree, and remand the case, with direction to allow the answer to be filed.

(45 W. Va. 731)

SHUFFLIN v. HOUSE et al.

(Supreme Court of Appeals of West Virginia.
Dec. 17, 1898.)

**LEASE BY LIFE TENANT—DURATION—DEATH OF
LIFE TENANT.**

1. The word "land" in section 1, c. 94, Code, is used in a restricted sense to denote agricultural or farming land, and not town lots used for building purposes alone.

2. All unexpired leases given by a life tenant on town lots used for building purposes alone terminate with the death of such life tenant, and do not continue in force until the end of the current year.

(Syllabus by the Court.)

Error to circuit court, Tyler county; R. H. Freer, Judge.

Suit by M. B. Shufflin against House & Hermann and others. Judgment for plaintiff, and defendants bring error. Reversed.

Robt. McEldouney, George W. McCoy, and Howard & Handlan, for plaintiffs in error. T. P. Jacobs and F. D. Young, for defendant in error.

DENT, J. S. Stephens and Amanda Stephens, holding a life tenancy in a certain lot in the town of Sistersville, Tyler county, W. Va., with remainder in Clara E. Jones, leased the same to M. B. Shufflin for the period of from one to five years, ending on the 12th day of May, 1897. This lease was afterwards extended to the 1st day of April, 1900. Clara E. Jones did not consent to or join in either of the leases. Amanda Stephens, the surviving life tenant, died the 2d day of January, 1897. In the meantime M. B. Shufflin

sublet the property to House & Hermann at the rate of \$150. House & Hermann paid Shufflin up to including the date of the death of Mrs. Stephens, and then released the property from Mrs. Jones. Shufflin, claiming the rent from Mrs. Stephens' death up to the end of the current year, to wit, 12th May, 1897, levied two distress warrants on the property of House & Hermann. They gave forthcoming bonds, and this suit is on such bonds to recover the balance of such rent. The circuit court gave judgment against the defendants for the sum of \$360, and they come to this court.

The only question presented is as to whether M. B. Shufflin or Clara E. Jones is entitled to the rent from the 2d day of January, 1897, to the 12th day of May, 1897, being from the date of the death of Mrs. Stephens to the end of the current year of the leasehold. All unexpired leases made by a life tenant terminate at his death, except as otherwise provided by statute. Gear, Landl. & Ten. § 21; 1 Tayl. Landl. & Ten. p. 121, § 172; 12 Am. & Eng. Enc. Law. p. 753, note 1. Code, c. 94, § 1, provides that, "If there be tenant for life or other uncertain interest in land which is let to another, the lessee may hold the land to the end of the current year of the tenancy, paying rent therefor; the rent if it be reserved in money shall be apportioned between the tenant for life or other uncertain interest, or his personal representative, and those who succeed to the land." This provision the plaintiff insists governs in this case, while the defendants insist that it only applies to lands used for agricultural purposes, and not to town lots or other real estate where the rent is payable monthly in money. The word "land" in this section was no doubt used in a restricted sense to denote agricultural land rented for an annual rental, for the purpose of encouraging agriculture and securing to the tenant the harvest that he might sow. 2 Minor, Inst. pp. 101, 102. Where the reason of the law fails, the law itself is at an end. "The word 'land' has two senses, one general and one restricted. If it occurs accompanied with other words which either in whole or in part supply the difference between the two senses, that is a reason for taking it in its less general sense; e. g. in a grant of lands, meadows, and pastures, the former word is held to mean only arable land. Burt, Real Prop. 183; Cro. Eliz. 476, 650; 2 And. 123; Van Gorden v. Jackson, 5 Johns. 440." Bouv. Law Dict. The reason for taking the word "land" in its less general sense as farming or agricultural land is from the context and the true purpose of the enactment, being to secure to the person who sows and cultivates the right to reap and enjoy. In the case of town property no such necessity exists. If the statute was applicable, all the tenant could do, even thereunder, would be to collect the rent and pay it over to the remainderman. He is only entitled to the rent up

to the date of the death of the life tenant. Why, then, permit him to collect rent which belongs to another, or retain control of property in which he has no possible interest? With agricultural land it is different. A yearly rental or a portion of the crop is usually reserved, and according to common law the subtenant, in case of the death of the life tenant, was entitled to the emblements. The object of the statute was to declare the common law and make it effective, and was in no sense to apply to town property rented for a monthly rental, of whatever term. As to such property its provisions have no application, and are wholly unnecessary and useless. Therefore the circuit court erred in rendering judgment for the plaintiff, and the same is reversed, and judgment is entered for the defendants.

(45 W. Va. 729)

JONES v. SHUFFLIN.

(Supreme Court of Appeals of West Virginia.
Dec. 17, 1898.)

APPEAL — OBJECTIONS NOT MADE BELOW — LIFE TENANCY—RIGHTS OF REMAINDER-MAN.

1. An objection to a bill in chancery, made for the first time in this court, for the reason that it is not signed by counsel, will not be entertained.

2. After the expiration of a life tenancy in a town lot by death, and the termination of a lease thereunder, the lessee cannot remove buildings put on such lot during the continuance of such tenancy. Such buildings become a part of the realty, and go to the person entitled to the remainder.

(Syllabus by the Court.)

Appeal from circuit court, Tyler county; R. H. Freer, Judge.

Bill by Clark E. Jones against M. B. Shufflin. Decree for plaintiff. Defendant appeals. Affirmed.

Thos. P. Jacobs and F. D. Young, for appellant. Robert McEldowney and G. M. McCoy, for appellee.

DENT, J. S. Stephens and Amanda Stephens, holding a life tenancy in a certain lot in the town of Sistersville, Tyler county, W. Va., with remainder in Clara E. Jones, leased the same to M. B. Shufflin for a period of years extending to the 1st day of April, 1900. Clara E. Jones did not consent to or join in either of these leases (there being two of them), but, on being applied to, positively refused to do so. To the first lease Mrs. J. S. Jones (now Mrs. Shufflin) was a party, but she was not made a party to this suit. These leases were terminated by the death of the surviving life tenant, Mrs. Amanda Stephens, the 2d day of January, 1897. See *Shufflin v. House* (decided at this term) 31 S. E. 974. During their existence M. B. Shufflin erected a large frame building on the lot which he leased to House & Herman, who were in the occupancy thereof at the time the leases terminated. This building was constructed on a good, firm foundation, and was connected

with the street sewerage, at the expense of the life tenancy. Defendant Shufflin undertook, after the termination of his lease aforesaid, to remove the building from the lot. Clara E. Jones, plaintiff, enjoined such removal, and, at the hearing of the cause on bill and answer, general replication, and depositions, the injunction was perpetuated. The defendant appeals, and claims: First. That the bill was not signed by an attorney. This is an objection that should have been taken in the circuit court, and cannot be taken for the first time in this court. Second. That Mrs. J. S. Jones was not made a party, while she is a party to the leases, or one of them. There is nothing to show that she was attempting to remove the building, and it will be time enough to enjoin her when she does undertake to do so. She was not a necessary party, as no relief is sought against her.

Defendant insists he had a right to remove the building—First, because his tenancy had not terminated; and, second, it remained his by virtue of the law of fixtures. The first of these questions is settled adversely to defendant's claim in the case of *Shufflin v. House*, before cited. As to the second question, the law is well settled that the remainder-man is entitled to the property with all improvements thereon at the expiration of the life tenancy. In the case of *White v. Arndt*, 1 Whart. 91, it is held: "(1) Even as between landlord and tenant, fixtures erected by the latter, and which he is entitled to remove, must be removed during the term; after the expiration of the term the tenant can neither remove them nor recover their value from the landlord. (2) This rule prevails more strictly between tenant for life or his lessee and the remainder-man, the latter of whom is not bound by any agreement between the tenant for life and his lessee under which the lessee may have erected buildings on the land." *Haflick v. Stober*, 11 Ohio St. 482; *Austell v. Swann*, 74 Ga. 278; *Dean v. Feely*, 69 Ga. 804. The plaintiff, being entitled to the remainder, and not having consented to the lease, is in no wise bound thereby, and the improvements come to her as though they had been placed thereon by a stranger. If a building is erected on land against the will of the landowner, or without his consent, it becomes realty, and cannot be removed therefrom without the commission of waste. *Bonney v. Foss*, 62 Me. 248; *Cannon v. Copeland*, 43 Ala. 252; *Dart v. Hercules*, 57 Ill. 446; *Honzik v. Delaglise*, 65 Wis. 494, 27 N. W. 171. The defendant in this case acted with open eyes. He erected the building against the consent and against the known will of the plaintiff. He allowed it to remain until after the expiration of the life tenancy and the termination of his lease, and thereby, if he might have done so before, he cannot remove the same. It has become a part of the realty, and belongs to the plaintiff. The court did right to perpetuate the injunction, and its decree is affirmed.

(45 W. Va. 595)

MYERS et al. v. MILLER et al.Supreme Court of Appeals of West Virginia.
Dec. 10, 1898.)**SUBROGATION—SURETIES ON OFFICIAL BOND.**

Sureties on the official bond of a sheriff, upon being compelled to make good the default of their principal, will, by the fact of payment, become equitable assignees, and be subrogated to the position of the state in respect of all its securities, liens, and priorities, for the purpose of enforcing reimbursement from their principal.

(Syllabus by the Court.)

Appeal from circuit court, Berkeley county;
E. B. Faulkner, Judge.

Bill by S. N. Myers and others against Charles H. Miller and others. From the decree, defendant D. W. Shaffer appeals. Affirmed.

Faulkner & Walker, U. S. G. Pitzer, and J. N. Wisner, for appellant. Flick, Westenhaver & Baker and Daniel B. Lucas, for appellees.

McWHORTER, J. S. N. Myers, P. C. Curtis, K. Creque, G. W. Buxton, W. S. Miller, James M. Vanmetre, John H. Miller, J. R. Brown, and Thomas H. Byers, sureties on the official bond of Charles H. Miller, sheriff of Berkeley county, filed their bill in the clerk's office of the circuit court of said county, at the December rules, 1895, against said Charles H. Miller; G. P. Miller, in his own right and as trustee; George M. Vanmetre; W. S. Small and John W. Porterfield, partners trading as Small & Co.; R. L. Thomas; M. A. Lamon; J. H. Miller, J. William Miller, and A. C. Miller, late partners trading as J. H. Miller & Sons; George W. Trimble; D. W. Shaffer; S. S. Felker; the National Bank of Martinsburg, a corporation; the People's National Bank of Martinsburg, a corporation; the Citizens' National Bank of Martinsburg, a corporation; E. L. Horner; C. M. Pine; J. Luther Ropp; William Rutledge; Thomas Kearns; John Simpson; L. C. Gerling; George W. Feldt; Alex. Clohan; Q. P. Riner; D. A. Beard; I. W. Wood; J. M. Small; E. W. Vanmetre; Berkeley County Canning Company, a corporation; James Oliver; J. H. Racey; D. F. Horner; T. A. Potts; Joseph E. Potts; Clara E. Blondell; J. A. Blondell; the Martinsburg Mining, Manufacturing & Improvement Company, a corporation; George M. Bowers, H. C. Berry, James J. Thompson, James H. Smith, Levi Williamson, Moses Myers, James W. Robinson, D. S. Griffith, and M. T. Ingles, special commissioners in chancery cause of E. B. Faulkner and others, administrators, etc., against Melvina Grantham and others,—alleging: That on the 27th of April, 1895, the state of West Virginia recovered in the circuit court of Kanawha county against the defendant Charles H. Miller, late sheriff of Berkeley county, and the said plaintiffs, as sureties on his official bond, a judgment for the sum of \$10,075.03, with interest thereon at the rate of 12 per cent. per annum from that date until paid, and the sum of

\$28.90 costs, and exhibited a copy of the judgment. That writ of summons in the action in which said judgment was rendered against all of said defendants was issued on the 13th day of December, 1894, and was served on the defendant Charles H. Miller and the other defendants on the 19th day of December, 1894; and, by virtue of the statute in such case made and provided, the said judgment became and is a lien on all the real and personal property owned by the said Charles H. Miller and the other defendants from the day on which the summons in said action was served on them. That on and prior to the 6th day of August, 1895, they, the said sureties of said Miller, were obliged to pay, and did pay, unto I. V. Johnson, the auditor of the state of West Virginia, and the person entitled by law to receive the said judgment, interest, and costs, the full amount of such judgment, principal, interest, and costs, and took from said auditor an assignment and transfer, and without recourse on the said state, of all its right, title, and interest in and to said judgment, and the right to enforce the lien thereof for the purpose of collecting the same out of any property of the said Charles H. Miller, the principal debtor; by means whereof they claim to be subrogated to the lien of the state as of the 19th day of December, 1894, on the real and personal property of said Charles H. Miller. That an execution was issued on said judgment on the — day of August, 1895, and delivered to the sheriff of Berkeley county, and an abstract thereof, together with the indorsement of the sheriff thereon, was duly docketed in the execution lien docket for the county of Berkeley, but that they are unable to realize anything under said execution out of the real or personal assets of said Charles H. Miller, owing to the fact that it was improper for him to make sale of real estate, because of the cloud upon his title to all of said real estate as hereinafter mentioned, and therefore the whole amount is still due and owing to the said plaintiffs. They then proceeded to set out the real estate of which said Charles H. Miller was seised, and the various judgments recovered by the other defendants to this bill, and prayed that all the creditors holding liens against the real estate of said Charles H. Miller might be convened, and the amounts and priorities established; that the real estate owned by said Miller might be ascertained; that all the clouds upon the title thereto might be removed; and, in cases where the legal title to the same was outstanding, that the same might be gotten into the name of said Charles H. Miller, and a sale might be made for the purpose of paying all the liens thereon; and for general relief.

D. W. Shaffer answered the bill, alleging that he recovered a judgment against Charles H. Miller for \$208.49, with interest and costs, on December 22, 1894, no part of which had yet been paid, and denying all the allegations of the bill wherein the plaintiffs

claim to have the right to any prior lien upon the property, real and personal, of Charles H. Miller, because: "First. He denies that the judgment of the state of West Virginia against said complainants and Charles H. Miller was ever assigned to the complainants. Secondly. That even if an attempt had been made to assign said judgment, that it is absolutely null and void as to this respondent and other lien creditors of Charles H. Miller prior to the date of said judgment of the state. Thirdly. That said judgment of the state of West Virginia against complainants and Charles H. Miller was a judgment for taxes, and therefore could not be assigned to the complainants. Fourthly. This respondent further denies the payment of said judgment by said bondsmen, and demands strict proof thereof. Fifth. That the judgment obtained by the state of West Virginia against said complainants and Charles H. Miller did not carry with it any lien, and that it is purely a statutory remedy exercised by the state against said bondsmen, and, if any lien was created thereby, the statute gives no right to any person to assign the lien. Sixth. This respondent further denies the payment of said judgment to the state for taxes collected by Charles H. Miller by said bondsmen, but alleges, on the contrary, that it was paid in whole or in part by the collection of taxes, prior to and since the rendition of said judgment, by Charles H. Miller and constables of the county of Berkeley, and who turned said money over to said bondsmen. This respondent asks for a strict account of all taxes collected by any person liable to the debt due the state, and what amount has been paid on Charles H. Miller's indebtedness to the state of West Virginia." And he further says that certain assignments have been made of deeds of trust, bonds, notes, and other obligations to W. S. Miller, L. C. Gerling, and others, of certain notes, without valid consideration, and which were liable to the state of West Virginia for taxes due and owing by the said Charles H. Miller, upon which the state of West Virginia had a lien at the time of said assignment by virtue of the statute in such case made and provided; which said amount, if applied to the payment of taxes due said state by said Miller, together with the taxes since collected and turned over for the payment of said indebtedness, would more than pay the same,—all of which matters and things respondent asked might be inquired into; and respondent, not admitting or denying any facts in complainants' bill, except so far as the responses in said answer contained, prayed to be hence dismissed, etc.

Defendant R. L. Thomas filed his answer, setting up his judgment recovered against C. H. Miller and Thomas Kearns for the sum of \$810.05, recovered on the 18th day of June, 1894, and another judgment for the sum of \$202.75, recovered on the 25th day

of July, 1895, and another judgment for the sum of \$266.35, recovered on the 12th day of October, 1894, with interest and costs on all three judgments, part of which said judgments only had been paid, and part of said costs; and denying all the allegations in plaintiffs' bill wherein the said complainants claim to have the right to any prior lien upon the property, real and personal, of Charles H. Miller, because of the same reasons set out in the answer of the defendant D. W. Shaffer.

On the 30th day of January, 1896, the cause came on to be heard on the bill of complaint and exhibits, process duly executed as to all the defendants, bill taken for confessed, and set for hearing at rules, upon the respective answers of D. W. Shaffer and R. L. Thomas that day filed, and general replication thereto, and was argued by counsel, and the cause was referred to Commissioner in Chancery L. D. Gerhardt, with instructions: "First, to ascertain and report the real estate owned by the said Charles H. Miller, its fee-simple and annual rental value, and the condition of the title of the said Charles H. Miller to the respective parcels of real estate; second, the liens, by judgment, deed of trust, or otherwise, against the real estate of said C. H. Miller, together with the respective amounts and priorities of such liens; third, any other matter by himself deemed pertinent, or which any of the parties in interest shall require him to ascertain and report;" and to give notice of the execution of said order of reference by advertisement of the same for four successive weeks in some newspaper published in Berkeley county, and to give the notice to lienholders required by section 7, c. 139, Code.

On the 4th day of April, 1896, the commissioner filed his report, showing the real estate of the said Miller and the liens thereon; to which report defendant D. W. Shaffer and the Citizens' National Bank entered their exceptions, as follows: "First. Because the same did not remain ten days in the commissioner's office after completion, as required by law, and as will be seen by his certificate. Second. Because said commissioner did not notify said defendants that said report was to be closed on the 4th of April, or at any other time, but, on the contrary, had notice from the undersigned counsel for defendants that they would introduce further evidence to the commissioner in support of the claims of the defendants, as they had a right to do. Third. Because said report shows on its face that the commissioner has not audited the liens against Charles H. Miller's real estate according to their respective priorities. Fourth. Because from said report many of the liens audited by the commissioner as judgment liens in a particular class do not show the dates of judgment, or when the same became a lien upon the real estate, by the recordation of the

same upon the judgment lien docket or otherwise, as required by law. Fifth. Because no judgments in the report show that they are liens upon the real estate of Charles H. Miller. Sixth. Because the commissioner's report fails to show whether the so-called reported judgments are liens against the real estate of Charles H. Miller as the original debtor or only as indorser. Seventh. Because the judgment B, in the fifth class, does not show that it is a lien upon the real estate of Charles H. Miller. Eighth. Because the commissioner reports the lien in judgment B, fifth class, in favor of S. N. Myers, P. C. Curtis, K. Creque, G. W. Buxton, J. R. Brown, and Thomas H. Byers by right of subrogation, and does not show by what authority of law they can be or are subrogated, and these exceptants deny that they are subrogated to the so-called lien set up therein. Ninth. Because the commissioner in the so-called judgment B, in class 5, undertakes to fix the lien for the benefit of S. N. Myers, P. C. Curtis, K. Creque, G. W. Buxton, J. R. Brown, and Thomas H. Byers, and that the same carries 12 per cent. interest, the right and the legality of which the exceptants deny. Tenth. Because the commissioner fails to report all the property of Charles H. Miller, as shown by evidence. Eleventh. Because the commissioner's report is irregular on its face, and filled with errors apparent on the face thereof. Twelfth. Because the proofs of certain interests jointly with Charles H. Miller are insufficient, and do not warrant the conclusions of the commissioner."

With his report the commissioner filed depositions of various parties, showing the rental and fee-simple value of the various properties in said Miller; and the deposition of D. O. Westenhaber, stating that the sureties of Charles H. Miller, who are plaintiffs in this suit, had settled this judgment with the state; that it was made through him as their agent; that the amount of cash accepted by the state in full settlement was \$9,213.06, and of this sum \$8,682.82 principal was paid on or about the 1st day of June, 1895, and the remainder, \$530.24, on or about the 1st day of August, 1895; and that, on this payment being completed, I. V. Johnson, auditor of state, executed the assignment, which is filed with the plaintiffs' bill, and also as a part of his testimony, and there should be credited on the total amount due the plaintiff the following sums: June 1, 1895, \$172.77; August 2, 1895, \$530.24; August 26, 1895, \$122.85; November 27, 1895, \$624; and January 28, 1896, \$113.67; and filed a statement marked "B," showing these payments; and stated that this is all the money, so far realized from the administration of Charles H. Miller's assets, properly applicable on his indebtedness to the state; that the chief remaining items of personal property were two judgments against John B. Wilson and S. W. Walker, aggregating about \$1,300 and \$1,400, a note of \$100

made by George D. Walker, and a claim in a suit against J. M. Wisner for taxes and against George W. Feldt; that what would be realized from them remained to be seen; that, if the claims against Mr. Wisner and Mr. Feldt were collected, part of it would be applied to the judgment; that, besides these, there were a number of fragments of personal property, not very large in the aggregate, and scarcely worth the cost of collection. Mr. Westenhaber, in reply to the question: "It is generally understood in the community that, of this amount of money paid to the state of West Virginia, the same was raised by a note of Charles H. Miller's father, W. S. Miller, who became the maker of said note, which was indorsed by the other plaintiffs in this bill. Is that the way that this amount of money of \$9,213.06 was raised for the payment of this debt?" says: "Mr. W. S. Miller gave his note for \$8,631.75, indorsed by the plaintiffs, which was discounted, and the money paid to the auditor. The remainder, as stated in my foregoing testimony, and additional payments, making in all \$1,563.31, was paid from the administration of C. H. Miller's assets."

The assignment of the judgment by the auditor, as appears from the exhibit, is as follows: "Whereas, W. S. Miller, Jas. M. Vanmetre, K. Creque, S. N. Myers, P. C. Curtis, J. R. Brown, John H. Miller, Thomas E. Byers, and G. W. Buxton, sureties on the official bond of Charles H. Miller, late sheriff of Berkeley county, have paid to the state of West Virginia the full amount, principal, interest, and costs, of a certain judgment recovered by the said state of West Virginia against the said Charles H. Miller, late sheriff of Berkeley county, and the parties above named as his sureties, in the circuit court of Kanawha county, West Virginia, on the 27th day of April, 1895: Now, therefore, I, Isaac V. Johnson, auditor of the state of West Virginia, at the request of the above-named sureties, so far as I have the power and authority as such auditor to do so, do hereby assign and transfer, on behalf of the said state, to the sureties aforesaid, the said judgment, without recourse on me or the said state, together with the right to them to use the name of the said state, so far as may be necessary, and without expense to the said state, in suing out further executions on said judgment, or prosecuting any suit or other proceeding for the collection of the said judgment from the said Charles H. Miller, the principal debtor therein. Given under my hand this 6th day of August, 1895. I. V. Johnson, Auditor."

On the 6th day of May, 1896, the cause came on to be further heard upon the papers and proceedings theretofore read and had therein, and on the report of L. D. Gerhardt, master commissioner, returned and filed on the 14th day of April, 1896. "And it appearing to the court that twelve exceptions have been taken to said report, all of which, except

as to allowance by the commissioner of interest at 12 per cent. in judgment B, in the fifth class, are not well taken, it is adjudged, ordered, and decreed that all of said exceptions, except as to said interest, be and are overruled, and said report, subject to a correct calculation of interest, be, and it hereby is, approved and confirmed. And it appearing to the court from said report that the said Charles H. Miller is the owner in fee simple of a tract of land, containing 173 acres, situated in Berkeley county, W. Va., and of another tract of nine acres, situated in Berkeley county, W. Va.; that he is the owner of another tract of 40 acres, situated in Arden district, Berkeley county, W. Va.; and that he is the owner of lot 4, block B, of the Martinsburg Mining, Manufacturing & Improvement Co.'s addition to the town of Martinsburg, and of lots 3 to 20, inclusive, of Charles H. Miller's Park lot subdivision, adjoining the said Martinsburg Manufacturing, Mining & Improvement Co.'s addition, and also of part of block C of plat No. 3 of the Martinsburg Mining, Manufacturing & Improvement Co.'s addition to the town of Martinsburg, containing $4\frac{1}{2}$ acres, and to which the title of said Charles H. Miller is perfect and is not in dispute. And it further appearing to the court that the liens against said real estate, together with their respective amounts and priorities, are as follows: * * *

Fifth Class. A judgment in favor of George W. Trimble for \$32.74, with interest on \$27.60, part thereof, from April 4, 1896; and also, of the same class, a judgment in favor of the state of West Virginia against Charles H. Miller, late sheriff of Berkeley county, and S. N. Myers, P. C. Curtis, K. Creque, G. W. Buxton, W. S. Miller, James M. Vanmetre, John K. Miller, J. R. Brown, and Thomas E. Byers, as sureties, which judgment having been paid by said sureties, they are entitled to be subrogated to the lien of the state, and on which there is due said sureties the sum of \$8,126.67, with interest at the rate of 6 per cent. per annum on \$8,068.93, part thereof, from April 4, 1896, this being a correction hereby made in said report, and law giving the state lien from the service of the writ in said action, which writ was served on December 19, 1894. **Sixth Class.** A judgment in favor of D. W. Shaffer for \$222.18, with interest on \$206.49, part thereof, from April 4, 1896; also a judgment in favor of S. S. Felker for \$124.79, with interest on \$113.04, part thereof, from April 4, 1896. **Seventh Class.** A judgment in favor of the National Bank of Martinsburg for \$111.07, with interest on \$99.39, part thereof, from April 4, 1896. **Eighth Class.** A judgment in favor of the National Bank of Martinsburg against Thomas Kearns and Charles H. Miller, for the sum of \$139.12, with interest on \$126.16, part thereof, from April 4, 1896. **Ninth Class.** A judgment in favor of the Citizens' National Bank of Martinsburg against the Berkeley Canning Company, E. W. Vanmetre, Alex. Clohan, D. A. Beard, Q. P. Riner, I. W. Wood, John M. Small, D. W. Shaffer,

and Charles H. Miller for \$331.46, with interest on \$302.77, part thereof, from April 4, 1896; also a judgment in favor of the Citizens' National Bank against all of said parties, except D. W. Shaffer, for \$316.19, with interest on \$288.80, part thereof, from April 4, 1896; also a judgment in favor of J. Luther Ropp against Thomas Kearns and Charles H. Miller for \$72.60, with interest on \$64.49, part thereof, from April 4, 1896. * * *

Whereupon it is further adjudged, ordered, and decreed that the foregoing liens, according to their priorities and amounts as therein set forth, be, and the same are hereby, established as liens against the real estate of said Charles H. Miller, above described. And, it appearing to the court that the rents and profits from the real estate of the said Charles H. Miller will not pay off said liens within five years, it is thereupon adjudged, ordered, and decreed that unless the said Charles H. Miller, or some one for him, shall pay off said liens and the costs of this suit within ten days from this date, then D. C. Westenhaver, S. W. Walker, H. U. Emmert, and U. S. G. Pitzer, who are hereby appointed as special commissioners for the purpose, shall proceed to make sale at the front door of the court house of Berkeley county by public auction, on the terms, for said tract of 173 acres, of one-third cash, the remainder in two payments, due in one and two years, respectively, from day of sale, and as to all the other real estate in two equal payments, one-half cash and the remainder in one year, the purchaser giving his notes for the deferred payments, bearing interest from the day of sale, and the title to the real estate sold to be retained until all the purchase money is paid. Said special commissioners shall give notice of the time, terms, and place of sale by advertisement for four successive weeks in some newspaper published in Berkeley county, and they, or some of them, shall, before proceeding to execute this decree of sale, give bond in the penalty of \$2,000, conditioned as required by law, with security to be approved by the clerk of this court. It further appearing to the court that as to all the other tracts of real estate owned by the said Charles H. Miller, or in which he owns an interest, as shown by the report of said master commissioner, L. D. Gerhardt, this court has jurisdiction thereof in separate suits, brought before the institution of this suit, and that on each or all of said tracts there is, or claimed to be, a just lien in favor of other parties, who are seeking to assert them in their respective suits, as shown by said report; and the court, therefore, being of opinion that such controversies must be settled and determined before it is proper to make a sale of said tracts of land in this cause: Thereupon it is further adjudged, ordered, and decreed that subject to such decrees as may be entered in said several respective causes, that the liens established in the foregoing part of this report be, and are hereby, established as liens also against said other

tracts, as shown by said commissioner's report, or of said Charles H. Miller's interest therein, but said special commissioner shall not at this time, without further order, proceed to make sale thereof." From this decree the defendant D. W. Shaffer appealed to this court.

First exception: Because the report did not remain 10 days in the commissioner's office after completion, as required by law, and as will be seen by his certificate. The report shows that it was completed on the 4th day of April, 1896, and was filed April 14, 1896. Section 12, c. 13, Code, "On Statutes and Rules of Construction," provides: "The time within which an act is to be done shall be computed by excluding the first day and including the last, or, if the last be Sunday, it shall also be excluded." So it appears that it was held 10 days by the commissioner before filing. Appellant however, argues that, April 4th being Sunday, the completion of the report would have to date from Monday the 5th. This point would probably be well taken if it were true, but on examination of calendars for the year 1896, which are considered good authority on that question, it appears that April 4th was Saturday.

Second exception: Because said commissioner did not notify said defendants that said report was to be closed on the 4th day of April, or at any other time, but, on the contrary, had notice from exceptants' counsel that they would introduce further evidence to the commissioner in support of their claims, as they had a right to do. It appears that due notice of the time and place of executing said decree of reference by said commissioner, and the notice to lienholders required, was given by the commissioner, and that his work was done with reasonable and commendable dispatch, yet without haste, and giving all parties ample time, in the absence of anything showing to the contrary, to furnish any evidence desired. "The commissioner has much latitude of discretion in granting continuances of proceedings before him, and the court whose order he is executing will not overrule his action in that respect, unless it is plainly erroneous. Still less will an appellate court reverse a decree for that cause; and in the absence of objections to such adjournments in the court below, and where it does not appear affirmatively that they were irregular, the cause will not be reversed on that account." 2 Bart. Ch. Prac. § 193. Nothing was offered, by way of affidavit or otherwise, to support this exception, to show that exceptant did not have all reasonable opportunity to offer his evidence. Appellant had entered his exceptions. It does not appear that he asked further time, or desired to except further, or to offer anything in support of those already made, and no objection was made to the hearing. Consent to the hearing is thereby implied. In *Strange's Adm'r v. Strange*, 76 Va. 240, a case in which a commissioner's report had been filed, and the

cause heard before the report had been filed the time required by the statute, the court say: "The objection made here in the present case cannot prevail, because it was waived in the court below. This is not expressed in the decree, but is plainly inferable from the language employed, that the said report be confirmed, except so far as excepted to. This indicates that there were objections to the report, but none to the hearing of the cause. It rather implies a consent to the hearing. In point of fact, however, as admitted in the argument, no exceptions were actually filed, none appear in the record, and the inference from the decree is clear that, whatever objections to the report there may have been,—oral suggestions, probably, intended to be afterwards, but never actually, embodied in actual exceptions,—the hearing, at least, was by consent of parties." In the case at bar appellant had entered 12 exceptions to the report of the commissioner, and they were passed upon by the court without objection, as well as no objection to the hearing, and, so far as the record shows, appellant desired to file no further exceptions. The object of the statute is to give parties interested an opportunity to except to the report. *Findley v. Smith*, 42 W. Va. 299, 26 S. E. 370 (Syl. point 5).

Third exception: "Because said report shows on its face that the commissioner had not audited the liens against Charles H. Miller's real estate according to their respective priorities." The judgment in the fifth class for \$3,126.67, as approved by the court, sought to be enforced by the plaintiffs in this case against the real estate of Charles H. Miller, was obtained by the state of West Virginia, in the circuit court of Kanawha county, against said Miller, as sheriff of Berkeley county, and the plaintiffs, his sureties on his official bond, and was rendered on the 27th day of April, 1895; in which action service of summons was had on the sheriff and his sureties on the 19th of December, 1894, under section 39, c. 35, Code, which provides: "In any proceedings had under the provisions of this chapter against sheriffs or collectors and their sureties, or any, or either of them, for money due the state, any transfer, assignment or alienation of property, real or personal, or any judgment or decree obtained against or suffered by such sheriff or collector or their sureties or either of them after service upon them, respectively, of summons or notice, shall be deemed fraudulent or void as to any judgment that may be thereafter rendered in favor of the state in pursuance of such a summons or notice. But this section shall not apply to a bona fide purchaser of any such property, without notice." It is claimed by plaintiffs that the lien of the state attached to the real estate of the said Charles H. Miller, and was a valid lien thereon from the 19th day of December, 1894, the date of the service of the summons; and that the plaintiffs, as said Miller's sureties, having paid said judgment to the auditor of the state, are entitled to be

subrogated to all the rights, remedies, and priorities of the state of West Virginia, and to enforce the collection of said judgment against the property of their principal in said bond. It is the placing of this judgment in class 5, and giving it force as of December 19, 1894, the date of service of process, and postponing the judgment of appellant, rendered December 22, 1894, to class 6, which constitutes the ground of their exception. Here comes in the question as to what right, if any, the appellees, as sureties of Charles H. Miller, are subrogated, by their payment to the state of the judgment due by him. In *Dering v. Earl of Winchelsea*, 1 White & T. Lead. Cas. Eq. 60 (M), it is said: "Payment by one who stands in the relation of surety, although it may extinguish the remedy or discharge the security as respects the creditor, has not that effect as between the principal debtor and the surety. As between them, it is in the nature of a purchase by the surety from the creditor. It operates an assignment in equity of the debt, and all legal proceedings upon it, and gives a right in equity to call for an assignment of all the securities, and, in favor of the surety, the debt, and all its obligations and incidents, are considered as still subsisting." In *Orem v. Wrightson*, 51 Md. 84 (Syl. point 4): "The doctrine of subrogation or substitution is a peculiar feature of equity. It is not founded in contract, but has its origin in a sense of natural justice. So soon as the surety pays the debt of the principal debtor, equity subrogates him to the place of the creditor, and gives him every right, lien, and security to which the creditor could have resorted for the payment of his debt." In the opinion in the same case: "Is a different rule to be applied where the state is the creditor? We can see no reason why it should be. It is not necessary to inquire how, or in what manner, the state's right to rank as a preferred creditor is derived,—whether it is a prerogative right derived from the common law, or whether it has been conferred by statute. As is said in some of the cases to which we have referred, equity, in applying the doctrine of subrogation, looks, not to form, but to the substance and essence, of the transaction. It looks to the debt which is to be paid, and not to the hand which may happen to hold it, and will see that the fund charged with its payment shall be so applied. In the present case, the debt of the collector, Leake, was due to the state at the time of his death. It was a charge against him as the principal debtor, and upon the assets left by him. The latter constituted the fund out of which it was to be paid as a preferred debt. And if equity does not regard the hand which holds the debt, and will see that the fund charged with its payment shall be so applied, what difference can logically result whether the creditor to whom the surety has made payment is the state or an individual? While this view of the law will do no wrong to anyone, it will

add facilities in securing and collecting the revenues of the state. If sureties know that they can be subrogated to the priority of the state, less apprehension will be felt in joining in the bonds of collectors, and less delay in payment by solvent sureties. Other creditors are not injured, for, if the state has the first claim upon the fund, it does them no wrong, whether this claim is enforced by the state, or by those standing in its stead." In *Elders v. Brune*, 4 Rand. 445, the court, in treating the subject of subrogation, says: "In enforcing these principles, courts of equity look, not to the form, but to the essence of the transaction. They consider the doctrine of substitution, not as one founded in contract, but the offspring of natural justice; nor do they leave it to the creditor to cede his actions, but, so soon as a third person who has become bound with the debtor pays his debt to the creditor, they substitute him to the creditor, giving him every right, every lien, every security, to which the creditor could resort, and, if the creditor should with bad faith release any of those securities, it would be a bar pro tanto to his recovery against the surety." *McNeill v. Miller*, 29 W. Va. 490, 2 S. E. 335 (Syl. point 1): "The doctrine of subrogation, being the creation of courts of equity, is so administered as to secure essential justice, without regard to form, and is independent of any contractual relation between the parties to be affected by it." 3 Pom. Eq. Jur. § 1419: "The surety who has paid or satisfied the principal's debt or obligation is entitled to be subrogated to, and to have the benefit of, all securities which may at any time have been put into the creditor's hands by the principal debtor, or which the creditor may have obtained by the principal debtor. By the fact of payment, the surety becomes an equitable assignee of all such securities, and is entitled to have them assigned and delivered up to him by the creditor, in order that he may enforce them for his own reimbursement and exoneration." And note 1 to same section and cases there cited. On the subject of sureties on official government bonds, 24 Am. & Eng. Enc. Law, p. 220: "Sureties on bonds for government officials, upon being compelled to make good the default of their principal, will be subrogated to the position of the government, in respect of all its securities, liens, and priorities, for the purpose of enforcing reimbursement from their principal or contribution from their co-sureties. And it is immaterial how the government's right of priority originated, whether out of common-law prerogative, positive statute, or contract; once established that it is entitled to rank as a preferred creditor, the same preference will be upheld, by way of subrogation, for the benefit of the surety." *Hawker v. Moore*, 40 W. Va. 49, 20 S. E. 848; *Boltz's Estate*, 123 Pa. St. 77, 19 Atl. 303; *Turner v. Teague*, 73 Ala. 554; *Livingston v. Anderson*, 80 Ga. 175, 5 S. E. 48; *Irby v. Livingston*, 81 Ga. 281, 6 S. E. 591; *Hunter v. U. S.*, 5 Pet. 173; *Rob-*

ertson v. Trigg's Adm'r, 32 Grat. 76; Crawford v. Richeson, 101 Ill. 351; Hook v. Same, 115 Ill. 431, 5 N. E. 98; 1 Jones, Liens, §§ 99, 100. It is contended that the auditor had no authority to assign the judgment of the state to plaintiffs. It is immaterial whether an assignment is made or not, as it will be seen from the authorities above cited that the doctrine is well established, by almost an unbroken line of decisions, that "a surety who has paid the debt of his principal obligor is subrogated in equity, by the act of payment, not only to the securities of the creditor, but to all his rights of priority"; and "what difference can logically result whether the creditor to whom the sureties made payment is the state or an individual?" 51 Md. 34, supra. The statement of the auditor, purporting to be an assignment, supplies the evidence of payment of the judgment to the state by the sureties. It is argued that because one of the plaintiffs made his note, and the others became indorsers, in order to raise the money to pay the state the amount of the judgment, as disclosed by the evidence, therefore the maker of the note is the only one who paid anything on the judgment, and the others cannot be entitled to the relief, because they have not suffered. The sureties had a right, among themselves, to devise ways and means to get the money, and, as between themselves, they may each and all be equally liable for the amount of the note so made and indorsed. They got the money and paid the debt, and are entitled to all the rights, remedies, and priorities of the state in respect to said judgment. And how is the complaining lienholder in any worse condition than he would be if the sureties had not paid the judgment, and the state were now pressing its collection instead of the plaintiffs?

The fourth exception: "Because from said report many of the liens audited by the commissioner as judgment liens in a particular class do not show the dates of judgment, or when the same became a lien upon the real estate by recordation of the same upon the judgment lien docket, or otherwise, as required by law." As to the dates of the recordation of the judgment, on inspection of the report, I find they are all given, up to and including the eighth class, and also in all after the ninth class. Those judgments in said ninth class are reported as being rendered "on the 24th —, 1895"; but as the judgment of appellant is in the sixth class, and having in said report priority over said ninth class, he is not affected by the omission. Yet, in the final statement or recapitulation of the liens in his report by the commissioner, he mentions the date of the several judgments in class 9 as January 24, 1895. By reference to section 5, c. 139, Code, it will be seen that "every judgment for money rendered in this state heretofore, or hereafter, against any person, shall be a lien on all real estate of or to which such person shall be possessed or entitled at or after the

date of such judgment, or, if it was rendered in court, at or after the commencement of the term at which it was so rendered," except as provided in the following section, which provides for the docketing of judgments in the county court clerk's office as notice to purchasers only, and gives no additional dignity to the judgment lien as between the parties.

All the other exceptions relied upon, except the tenth and twelfth, have been disposed of in the treatment of the third and fourth.

Tenth: "Because the commissioner failed to report all the property of Charles H. Miller, as shown by the evidence;" and twelfth: "Because the proofs of certain interests jointly with Charles H. Miller are insufficient, and do not warrant the conclusion of the commissioner." The decree of reference required the commissioner: "First, to ascertain and report the real estate owned by the said Charles H. Miller, its fee-simple and annual rental value, and the condition of the title of the said Charles H. Miller to the respective parcels of real estate." The report of the commissioner responds to said decree of reference, and gives all the real estate, the only property on which he was required to report, and all of which, including that held jointly with others, was set out in the bill, and said Miller's interests described therein, and the bill taken for confessed, which supports said finding of the commissioner. I see no error in the decree, and the same is affirmed.

On Rehearing.

On the day the decision was handed down in this cause a brief on behalf of the appellant, by Judge Lucas, came to the hands of the court, which was asked to be taken as petition for rehearing. This brief starts out with the statement that "the nature of the doctrine of subrogation is fully discussed by this court in two cases in 29 W. Va. and 2 S. E., by those pre-eminent jurists, Judge Snyder and Judge T. C. Green," and says: "They both concur in defining the doctrine [quoting point 1, Syl., in case of McNeil v. Miller, 29 W. Va. 490, 2 S. E. 335]: 'The doctrine of subrogation, being the creature of courts of equity, is so administered as to secure substantial justice without regard to form, and is independent of any contractual relation between the parties to be affected by it.'" If he had included in his quotation the second point in the syllabus, he would have given us the whole scope of the doctrine, which holds that "it is not applied in favor of one who has officiously, and as a mere volunteer, paid the debt of another, for which neither he nor his property was answerable; but it will be applied whenever the person claiming its benefit has paid a debt for which another was primarily answerable, and which he was compelled to pay in order to protect his own rights or save his own property." He also cites Hinchman v. Morris, 29 W. Va. 673, 2 S. E. 863 (Syl. point 1): "The levying and

collecting of a tax, whether state or county, is a matter solely of statutory creation. Such taxes are not debts; and unless they are expressly, or by plain implication, authorized to be assigned legally or equitably, they are incapable of assignment, and no one can be subrogated to the rights and remedies of the state,"—and seems to rely very strongly upon this ruling to support his position that the sureties cannot be subrogated to the rights and remedies of the state. This, however, is not a general proposition that no one can be subrogated to the rights and remedies of the state in any case, but in the enforcement of the collection of its revenues in the shape of taxes, as was sought to be done in that case. *Hinchman v. Morris*, supra. There are abundant authorities in support of subrogation, to all the rights, remedies, and priorities of the state, of sureties who have paid the state's judgment. The case last cited is dealing with taxes uncollected, as against the individual charged therewith or his estate, when the sheriff had paid the same to the state, and was seeking to be substituted to the lien of the state for the taxes on the lands of the estate of Morris; and it is there held that taxes are not debts, and not capable of assignment, unless they are expressly, or by plain implication, authorized to be assigned legally or equitably. But the status of the case at bar is wholly different. The sheriff gave bond for the faithful discharge of his duties. He failed to perform his duties. Surely, this bond is a contract. Suit is brought upon it, and a large judgment recovered against him and his sureties on this contract. Upon default being made by the sheriff, he became indebted to the state. Whether he had collected the taxes, or failed to collect them, is immaterial. He had failed to return them as delinquent, and thereby the state, because of the default of its officer, had lost its remedy against the property of the taxpayer, and the only remedy it had was to proceed against the sheriff, its debtor, and his sureties, on the bond he had given. It was no longer taxes due the state which was under the statute a lien upon the property upon which it was levied, but a debt due to it from its defaulting officer. All the elements of taxes had been eliminated. I am unable to see the application of *Dent v. Wait's Adm'r*, 9 W. Va. 46, cited by appellants. In that case *Orichton* had made his negotiable note to *Wait*, who negotiated it. Protest followed. The bank secured judgment against maker and indorser, and execution was levied on property of *Orichton*, the principal debtor, who, with *Dent* as surety, gave forthcoming bond, which was forfeited, and *Dent* compelled to pay. In a suit to collect, by right of substitution, against the estate of *Wait*, the court properly held that *Orichton* was the principal debtor; that *Dent* relieved *Wait* at law by becoming the security of *Orichton*, and could not charge the estate of *Wait*, under the equitable doctrine of subrogation.

Perrins v. Ragland, 5 Leigh, 552; *Douglass v. Fagg*, 8 Leigh, 588. In *Dent v. Wait's Adm'r*, supra, the opinion says: "There is no doctrine better settled in this state than that, when a security pays a judgment for another, he is entitled to be subrogated to all the rights and remedies of the creditor against the principal debtor subsisting at the time he became so bound for the debt." *Robinson v. Sherman*, 2 Grat. 178; *Powell's Ex'rs v. White*, 11 Leigh, 309; *Preston v. Preston*, 4 Grat. 88; *Hill v. Manser*, 11 Grat. 522.

It is contended that *Enders v. Brune*, 4 Rand. 438, cited in the original opinion, referred to the United States statute, and only carried the principle as far as the statute expressly provided, and which would not be extended. On the contrary, the opinion quotes the statute, and shows the rights of sureties under it, and then asks: "Is the case of the plaintiffs within this last act? I incline to think not. The law speaks of principal and surety in the bond. Although these bonds were executed by *Brune* for the debt of *Shelton & Co.*, and the plaintiff by discharging them paid their debt, yet *Shelton & Co.* were not principals, and the plaintiffs sureties, in the bonds." In the syllabus it is held: "Where A. gives his bond for duties on goods imported into the United States for B., the importer, and B. is not bound in the bond, if A. discharges the bond it seems that he cannot be placed in a position of the United States, as to priority, in a claim against A., under the law of congress. But, upon general principles of equity, A., in such case, will be substituted in the place of the creditor (the United States), and have every preference that the United States were entitled to." The case of *U. S. v. Ryder*, 110 U. S. 730, 4 Sup. Ct. 196, cited by appellant, was a suit brought by *Ryder* as surety on a recognizance in a criminal proceeding, where the court held that "subrogating a surety on a recognizance in a criminal case to the peculiar remedies which the government enjoys is against public policy, and tends to subvert the object and purpose of the recognizance." It is insisted that, if appellees are subrogated at all to the rights of the state, their rights can only date from the date of the judgment in favor of the state. In *Orem v. Wrightston*, 51 Md. 34, cited in the opinion first filed herein, and other authorities there cited, as well as in *Enders v. Brune*, supra, it is held that the surety is entitled to all the securities, liens, and priorities of the creditor; and, as stated in *Enders v. Brune*, he is entitled "to have every preference that the United States were entitled to." But we are told that, if appellees were thus entitled by their laches, they have defeated their right of subrogation. The state is not liable for the laches of its officers, nor estopped by their conduct. *U. S. v. Kirkpatrick*, 9 Wheat. 720; *U. S. v. Vanzandt*, 11 Wheat. 184; *Dox v. Postmaster-General*, 1 Pet. 318. Section 25, c. 30, Code, provides that "the taxes collected under this chapter shall be paid into the treas-

ury as follows: One-half of such taxes shall be paid on or before the 20th day of January in the year next after the said taxes shall have been assessed; one-fourth on or before the first day of May, and the remainder on or before the first day of August in such year." The sheriff's term expired December 31, 1892. He had until August 1, 1893, to pay in the last fourth of the taxes for 1892. The state commenced her suit December 13, 1894, and obtained judgment April 27, 1895. Appellees paid the judgment August 6, 1895, and instituted this suit November 26, 1895, but little over three months after their right accrued. It is not contended that, if the sureties had not paid the judgment, the appellants, or any of them, could have prevented the state from proceeding to exhaust the assets of the sheriff, Miller, in the satisfaction of its judgment, and surely they are in no worse condition because the sureties proceed against it. What new rights have accrued to appellants, or what rights of innocent parties have intervened, to be affected by any delay on the part of appellees in asserting their rights, which would not be equally affected if the state, and not the appellees, was pressing the collection of the judgment against the assets of the sheriff? Appellant's references to *Sheld, Subr.*, and to *2 Brandt, Sur.*, are on the subject of laches, and are based on decisions where, by the laches of the party seeking to be subrogated, the rights of others had intervened, as in *Gring's Appeal*, 89 Pa. St. 336, cited by appellant: "A joint judgment debtor was forced under execution to pay the whole debt. It was afterwards shown that he was only a surety. He neglected to have the judgment marked to his use for more than a year after its payment. Meanwhile the property of the principal debtor was sold, and the surety claimed that he was entitled to be subrogated to the rights of the creditors under the judgment as against subsequent judgment creditors. Held, that he had not exercised due diligence in having the judgment marked to his use, and his claim could not be allowed." This is about the strongest case cited, and in this case it was only after the sale of property that it was discovered that *Gring* was a surety, and the court say "that it cannot be permitted that a secret equity may be held unasserted until holders of legal rights have been thrown off their guard, and lost their opportunity to protect themselves, by attending a sale against it, and then be brought forward, to the injury of those who had no notice of their existence." *Clevinger v. Miller*, 27 Grat. 740, is cited in support of appellant's contentions. That simply holds that "a sheriff or other officer who pays an execution in his hands for collection, without an assignment at the time of the judgment on which it is founded or the debt, is not entitled to be subrogated to the lien of the creditor whose debt he has paid, as against other creditors having liens by judgment or otherwise." The case of the officer is very differ-

ent from that of a surety of the debtor who is primarily liable, and who has been compelled to pay his principal's debt. The officer was under no obligation to pay the debt. He had a simple duty to perform,—to levy the execution and collect the money, if he could; if not, to return the execution. Having paid the debt without assignment, as against other creditors having liens, by judgment or otherwise, he is regarded as a mere volunteer. So, also, appellant's citation of *People v. Onondaga Common Pleas*, 19 Wend. 79, was a case where a sheriff levied an execution on personal property, and left it with the execution defendant, who removed it from the county, and the sheriff was made liable for the amount. The court, on notice to the defendant, permitted a new execution to issue for the benefit of the sheriff, and he levied on the real estate of the defendant, saving, however, the rights of subsequent incumbrancers attaching after the removal of the personal property. And the reason given for it was that the levy by Luther (the sheriff) on the personal property was *prima facie* a satisfaction, and might well have induced the other creditors to suppose that the first judgment was satisfied, and led them on, in their own suits, to expense and trouble. "All this was very likely in consequence of Luther's neglect. He was careless in not keeping the property, and in leaving it with the defendant." In *Hoge v. Brookover*, 28 W. Va. 304, judgment was rendered for the state, May 9, 1889, the sureties having paid the judgment; and in August, 1892, more than three years after the judgment, filed their bill to be subrogated to the rights of the state, which was done. The court in that case, after quoting the act of February 28, 1872, which is the same as section 39, c. 35, Code, without the last clause, say: "This goes much further than could be claimed for the common law, because it makes a judgment, thereafter secured, a lien on all the property of sheriff's collectors or their securities, or either of them, from the time when they respectively were served with such notice or summons, pursuant to which the judgment was afterwards recovered. The policy of the state, as manifested in this act, was effectually to prevent any fraud by which she should be deprived of her revenue or debts due her." In *Hawker v. Moore*, 40 W. Va. 49, 20 S. E. 848, Judge Holt, in speaking of the doctrine of subrogation, says: "It is eminently calculated to do exact justice between persons who are bound for the performance of the same duty or obligation, and is one, therefore, which is much encouraged and protected. 'Equality is equity,' is on this branch its maxim. It springs naturally out of the two equities of contribution and exoneration, and is in fact one of the means by which those equities are enforced;" and citations, page 51 40 W. Va., and page 849, 20 S. E. And, continuing, he further says: "Here the plaintiff has paid off the judgment, and asks the court to give him the benefit of the creditor's lien.

Who can object to this? Who is injured by it? Not the bank, for they have received their debt from the plaintiff, and justice binds them to give the plaintiff their vantage ground. Not the principal debtor, for he is insolvent, and has no interest in the matter. * * * The other creditors cannot complain, for the debt has in truth not been paid, because not paid by the one ultimately bound, but by others, who became his unwilling creditors, in due course of law. But if there should be any one who, by any rule of strict law, or in equity and good conscience, stands on higher ground, or for any reason has a better right, he will not be displaced, or his right disturbed, for that is the essence of the doctrine." The statute gave the judgment of the state priority over all judgments recorded or laws created after service of process in the action instituted by the state, and the rights of no bona fide purchaser without notice intervene, and I am unable to see how or in what manner the complaining creditors are injured. I see no sufficient reason for changing my conclusion in this cause.

(45 W. Va. 199)

WILLIAMS v. BOARD OF EDUCATION OF FAIRFAX DISTRICT.

(Supreme Court of Appeals of West Virginia.
Nov. 16, 1898.)

PUBLIC SCHOOLS—DISCRIMINATION—COMPENSATION OF TEACHER.

1. The law of this state does not authorize boards of education to discriminate between white and colored schools in the same district as to length of term to be taught.

2. Where a teacher has been employed to teach a colored school by the trustees thereof, under the supervision of the board of education, and she teaches the same the full term of the other primary schools in the same district, satisfactorily to the patrons of such school, she is entitled to pay for her whole term of service; and the board of education cannot escape the payment thereof by interposing a plea that it had, by reason of the school being a colored school, limited the term thereof to a shorter period than the white schools in the same district. Such discrimination, being made merely on account of color, cannot be recognized or tolerated, as it is contrary to public policy and the law of the land.

(Syllabus by the Court.)

Error to circuit court, Tucker county; Joseph T. Hoke, Judge.

Action by Carrie Williams against the board of education of Fairfax district, in the county of Tucker. Judgment for plaintiff, and defendant brings error. Affirmed.

C. O. Strieby, for plaintiff in error. J. R. Clifford and A. G. Dayton, for defendant in error.

DENT, J. Carrie Williams sues the board of education of Fairfax district, in the county of Tucker, for three months' unpaid services as teacher of the colored school of Coketon, in

said district, amounting to \$120, and also \$1 deducted illegally off of a previous month's salary for failure to return the term report required by law. The circuit court gave her judgment, and the board brings the matter to this court, and now here interposes the following defenses:

1. That the individual names of the members of the board are set out in the summons and declaration. This was wholly unnecessary, and will be regarded as mere surplage.

2. That her appointment as a teacher was not in writing, as required by section 13, c. 45, Code. After the service has been rendered in a satisfactory manner to the patrons of the school, and the board has recognized and approved it by receiving her monthly reports, and paying her five months' salary, it is too late for them to object that her appointment was not in writing, as required by law.

3. That the trustees had not established a primary school as required by section 17, c. 45, Code, the enumeration of colored children being 26, but had apportioned the funds under section 18, Id., assigning to the colored children their pro rata share. This is directly in the face of the positive mandatory requirement of the statute, and it is contrary to public policy to entertain such a plea. No public officer should be permitted to plead his own misconduct in defense of what would otherwise be a just legal claim against him. On the contrary, the court will presume that he faithfully discharged the duties of his office, in the very face of his plea, when such presumption appears proper. In this case the trustees established a colored school at Coketon; and it must be presumed that this was done in accordance with the provisions of section 17, and not section 18, c. 45, Code. To hold otherwise would be to condemn the trustees as guilty of a plain failure of duty, subjecting them to the penalties imposed by section 59 of said chapter, which would be unjust to them in the face of the matters contained in the record. The trustees are not parties in any wise to this suit, and it is hardly fair to them for the board to seek to defend itself by alleging neglect of plain mandatory duty on their part, if legally proper to do so, which is certainly not the law.

4. That, the people of the district having voted for an eight months' school, the board arbitrarily determined the white schools should run eight months, and the colored school only five months. This distinction on the part of the board, being clearly illegal, and a discrimination made merely on account of color, should be treated as a nullity, as being contrary to public policy and good morals. At the end of five months the board notified the teacher to stop the school, the only reason for so doing being their discriminating action towards the colored school. This she refused to do, but taught it, satisfactorily to the patrons of the school, the full

eight months authorized by law. In the case of *West Virginia Transp. Co. v. Ohio River Pipe-Line Co.*, 22 W. Va. 617, it is said: "The common law will not permit individuals to oblige themselves by a contract either to do or not to do anything when the thing to be done or omitted is in any degree clearly injurious to the public." On page 3 of *Greenhood on Public Policy* it is said: "The element of public policy in the law of contracts and in the law generally is by no means of recent origin, but owes its existence to the very sources from which our common law is supplied." "It secures the people against the corruption of justice or the public service, and places itself as a barrier before all devices to disregard public convenience." And on page 3: "By 'public policy' is intended that principle of the law which holds that no subject can lawfully do that which has a tendency to be injurious to the public or the public good." Hence no court will permit an otherwise just claim to be defended on the grounds of dereliction of duty or misconduct on the part of any public officer, because detrimental to the public service, and injurious to the common weal. As no individual can take advantage of his own wrong, so no public servant can take advantage of his own illegal conduct, or failure to discharge his official duties in accordance with the express provisions of the statute that creates him. Ignorance of law is no excuse, and violation of law is no defense. Discrimination against the colored people, because of color alone, as to privileges, immunities, and equal legal protection, is contrary to public policy and the law of the land. If any discrimination as to education should be made, it should be favorable to, and not against, the colored people. Held in the bondage of slavery, and continued in a low moral and intellectual condition, for a long period of years, and then clothed at once, without preparation, with full citizenship, in this great republic, and the power to control and guide its destinies, the future welfare, prosperity, and peace of our people demand that this benighted race should be elevated by education, both morally and intellectually, that they may become exemplary citizens; otherwise the perpetuity of our free institutions may be greatly endangered.

The board claim, however, that the proper remedy was by mandamus, and that the plaintiff had no right to take the law into her own hands. How much better was it for the patrons of the school, the board, and the public, that she should regard her employment as strictly in accordance with law, and disregard the illegal discrimination on account of color, and thus secure to her pupils their legal rights, without resort to the writ of mandamus, which, while it might have condemned and punished the board, would have been inadequate to furnish the relief sought. There is no question that she was employed to teach the school, and that she did teach it in ac-

cordance with law, and satisfactorily to its patrons. But the board says, it being a colored school, it was allowed its pro rata share of the funds, and limited to the period of five months. This action on its part, being without authority, and in direct disobedience of law, must be disregarded, and the board presumed to have discharged its legal duties.

Counsel insist that the colored pupils, having been allotted their pro rata share of the school funds, have no right to complain. The law guaranteed them eight months of school, and, though it cost many times in proportion what the white schools cost, they should have had it. Money values should not be set off against moral and intellectual improvement. A nation that depends on its wealth is a depraved nation, while moral purity and intellectual progress alone can preserve the integrity of free institutions, and the love of true liberty, under the protection of equal laws, in the hearts of the people. The judgment is affirmed.

(45 W. Va. 361)

LAUCK et al. v. LOGAN.

(Supreme Court of Appeals of West Virginia.
Nov. 23, 1898.)

TESTAMENTARY INSTRUMENT—CONSTRUCTION.

1. The rule of construction for determining whether an instrument is a will or testamentary paper or a deed is that, if it passes a present interest, though the right to possession or enjoyment does not accrue till the death of the maker, it is a deed or contract, but, if it does not pass any interest or title whatever till his death, it is a will or testamentary paper, not a valid deed or contract. Section 5, c. 71, Code 1891, does not change this rule.

2. In determining whether an instrument is testamentary or deed or contract, courts do not allow language peculiar to either class of instrument, nor even the belief of the maker as to the character of the instrument, nor the name he gives it, to control inflexibly its construction; but, giving due weight to these circumstances, courts look further, and, weighing all the circumstances surrounding the parties and attending the execution of the instrument, give to it such construction as will effectuate the manifest intention of its maker.

3. An instrument in form and name a deed of conveyance, acknowledged as such, and delivered to the grantee, whereby, for consideration of five dollars and love and affection, the grantors "do grant with general warranty" a tract of land closing with the clause, "But it is hereby distinctly understood and stipulated that this deed shall take and be in full force and effect immediately after the said William Logan shall depart this life, and not sooner," is a valid deed, not a testamentary paper, and confers a vested remainder on the grantee, to come into enjoyment on William Logan's death.

Section 1, c. 116, Code Va. 1849, taking effect 1st of July, 1850, abolished livery of seisin.

(Syllabus by the Court.)

Appeal from circuit court, Wood county; A. I. Boreman, Judge.

Bill by Sarah E. Lauck and Laura L. Downing against L. N. Logan and others. From the decree, Logan appeals. Reversed.

Van Winkle & Ambler and George W. Neal, for appellant. Harry P. Camden and W. N. Miller, for appellees.

BRANNON, P. William Logan and wife made a deed by which they conveyed to L. N. Logan certain real estate in Parkersburg in consideration of five dollars paid, and love and affection. The granting part of the deed is, "Do grant, with general warranty, the property described." At the close is the clause, "But it is hereby distinctly understood and stipulated that this deed shall take and be in full force and effect immediately after the said William Logan shall depart this life, and not sooner." This writing was signed, acknowledged, and delivered to L. N. Logan at its date. William Logan died, and the deed was put on record a few days after his death. Later, Sarah E. Lauck and Laura L. Downing brought suit in chancery against L. N. Logan to annul said deed, which resulted in a decree annulling it, from which L. N. Logan appeals. All said parties are children of William Logan. The plaintiffs rested their bill on three grounds, namely, the incompetency of William Logan to make the conveyance, undue influence used to induce him to make it, and invalidity of the conveyance itself. There is no basis under the evidence to sustain the charges of incompetency and undue influence. Indeed, virtually, they were not relied upon in argument. The sole question is the validity of the deed. It is claimed by plaintiffs that it is neither a deed nor a will effectual to convey the property; that it is not a deed valid to pass property, because it conveys no present estate, vests no title in the grantee in present (at present), but vests it in futuro (in future), and therefore is not a deed passing estate, but is testamentary in character, operating, like a will, to vest estate only at the death of its grantor; and that it is not a will because not shown to have been wholly written by Logan, or executed with witnesses, as required by law to make it a good will. I will remark that it is no objection that a deed vests estate in futuro, for that a deed may now do under our statute law; but the objection made against this deed is that it vests title only at the death of William Logan, and is thus not an act of alienation operative between living persons (*inter vivos*). In *Roberts v. Coleman*, 37 W. Va. 143, 16 S. E. 482, this court held that "an instrument transferring property intended to operate only after the death of its maker is testamentary in character, and cannot operate as an instrument *inter vivos*." Further examination upon the subject made by me in this case, and the able brief of appellees' counsel, confirm me in the opinion that the said statement of law is borne out by the decided weight of authority in many well-considered cases. I may safely say under them that, if a writing passes a present interest,

though the right to its possession and enjoyment may not accrue till grantor's death, it is a good deed or contract; but, if it does not pass an interest or right till the death of the maker, it is a will or testamentary paper, and not good as a deed or contract. No matter that the paper is in name or form a deed, a bond, a note, or an agreement, if it is to pass title only at death, and vest no manner of estate till then, it is not a deed, bond, note, or agreement, but a will or testamentary paper; no matter what its maker called the paper, or believed it to be. What does it say? What is its effect in law? That is the question. The intention of the maker as to the character of the estate conveyed is the criterion by which the court determines whether it is a deed or will, and, if the intention gathered from the whole paper is that no estate is to pass until his death, it is a will, not a deed. It may confer a present vested estate, though the right of possession and enjoyment under it may be in the future, and it is a good deed; but if it vests no estate whatever till death it is a will. 29 Am. & Eng. Enc. Law, 145, 149; *Burlington University v. Barrett*, 92 Am. Dec. 376, note, 383; *McBride v. McBride*, 26 Grat. 476; *Hazleton v. Reed* (Kan. Sup.) 26 Pac. 450; *Turner v. Scott*, 51 Pa. St. 126; *Deiz's Case*, 50 N. Y. 88; *Brewer v. Baxter*, 5 Am. Rep. 530; *Watkins v. Dean*, 31 Am. Dec. 583; *Babb v. Harrison*, 70 Am. Dec. 203; *Carey v. Dennis*, 13 Md. 1. The eminent Judge Baldwin said in *Pollock v. Glassell*, 2 Grat. 457: "The very reason which prevents this assignment from taking effect as a deed requires that it should be treated as a will. A deed is an instrument which must operate *inter vivos*; and here the instrument cannot operate in that way, it having no legal effect till the death of the party by whom it was executed." The theory upon which this doctrine seems to rest is that the paper does just what a will does,—that is, it gives the property at the death of the maker, a thing which the law says can only be done by a will; and therefore, if of any effect, it is as a will, not as a paper operative between living people. The law says that property can be passed by the act of the parties only by deed or will, and when a paper is a will it is not a deed. That is the sole reason for denying it effect as a deed. If it were an open question, I would say that the law ought to give a paper not so executed as to be good as a will effect as a deed if good as a deed, and a paper so executed so as not to be good as a deed effect as a will if good as a will. If A. grant land to B., reserving a life estate, all agree that the deed is valid, because it instantly passes a vested estate to B. in remainder, only postponing its possession and enjoyment till the death of A. (*Hurst v. Hurst*, 7 W. Va. 289; *Trawick v. Davis*, 85 Ala. 342, 5 South. 83); and yet if A. "doth grant a certain tract of land to B. at A.'s

death," it would be no deed, because passing no title of estate till A.'s death. How technical the difference! How unsubstantial! In both the grantor means the same thing,—that is, to reserve the possession and enjoyment in himself during life, and then give them over to B.,—and his intent ought to prevail. If a man make a deed, and deliver it to another in escrow, to be delivered to the grantee after the death of the grantor, it is a good deed, though we know that a deed is ineffective without delivery. The courts struggle to make the act execute the intent. *Lang v. Smith*, 37 W. Va. 734, 17 S. E. 213; *Davis v. Ellis*, 39 W. Va. 230, 19 S. E. 399. But the rule stated above, though seeming to me to be unreasonable, is intrenched behind many decisions through many years, and we cannot repeal it, especially as it is a rule of property, not a mere rule of court practice. But, as it defeats intention, it should be applied only in the plainest cases. Such is the general rule. Its application is often difficult. Each instrument must stand on its own feet, be judged by its language and circumstances. In the first place, in the construction of both deeds and wills we must seek the intent of their makers; and in doing so the whole paper, and all its parts, must be considered together. *Hurst v. Hurst*, 7 W. Va. 289, 339. "In determining whether the paper is testament or deed or contract, courts do not allow the use of language peculiar to either class of instruments, nor even the belief of the maker as to the character of the instrument, to control inflexibly the construction; but, giving due weight to these circumstances, courts look further, and, weighing all the language, as well as facts and circumstances surrounding the parties attending the execution of the instrument, give it such construction as will effectuate the manifest intention of the maker." *Burlington University v. Barrett*, 92 Am. Dec. 376.

Now, let us look into the deed before us. Without the closing clause it is perfectly clear that this deed vests a present fee-simple estate by the words "do grant" in the present tense, importing in grammar, as well as daily language, present, actual transfer. We must give these words, found in the very heart of the deed,—in its granting clause,—their natural force. The closing clause, however, must not be forgotten. Shall it destroy the plain import of the words "do grant"? Or shall we rather say that it means only to postpone the actual possession and use of the property till William Logan's death? Is not this a construction giving these different parts of the deed due weight? Who shall say, or who can reasonably say, that it does not speak the real purpose of the parties? Did not William Logan intend to vest the property finally and actually, and beyond his recall, in L. N. Logan, only reserving to himself a life estate? The use of the word "full" strengthens this view, implying that the mind real-

ized that the deed had present partial effect; yet it was not intended to have full, complete, final effect until the grantor's death,—that is, the property was to be the grantee's, but not to come to his hands, but remain in the grantor's hands, until the grantor's death. The deed does not say, "do grant to L. N. Logan at the death of William Logan," but the granting clause is absolute, and the reservation of what I say was intended to be only the reservation of a life estate is a later and independent clause. We have words of present grant. They are not without force, and are not to be paralyzed by the closing clause, when we can assign to it a reasonable function, and give each clause its fair relative meaning, when laid by the side of the other clause. These words were considered potential in *Wall v. Wall*, 64 Am. Dec. 151. Do you think that William Logan intended that this paper should be ambulatory, vesting no right in his son, but subject to his own revocation? He inserted no clause of revocability. He does not hint of such a purpose, and he grants with general warranty. That does not comport with the idea of a power of revocation in him. People do not put warranty in wills. They do so in deeds of present grant. The deed was executed by both husband and wife. Such is not the case with wills. The paper does not dispose of all Logan's property, for by an exactly similar deed he conveyed on the same day to a daughter, Mrs. Broughton, other valuable property. If he intended to do a testamentary act, why did he not make one will cover both properties? The answer is that he intended by these deeds, as deeds, to give finally to these children the properties irrevocably, reserving to himself a life estate. He had a lawyer drawing the papers. Why did he not draw a will, if he intended a will? He was instructed to draw deeds, and not a will. And then, again, William Logan did not keep this paper in his own possession, as men do with wills, because they have no operation until death; but he delivered them on their very date, because he intended them to operate at once, as men do with deeds; he intended to give his son and daughter muniment and evidence of irrevocable title. He acknowledged the deed before a notary for recordation. Men do not acknowledge wills. William Logan did each and everything which he could do, or was required by law to do, to make the deed effectual as a deed, and when that deed contains language and form and cast operating as and for a deed, and not a will, why shall we not accord it force as a deed? There is one thing that is very certain, and that is that this construction carries out the true intent of William Logan, and enables a man competent to do the act, and free from undue influence, to do what he pleases with his property, or some of it. Why he chose to give it to these two children we do not know; but, as he was con-

petent, this court cannot inquire into the reasonableness or justice of his act. *Hale v. Cole*, 31 W. Va. 576, 8 S. E. 516. We hold the deed valid.

Reference was made to our decision in *Ward v. Ward*, 43 W. Va. 1, 26 S. E. 542, as ignoring the rule that a paper vesting estate at death is not a deed, but testamentary. By no means does it do so. The point was not raised or considered. The deed was conceded to be a valid deed. The point could not arise, because the deed reserved plainly a life estate to grantor, and conferred a remainder on grantee, which all authorities hold good.

I know that some of the cases cited above for the rule stated would overthrow this deed, but others would not. *Wilson v. Carrico*, 40 Ind. 533, held a deed saying, "to be of no effect until after death of grantors, and then to be in force," valid as a deed, not testamentary. Deed in *Shackelton v. Sebrree*, 86 Ill. 616, read "This deed not to take effect until after my decease,—not to be recorded till after my decease." Held a valid deed. So held in *Owen v. Williams*, 114 Ind. 179, 15 N. E. 678, of a deed granting "after my death and not before." Deed conveyed "premises, to have and hold to him at said grantor's and grantor's wife's death." Held valid deed, not a will. *Goff v. Davenport*, 96 Ga. 423, 23 S. E. 395. So, in *Wyman v. Brown*, 50 Me. 139, a deed "not to take effect during my lifetime, and to take effect and be in force from and after my death." Likewise, *Abbott v. Holway*, 72 Me. 298, a deed "not to take effect and operate as a conveyance till my decease." So a deed, "at my death to have and hold." *Chancellor v. Windham*, 1 Rich. Law, 161. So, *Jenkins v. Adcock* (Tex. Civ. App.) 27 S. W. 21; *Carpenter v. Hannig* (Tex. Civ. App.) 34 S. W. 774. Since reaching this point in this opinion, I conclude there are as many, if not more, cases pointedly sustaining as those pointedly overthrowing this deed. So, reputable cases vindicate our holding, and in the conflict of authority why should we not make this instrument carry out its maker's intent, rather than make it perish? How should we decide if in doubt?

Counsel argue that, even if this deed were void tested by common-law principles, yet certain statutory provisions so change the common law as to make it valid. They refer to Code 1891, c. 71, § 5, saying, "Any estate may be made to commence in futuro by deed in like manner as by will, and any estate which would be good as an executory devise or bequest shall be good, if created by deed." I cannot see that this operates to repeal the rule above stated that a paper which confers no estate till the death of its maker is inoperative, unless good as a will. After the Norman conquest, land could not be transferred at all by act of the parties. Then came a statute allowing its transfer by feoffment, with livery of seisin,—that is, ac-

tual delivery of possession. As the right of transfer existed only under statute, there could be none except by feoffment. Delivery of possession being necessary to manifest the transfer, there could be none where an estate to begin in futuro was to be created, and hence no estate in land to begin in future could be created. Another reason was that a freehold could not be in abeyance. The fiction was gotten up that where a particular estate, one for years or life, with a remainder in fee thereafter, was created, this particular estate would support the remainder, and delivery of possession to the tenant of that immediate estate would answer for the remainder. Hence the rule that a future estate must have a particular estate to rest upon. This continued the law in Virginia till chapter 99, § 28, Code 1819, as to feoffments. But when the statute allowing a man to make a will of lands was passed, a future estate could, by will, be created without a particular estate, and without livery. So, also, under the statute of uses, by those particular conveyances good under it, a future estate could be made without livery. Code 1819, c. 90, § 29. But the common-law feoffment must be accompanied by livery. Even after the act of 1785, saying that no estate of more than five years should be declared except by deed, livery continued necessary, as it simply required that conveyance "be declared," not made by deed. The act, too, provided that livery of seisin, where that was required, should be in writing and recorded, showing that where the old law required livery it must still be made. It was required in common-law conveyance, feoffment, but not in devises or instruments good under the statute of uses. But our Code of 1819 partially abolished livery of seisin in saying an estate might be made to commence in futuro as well by deed as by will. It abolished livery as to future estates, not present ones. So I think a mere grant, which, before this act, was only proper to grant estate in incorporeal property, became effectual to convey the land itself, and without livery. Grants always were required to be by deed, which passed title; feoffments were by word and livery only until the statute requiring them to be declared by deed. This deed did not vest title, but only attested what the livery did. That passed title. *Tied. Real Prop.* § 771. Now, the only purpose of this act was to get rid of livery of seisin, which prevented creation of future estates. It was not intended to abolish wills, nor the necessity of a will for an act of transfer requiring a will, that is, a vesting of an estate upon the death of its creator. The objection to a "will deed" is, not that it creates a future estate, but that it gives estate at death, which requires a will. If this statute so operated, there would scarcely be use for wills, and any instrument passing estate only at death would

be valid, and all the decisions holding "deed wills"—that is, deeds vesting estate at death of grantor—void would be no longer in force. It has not been so construed. Certainly not in Virginia.

I may remark, though not important in the case, that livery of seisin was abolished by Code 1819, c. 99, § 28, only partly,—that is, as to freehold estates commencing in futuro; or, rather, we cannot say abolished, as livery was never applied to future estates, but prevented their creation; and therefore it is more accurate to simply say that that act allowed, for the first time, the creation by deed of estates to begin in futuro. It left standing livery of seisin where it had always stood, necessary in the creation of freeholds commencing at once. This appears from the fact that the same act which allows in section 28 the creation of a future estate, still continues in section 3 livery of seisin where it had been always required in immediate estates. And even the statute cited as wiping out livery (Code 1849, c. 116, § 4), going into force July 1, 1850, did not abolish it, and only rendered it needless, because it says, "All real estate shall, as regards the conveyance of the immediate freehold thereof, be deemed to lie in grant as well as in livery," contemplating both as still operative. It does not say "lie in grant" only, or "in grant and not in livery." And this confirms my view that the Code of 1819, in allowing future estates, left livery standing as to creation of immediate estates, because the section quoted from the Code of 1849 says, "as regards the conveyance of the immediate freehold," thus limiting it to conveyance of the immediate freehold, and showing that the legislature considered livery as yet applicable to them, and designed to dispense with its presence as to them. But, while that section did not abolish livery, and only allowed a grant for the immediate corporeal freehold, and thus enlarged the common-law effect of a grant before used only for incorporeal property, I think that section 1, c. 116, Code 1849, saying that no greater estate than five years should be conveyed except by deed or will, did abolish livery. Thus, a grant of land, without livery, prior to July 1, 1850, would not be good (unless under statute of uses); but it would be good after that date. Before that date

it must be "declared" by deed, or it would not be good, even with livery; but if it were so declared by deed, livery was till then essential. Since then, livery without deed is not good. I think, however, that such grant before July 1, 1850, based on good consideration, would have been good under the statute of uses as a covenant to stand seised to use, without livery; and a grant for valuable consideration good as a bargain and sale, under that statute. But a voluntary conveyance without livery would not have been good. Thus livery of seisin is unavailing since that date; and a deed of grant itself, without livery, passes the freehold, as Code 1849, § 1, in saying no greater estate than five years shall be passed but by deed or will, impliedly says it may be passed by deed or will; and section 4 says, "All real estate as regards the immediate freehold shall lie in grant as well as in livery," and section 5 says, "Any interest in or claim to real estate may be disposed of by deed or will;" and chapter 117, § 2, says that the form of grant of land given by that chapter shall convey all the grantor's "estate, right, title, and interest." The West Virginia Code contains those provisions in chapter 71, §§ 1, 4, 5, and chapter 72, § 2. The provision in Code, c. 71, § 5, that "any estate which would be good as an executory devise or bequest shall be good if created by deed," only intends to enable what is in quality an executory devise to be made by deed, giving the same force to a deed to create executory interests as a will. By the use of the word "and" after the clause enabling an estate in futuro to be created by deed, this clause as to executory devise may be only to make more clear the capacity of a deed to create a future estate,—place it beyond question by mere expansion of language,—but its office seems to be to do by deed what could before only be done by will. Certainly, we cannot say it abolishes the rule that a deed passing no shadow of title to land till the grantor's death shall be repealed. Briefs of able counsel and oral argument have introduced these statute provisions into this case, and I would be wanting in deference if I had not discussed the subject, though I must, with entire respect to counsel, say that I do not see that they are relevant. Decree reversed, and bill dismissed.

(45 W. Va. 275)

SAVAGE et al. v. PEOPLE'S BUILDING, LOAN & SAVINGS ASS'N.(Supreme Court of Appeals of West Virginia.
Nov. 23, 1898.)**FOREIGN BUILDING ASSOCIATION—DOMESTIC CORPORATION—RIGHT OF ACTION—VALIDITY OF BY-LAWS—VESTED RIGHTS—WITHDRAWAL AND PAYMENT.**

1. A building and loan association chartered by the state of New York, which has complied with our statute by appointing an attorney in this state to accept service for it, does not thereby become a domestic corporation.

2. A statute merely enabling a foreign corporation to hold property or do business in this state does not make it a domestic corporation, and it may be proceeded against by attachment as a foreign corporation.

3. A provision in one of the conditions indorsed on the certificates of stock issued by such corporation that any action brought against the association by the shareholders shall be brought in the county of Ontario, N. Y., is a void requirement, as jurisdiction cannot be taken away by consent.

4. A corporation has not the power, by laws of its own enactment, to disturb or divest rights which it has created, or to impair the obligation of its contracts, or to change its responsibility to its members, or to draw them into new and distinct relations; and all by-laws attempting to do this are inoperative and void.

5. Where a certificate of stock on its face provides that the holder may withdraw the amount paid on the same to a building and loan association, at any time within three years from its date, together with 6 per cent. interest, all of which are payable in the manner set forth in the articles of association and by-laws, and terms and conditions printed on the back of certificate,—the fourth of which conditions provides that "the payment on this certificate cannot be withdrawn until after three years from the date of this certificate; if withdrawn between that date and maturity, the holder shall be entitled to receive sixty dollars for each of said shares, together with six per cent. per annum,"—said condition and the by-laws of said association existing at the date of said certificate are a part of the contract, and the manner and time of withdrawal and payment cannot be changed by a subsequent by-law.

(Syllabus by the Court.)

Appeal from circuit court, Wood county;
A. I. Boreman, Judge.

Bill by Thomas S. and E. J. Savage against the People's Building, Loan & Savings Association. Decree for plaintiffs, and defendant appeals. Affirmed.

J. W. Vandervort and Chester M. Elliott, for appellant. Van Winkle & Ambler and Moats & Peterkin, for appellees.

ENGLISH, J. Thomas S. Savage and E. J. Savage, administrators of the estate of George Savage, deceased, brought a suit in equity in the circuit court of Wood county, against the People's Building, Loan & Savings Association, a corporation organized and existing under the laws of the state of New York, to recover from the defendant the sum of \$840, with interest thereon from the 10th day of August, 1892, claimed to be due the plaintiffs, as the withdrawal value of 14 shares of paid-

up stock in the defendant company. An attachment was sued out against the defendant, and levied on its real estate situated in said county. The sole ground upon which the order of attachment was based was that the defendant was a foreign corporation. The defense interposed was a plea in abatement of the suit, a plea in abatement to the attachment, and a demurrer and answer to the bill. Depositions were taken by plaintiffs and defendant. Objections were sustained to the pleas in abatement. The demurrer to the bill was overruled. A decree was rendered against the defendant for \$1,105.86. The attachment was sustained, and the real estate levied on was directed to be sold to satisfy said debt, upon the terms prescribed in said decree. The defendant then moved the court to modify the decree so that interest should be calculated on the \$840 only from the date said shares of stock in controversy were presented to defendant association for withdrawal, to wit, September 9, 1895, which motion was overruled. The defendant also moved the court to require plaintiffs and the special commissioners appointed to enforce said decree to do so in such manner that plaintiffs should only participate equally with the other stockholders who filed withdrawals of their shares with said association at the same time or before plaintiffs filed withdrawals of their shares, in order that all stockholders might be placed in the same position, and the withdrawing shareholders might all have equal standing, which motion was overruled, and the defendant obtained this appeal.

The first error assigned and relied on by the defendant is that the court erred in falling and refusing to dismiss the plaintiffs' bill upon the plea in abatement to said suit. This plea, in substance, claims that the plaintiffs did not at the time of the institution of said suit have a right to institute it in the state of West Virginia, because, as fully shown in the bill, if any such suit or action existed at the time the same was instituted, it should have been brought in the county of Ontario and state of New York; that it is a corporation of the state of New York, and has fully complied with the laws of West Virginia governing foreign corporations doing business in this state, has caused an attorney in fact to be appointed, as required by statutes of West Virginia, and the plaintiffs could not obtain jurisdiction by attachment of defendant's property in this state; that defendant is a solvent corporation, and no ground for said attachment existed. This question was passed upon by this court in the case of Quesenberry v. Association (recently decided, and not yet officially reported) 30 S. E. 73, in which it was held: "(1) A suit against a foreign corporation may be brought in any county wherein it has estate or debts due it. It is a nonresident, under clause 3, § 1, c. 123, Code 1891. (2) The appointment by a foreign corporation of an attorney in this state to accept service of process does

not make it a domestic corporation. (3) A statute merely enabling a foreign corporation to hold property or do business in this state does not make it a domestic corporation." Brannon, P., in delivering the opinion of the court, uses the following language: "Another point is made that, as this foreign corporation has appointed an agent to accept service of process, it is not liable to attachment. It is a foreign corporation, and is a nonresident, and the fact that it owns property here no more converts it into a resident than it converts a natural person into a resident. It dwells—has its habitat or domicile—in New York, where it was chartered;" citing *Humphreys v. Newport News & M. V. Co.*, 33 W. Va. 137, 10 S. E. 39.

It is insisted by counsel for the appellant in his brief that this suit abated by reason of the fact that the summons was issued on the 2d day of December, 1895, and was returnable to rules to be held on the 1st of December, 1895,—a day prior to the date on which it issued, and before the suit was instituted,—and a considerable portion of his argument is devoted to the consideration of this alleged mistake. A stipulation is filed with attorneys' brief for the appellees, signed by counsel for both parties, which reads as follows: "It is stipulated and agreed that the original summons in this cause was issued to rules to be held on the first Monday of December, 1895, whereas it is printed on page 7 of record as 'on the 1st day of December, 1895.'" This stipulation therefore disposes of the first and second assignments of error, which were based upon the alleged fact that said summons was returnable to the 1st day of December, 1895.

The appellant assigns as the third point of error that the court erred in not sustaining the demurrer to plaintiffs' bill, and in overruling the same, as the bill clearly shows on its face that there was no debt due at the time of the institution of this suit. Can this assignment be sustained? This suit was instituted December 2, 1895, and was predicated upon the alleged fact that they were the owners of 14 shares of the defendant's stock, on which they had paid the sum of \$840. By article 29 of the by-laws of said corporation, in force at the time the plaintiffs became the owners of said stock, "members holding paid-up certificates might, upon the surrender of such certificates, withdraw the amount paid on the same, at any time after three years from the date of issue, and before maturity, together with an annual interest of six per cent., said interest to be computed upon the withdrawal of paid-up certificates for even months only, and such paid-up certificates should cease bearing interest after the date of such application for withdrawal." The stock held by plaintiffs was issued August 10, 1892, and the holders were entitled to withdraw after 3 years from that date, by complying with the requirements of the by-laws

then in force, as plaintiffs contend. Plaintiffs, between the 4th and 9th of September, 1895, executed proper applications for withdrawal, and sent them, by letter, their receipt, by defendant acknowledged, stating that they had been placed on file, and would be paid in regular order, under the rules of the association. Upon receipt of that letter, plaintiffs demanded immediate payment of the amount due, according to the contract. And by letter dated September 27, 1895, defendant informed plaintiffs that only one-half of the receipts of the association were applicable to the payment of withdrawals; that there were applications for withdrawal filed before theirs, amounting to \$130,000, and the receipts of the association averaged about \$7,500 a month, and plaintiffs' certificates would have to wait their turn for payment. The by-law under which the manner of payment of withdrawals was adopted was passed January 12, 1895, and formed no part of defendant's by-laws on August 10, 1892, when plaintiffs became owners of said certificates. On the face of these certificates of shares it was contracted that, in consideration of the money received, and full compliance with the terms and conditions as printed on back of certificates, the by-laws, etc., all of which were made part of the contract, said defendant would pay said shareholders, their heirs, administrators, or assigns, the sum of — dollars at the end of five years, or at maturity. One of the conditions on the back of said certificate was that "the payment on this certificate cannot be withdrawn until after three years from the date" thereof; "if withdrawn between that date and maturity, the holder shall be entitled to receive sixty dollars for each of said shares, together with six per cent. interest per annum." These, with article 29 above quoted, were the conditions bearing upon the question of withdrawal from the association at the time plaintiffs became the owners of the certificates upon which this suit was predicated. They became part of the contract.

Could the contract be varied or altered by the enactment of subsequent laws, changing time and terms of payment? On this point, Beach on the Modern Law of Contracts (section 1223, p. 1615) says: "A person has the right to treat the by-laws given to him on becoming a member of the association as all the by-laws such association has; and he is not bound to take notice of modifications of such by-laws with respect to withdrawing, on the record of the company simply, without further notice to him, which notice must be proven by the defendant company to have been given,"—citing *McKenney v. Association*, 8 Houst. 557, 18 Atl. 905. Again, in *Association v. Lewis*, 1 Colo. App. 127, 27 Pac. 872, the court held that: "Where plaintiff became a member of defendant building association at a time when a by-law provided that all nonborrowing stockholders wishing to withdraw shall be privileged so to do upon giving

notice to the directors of his or her intention, and shall be entitled to receive the amount of installments actually paid in without interest, plaintiff's right of withdrawal was a vested right, of which defendant could not deprive him without his consent by a subsequent repeal of the by-law." The general proposition is well and properly stated in 5 Am. & Eng. Enc. Law, 96, where it says: "A corporation has not the power, by laws of its own enactment, to disturb or divest rights which it has created, or to impair the obligations of its contracts, or to change its responsibility to its members, or to draw them into new and distinct relations; and all by-laws attempting to do this are inoperative and void,"—citing "numerous authorities, among them *Pulford v. Fire Department*, 81 Mich. 458, where it is said: "By-laws and regulations of corporations merely govern future action. Ex post facto laws are no more lawful for corporations than for states." See, also, *Kent v. Mining Co.*, 78 N. Y. 159; *Becker v. Insurance Co.*, 48 Mich. 610, 12 N. W. 874.

Authorities might be multiplied upon this question, but these are regarded as sufficient to establish the doctrine of the inability of a corporation, by subsequent by-laws, to take from a stockholder therein vested rights, acquired under by-laws existing at the date of the contract made with the corporation at the time said shares were acquired. After agreeing that stockholders may withdraw at the end of three years, upon surrender of their paid-up certificates, the amount paid on same, with interest at 6 per cent. per annum, such corporation cannot, by subsequent by-law, provide that the association shall not be required to pay out, on withdrawing and matured stock, more than one-half the amount received from dues and stock payments in any month. To sustain the validity of such by-law would imply the right to say that but one-tenth of the receipts from dues and stock payments in any month should be paid on withdrawal, and thus indefinitely prolong the payment of withdrawal value, when, as in this case, the holder had fully complied with all the requirements of his contract. My conclusion, therefore, is that the court committed no error in overruling the demurrer. As to the right to recover, this court held in *Haigh v. Association*, 19 W. Va. 798, that "a member of a building association who complies with its constitution and by-laws, and, under their provisions, withdraws, can recover the amount due him under such constitution and by-laws, by an action of assumpsit, in which there is no special count, but only the common counts." So, in a recent case decided by the supreme court of South Carolina (*McNab v. Association*, 27 S. E. 543), it is held that "where a building and loan association's by-laws provide that a member who has made all payments may surrender his shares of stock at any time after a certain period from the date of certificates, on giving a certain

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notice, and take the withdrawal value thereof in cash, the relation of debtor and creditor is established as soon as the member has surrendered his stock, and has given the required notice." In the case at bar these shareholders appear to have done all that their contract and the rules required of them, to entitle them to the withdrawal value of their shares with interest; and we must hold that the relation of debtor and creditor was established at the time the suit was brought.

The contention that the defendant was improperly proceeded against as a nonresident or foreign corporation has already been considered, and shown to be no longer an open question in this state.

The ninth condition found on the back of the certificates of shares, providing that any action brought against the association by shareholders shall be brought on or before six months from the date the cause of action accrues, and in the county of Ontario, N. Y., was a void requirement, as jurisdiction cannot be taken away by consent. See *Nute v. Insurance Co.*, 9 Gray, 174-180; *Hall v. Insurance Co.*, 6 Gray, 185; *Reichard v. Insurance Co.*, 31 Mo. 518.

The affidavit and order of attachment sued out appear to be regular, and in compliance with the statute, and the lien thereby created properly directed to be enforced against the real estate levied upon. I am therefore of opinion that the decree complained of must be affirmed, with costs and damages.

(45 W. Va. 262)

RITZ v. CITY OF WHEELING.

(Supreme Court of Appeals of West Virginia.
Nov. 23, 1898.)

DIRECTIVE VERDICT—NEGLIGENCE—INJURY TO TRESPASSER.

1. When, upon the facts conceded as shown, a verdict for the plaintiff would be against law, the court should, on motion, exclude the plaintiff's evidence, and direct a verdict for the defendant. So it is also where, if the essential facts claimed to be proven by the evidence were proven, a verdict for plaintiff would be justified by the law, yet the evidence does not appreciably tend to prove them, but so plainly fails to do so that two reasonable men should not differ as to its insufficiency.

2. A landowner is under no duty to a mere trespasser to keep his premises safe, and the fact that the trespasser is a child does not raise a duty where none otherwise exists. Such a trespasser, injured on such premises, cannot recover of the landowner by reason of the unsafe condition of the premises, unless this negligence be so gross as to amount to a wanton injury. *Frost v. Railroad Co.*, 9 Atl. 790, 64 N. H. 220.

(Syllabus by the Court.)

Error to circuit court, Ohio county; H. C. Hervey, Judge.

Action by John S. Ritz against the city of Wheeling. Judgment for defendant, and plaintiff appeals. Affirmed.

Caldwell & Caldwell, for plaintiff in error. Henry M. Russell, Frank W. Nesbitt, and S. O. Boyce, for defendant in error.

BRANNON, P. Sarah Ritz, a child of less than five years, was drowned in a reservoir maintained by the city of Wheeling to furnish water for public use, and the administrator brought action against the city, and upon the trial the court excluded the whole of the plaintiff's evidence from the jury as insufficient to warrant a verdict, and directed the jury to find for the defendant, and upon such a verdict gave judgment for defendant, and the plaintiff appeals. The case is not one involving credibility of witnesses, or weight of evidence, or the proper inferences and deductions from evidence, which are matters proper for the consideration of a jury; for the material facts of the case are undisputed, and the case presents simply the question of law whether, upon the facts, a liability rests on the city. The question is, was the city guilty of negligence? Negligence is most frequently a question of mixed law and fact, proper to go before a jury; but, where the facts are such that ordinarily men will not differ about their effect in not showing negligence, it becomes a question of law for the court, not one of fact for the jury, and, if the evidence is not colorably sufficient to show negligence, the court ought to take the case from the jury and direct a verdict against the plaintiff. When the evidence is so clearly deficient as to give no support to a verdict for plaintiff, if rendered, the evidence should be excluded from the jury. *Klinkler v. Iron Co.*, 27 S. E. 237, 43 W. Va. 219; 1 *Shear. & R. Neg.* (2d Ed.) § 56. Where the case turns on the weight and effect of the evidence in proving or not proving facts necessary to support the action, and the evidence appreciably goes to prove such facts, it ought to go to the jury, as a verdict upon such evidence gives it a force which it might not have with the judge before verdict, and fortifies his case more against the action of the court, as the court cannot set the verdict aside unless plainly and decidedly contrary to or without evidence; but where the case is not such, but one of undisputed or indisputable facts, leaving it only a matter of law whether the facts show a liability on the defendant, the court should take the case from the jury, and direct a verdict, if the evidence shows no case for the plaintiff, because, if there were a verdict for him, it would be a finding against law, and the court always annuls a verdict against law upon conceded or indisputable facts. It is different, then, from a motion for a new trial, where the verdict rests on the credibility of witnesses or the weight and effect of evidence. *Grayson's Case*, 6 Grat. 712; *Poling v. Railroad Co.*, 38 W. Va. 645, 18 S. E. 782 (Syl. point 8). Likely this distinction is not always thought of. Plainly, if the court does right in excluding the evidence, it commits

no error in directing a verdict, as such a verdict is the inevitable consequence of such exclusion. There cannot then be any different verdict.

Let us see then whether the city is liable. In maintaining the reservoir, the city was engaged in a lawful act, within its power and duty as a municipal corporation,—a governmental act; and I do not see, in the absence of a statute imposing liability, if an open question, how it could be held liable, even if guilty of negligence, under the principle stated in *Brown's Adm'r v. Town of Guyandotte*, 34 W. Va. 299, 12 S. E. 707, and 1 *Beach, Pub. Corp.* § 749: "Where a city, under authority of a general law, undertakes a work for the sole use and benefit of the public, it is not liable for an injury caused by the negligent or defective act of its servants, unless some statute, either directly or by implication, gives a private remedy. This rule has been applied against a traveler injured by negligent blasting while excavating the foundation of a public school house, and against a child injured by reason of an unsafe staircase of a school house, and a dangerous excavation in a school-house yard. The same rule has been applied in favor of cities in respect to town houses and court houses, and public grounds, like Boston Common. And it makes no difference, in the application of the rule, whether the injury is caused by a negligent act done in the direct performance of the public work, or is received after the completion of the work." You cannot sue the state for such cause, unless it granted remedy. Why sue a city when performing a governmental function? One citizen is as much guilty of negligence as are others; all are guilty alike. Contrary doctrine holds a city liable as if an individual engaged in private work for private ends. But most authorities oppose this view. The law seems to be that a city or town, in the use of its property, though for purely public purposes, is liable for negligence as private owners. *Gibson v. City of Huntington*, 38 W. Va. 177, 18 S. E. 447; 2 *Dill. Mun. Corp.* § 985; 15 *Am. & Eng. Enc. Law*, 1141, 1149, 1155. But those authorities hold that, to make a municipal corporation liable for injury received from its use of its property, negligence must be shown. Thus we encounter in this case the question whether the city was guilty of negligence to which we can attribute the death of the little girl. There can be no negligence charged upon a person unless he rests under a duty to the person complaining of damage at his hands; for if there is no duty violated, though there may be grave damage befalling the complaining party, he has no ground of action. It is a case denominated in law as "damnum absque injuria,"—damage done, but without violation of a right in the injured party; a misfortune unaccompanied by a breach of duty by the party inflicting the injury. *Shear. & R. Neg.* § 8. The reservoir

and the land containing it were the private property of the city, used, not as a park or place of public resort or common, but only for reservoir purposes. The child was a trespasser, if you can say a child can be a trespasser. It was a trespasser, in legal sense; that is, it was on this property without right. The city was not bound to watch it. It could not be liable to it only for willful or wanton injury. I would, as an original question, hold that the law testing this case is laid down in 1 Beach, Pub. Corp. § 754, as follows: "A municipal corporation is not liable to a trespasser who goes, without license or invitation, upon its land, though unmolested, for mere pleasure or to gratify curiosity, and there meets with an injury through the corporation's negligent management of its property; and no distinction is made in favor of an infant child so receiving an injury. In such a case the municipality owes no special duty to a child straying from its parents, and the duty of protecting it is not shifted from its parents to the municipality because it chances to escape from their care. This is the general rule applicable to those who trespass on private lands, and there is no reason why municipal corporations should not have the benefit of it; but, of course, it has no application to highways, where all have a right to be."

I repeat, this is so, because no legal duty rests on the corporation. Our own cases sustain the doctrine of immunity where there is no duty placed by the law upon the party sought to be charged with damages. By reason of this doctrine, the case of Woolwine's Adm'r v. Railway Co., 36 W. Va. 329, 15 S. E. 81, denied relief to a man who visited a telegraph office kept by a railroad company to make a call of friendship on the operator, and was injured by negligence of the railroad's servants. And by reason of this doctrine, in Polling v. Railroad Co., 38 W. Va. 645, 18 S. E. 782, no damages were conceded for the death of a person standing on the railroad grounds, and killed by reason of a defective apparatus used to catch mail from a passing train. And by reason of the same doctrine, in Dicken v. Coal Co., 41 W. Va. 511, 23 S. E. 582, recovery was denied for the injury of a little child crippled by a car while on a train road of a salt company. Such must be the ruling as long as private ownership in property is recognized, as to hold otherwise would detract from the lawful dominion of a man over his own property, and contravene the canon of property expressed in the Dicken Case, that "a party who is using his own property in a lawful way cannot be guilty of a breach of duty to any one."

These cases of our own decide the case against the plaintiff, but the importance of the case and briefs of counsel justify reference to other states. In Clark v. Manchester, 62 N. H. 577, a child of four years was drowned in a reservoir which had once been

used by a city, but its use had ceased, the fence was removed, it was partly filled up, and but a portion yet had water in it. Children played there. A field was near by, where ball playing and other amusements went on. The child, while passing along a path at the reservoir, fell into it. It was held that the city was not, without a statute, liable for neglect of a public corporate duty, and that the city owed no duty to one going upon its land for pleasure or curiosity, unless the negligence be so gross as to amount to a wanton infliction of injury, and that no distinction is made in favor of an infant. In Grindley v. McKechnie, 163 Mass. 494, 40 N. E. 764, a city kept a sewer, and by it a hole had been formed by the action of the water, and was filled with water, the hole being 50 feet from the street, along which was a fence, and some boards had been torn from it, and a path led from this opening to the sewer. A child went through this opening, along the path, to the sewer, and was drowned. It was held that the city owed no duty to the child to keep the sewer or hole in safe condition, and was not liable in damages. Similar decisions, based on principles above stated, are to be found in Murphy v. City of Brooklyn, 118 N. Y. 575, 23 N. E. 887; Gillespie v. McGowan, 100 Pa. St. 144; Benson v. Traction Co., 77 Md. 535, 26 Atl. 973; Charlebois v. Railroad Co., 91 Mich. 59, 51 N. W. 812; Moran v. Pullman Palace-Car Co. (Mo. Sup.) 36 S. W. 659; Overholt v. Vieths, 93 Mo. 422, 6 S. W. 74; Kilx v. Nieman, 68 Wis. 271, 32 N. W. 223; Dobbins v. Railway Co. (Tex. Sup.) 41 S. W. 62; Richards v. Connell, 45 Neb. 467, 63 N. W. 915; City of Omaha v. Bowman, 52 Neb. 293, 72 N. W. 816; Peters v. Bowman, 115 Cal. 345, 47 Pac. 118, 598. They are cases of small children drowning in reservoirs or pools of water, in most instances unprotected by fence, whereas in this instance the reservoir was well fenced. Those cases are apposite to this in similarity of source of injury and character of the persons injured. Many cases may be cited of injury from other causes to persons on ground occupied by others. They involve the same principle, regardless of different cause of injury; that is, that the owner of the ground owed no duty to one having no legal right to be upon the ground. Recovery was refused in Gay v. Railway Co., 159 Mass. 238, 34 N. E. 186, to a boy 10 years old, who went on a car unlawfully standing in a street, and was injured by a recoiling brake not properly fastened. It was said that, if standing on the company's ground, it would be most clear that the company would not be liable; and, as it was, the court said that the defendant was not liable. In Railway Co. v. Edwards (Tex. Sup.) 36 S. W. 430, an eight year old child in a lot of the company open on one side was crushed by a pile of plank improperly piled. In Talty v. City of Atlantic, 92 Iowa, 135, 60 N. W. 516, child

was injured by going down path from street, and crushed while digging sand, by a bank caving. It was held that the city was not bound to fence the path. In *O'Conner v. Railroad Co.* (La.) 10 South. 678, children usually played in a block with openings in fence, and one of seven years was injured. In *Railroad Co. v. Bockoven* (Kan. Sup.) 36 Pac. 322, a child of five years was killed while swinging, by a falling gate, which was defective and dangerous. In *Ratte v. Dawson*, 50 Minn. 450, 52 N. W. 965, a child of three years was playing in a pit caused by taking out sand, and wholly unguarded, in a vacant lot, and was killed by a falling embankment left in dangerous condition. Children usually played in the sand, as it was attractive to them. It was held there could be no recovery, as there was no duty on the owner to keep his premises safe. In *Barney v. Railroad Co.*, 126 Mo. 372, 28 S. W. 1069, the railroad owned a yard not fenced, where children went to play, and one of six years jumped on a train and was injured. Held no duty to the child was on the company. In *Vanderbeck v. Hendry*, 84 N. J. Law, 467, defendant owned a board yard in a populous part of city, frequented by children, and a child injured by a falling pile of lumber, not in safe condition, was denied recovery, because no duty as to the child rested on the defendant to pile the plank properly. In *Clark v. City of Richmond*, 83 Va. 355, 5 S. E. 369, the city had made excavation on land of another, who had erected a wall along the street, and a child of six years walked on the wall, and fell into the pit. The court said the city owed him no duty, as he went upon property where there was no duty owing him. *McGuinness v. Butler* (Mass.) 84 N. E. 259, denied relief to a child injured by pulling upon himself a slab left by the owner leaning against his shop, one end in the street and the top a few inches inside his line.

But it is contended that, while this doctrine that no duty lies upon the owner of property to keep it in safe condition as to trespasser applies to persons who have attained years of discretion, the case is wholly different as to children of tender years; that as to them the owner cannot use the property as he chooses, but must so use it as not to injure them. Perhaps this is stating the position of plaintiff's counsel too broadly. The position is that the owner cannot erect or continue on his property any structure, establishment, or machinery that is at the same time in dangerous condition, and calculated to attract and allure young children to it. It must be both to sustain a recovery. This position is sought to be supported by what is called the "Turntable Cases" (*Railroad Co. v. Stout*, 17 Wall. 657, and other cases following it). In that case a boy was injured while playing in a railroad turntable left unlocked, and was allowed a recovery. The case is most unsatisfactory. The opinion is not clear. It seems

to go upon the idea, as an element of decision, that to deny a recovery it was necessary to impute contributory negligence to a child; whereas the matter in that case did not, nor does it in this case, involve contributory negligence, which is foreign to our question, which question is whether the defendant owes duty to a child wandering upon the defendant's premises and injured by its lawful works. And in the *Stout* Case the real point of the decision is that the case should have gone to the jury, rather than a flat decision of defendant's liability, though I do not say it was not involved. But the *Stout* Case, if carried to the length to which it is sought to be carried, would exact of every property owner the utmost watchfulness, vigilance, and expenditure to guard against hurt to children, else he would be every moment in danger of ruinous damages. It attacks the right of free use of one's property in lawful business. A railroad liable because it happened to leave a turntable unlocked, as turntables often are, on its own track,—a necessary appliance in a lawful business! Ought a farmer be liable for failing to put a picket fence around his pond necessary for his cattle? If he does not, some little boy will climb the fence into the farmer's field, drown in the pond, and sue the farmer, on the same principle. The dam that contains water to turn the mill wheel, having a path around it shaded with willows, is very alluring to the child and the man. Must the miller inclose it? The canal, with its towpath and frogs, is very attractive to the little boy or girl, and dangerous, too. If a child drown in it, is the company liable? How many more instances of things useful in lawful business, and withal very attractive to children, and very dangerous, might be put? And the rule contended for says that, if the thing causing the injury be attractive or seductive, the liability attends it. How many things are, or may be, so to children? "A child's will is the wind's will." Almost everything will attract some child. The pretty horse, or the bright red mowing machine, or the pond in the farmer's field, the millpond, canal, the railroad cars, the moving carriage in the street, electric works, and infinite other things, attract the child as well as the city's reservoir. To what things is the rule to be limited? And where will not the curiosity, the thoughtlessness, and the agile feet of the truant boy carry him? He climbs into the high barn and the high cherry tree. Are they, too, to be watched and guarded against him? As was well said in *Gillespie v. McGowan*, 100 Pa. St. 144, this rule "would charge the duty of the protection of children upon every member of the community except their parents." A very onerous duty! *Nolan v. Railroad Co.*, 53 Conn. 462, 4 Atl. 106, holds that the same precautions by property owners apply to infants and adults.

I am guilty of no undue assumption in con-

demning the Stout Case, as it has received in some courts, the most eminent in the land, open condemnation, and in others criticism tantamount to condemnation; and some which followed it limit its application to its facts or desire to recant. *Walsh v. Railroad Co.*, 145 N. Y. 301, 39 N. E. 1068; *Frost v. Railroad Co.*, 64 N. H. 220, 9 Atl. 790; *Daniels v. Railroad Co.*, 154 Mass. 349, 28 N. E. 283; *Barney v. Railroad Co.*, 126 Mo. 372, 28 S. W. 1069; *Railway Co. v. Edwards* (Tex. Sup.) 36 S. W. 431; *Dobbins v. Railroad Co.* (Tex. Sup.) 41 S. W. 62; *Railroad Co. v. Bockoven* (Kan. Sup.) 36 Pac. 322; *Peters v. Bowman*, 115 Cal. 345, 47 Pac. 113, 598; *Catlett v. Railway Co.*, 57 Ark. 461, 21 S. W. 1062; *Bishop v. Railroad Co.*, 14 R. I. 320.

Here I may fitly add that the cases cited denying recovery were cases of infants of tender years. Are they all wrong, running through so many years? Is our own Dicken Case wrong? And the Woolwine and Poling Cases? Another reason against applying the Stout Case to mulct the city of Wheeling in damages is that, as often construed, that case only applies to "dangerous machinery." Several courts which followed it have since said it ought to be limited to its particular facts. Whether the distinction between "dangerous machinery" and other means of injury be clear or not, several courts and text writers have made it. Railroad cars held not such "dangerous machines." *Barney v. Railroad Co.*, 126 Mo. 372, 28 S. W. 1069; *Catlett v. Railroad Co.*, 57 Ark. 461, 21 S. W. 1062. Cars are attractive to children, but the law does not require a guard to keep children from standing cars. *Railroad Co. v. McLaughlin*, 47 Ill. 285.

Now, I do not suppose this reservoir of the city would come under the head of "dangerous machinery." If so, what structure or establishment might not? At any rate, if that is "dangerous machinery," hundreds of necessary things would fall under this head of liability not heretofore regarded as dangerous and attractive to children, and greatly endanger the maintenance of many things necessary in life and business, and be an enormous burden to guard and watch with never sleeping eyes. Strange to me the idea that such a reservoir can be made to come under this rule. And I say that the reservoir is not "dangerous" in that sense. And I say, with yet greater confidence, that it is not specially "attractive" in that sense. If not, there can be no recovery in this case; for on that narrow ground the case hinges. Hence the Stout Case does not apply.

But a most important matter is, what is the negligence claimed to sustain this action? It is that there was a gate of entry into the inclosure containing the reservoir, which was sometimes open, and that there was an opening under the picket fence several feet deep to allow water coming into the reservoir inclosure from the hill above, from rain, to pass

out so as to keep it from entering the reservoir and polluting its water. The reservoir was inclosed with a high, strong picket fence. It does not appear how the child entered the inclosure, but likely through the opening under the fence. Now, most of the cases above will show that the city was not bound to fence, but it did securely fence, the reservoir. It adopted a reasonable precaution, and did all that reasonable care would exact. Do the gate and drain, things indispensable, convict the city of want of ordinary care or gross negligence? Surely not. The place was reasonably safe. Though people and children did sometimes go upon the city land containing the reservoir, and along the narrow path along the fence on the east side over the high, steep ground, almost a precipice of hundreds of feet, to watch games of baseball in a field below, yet there was no invitation by the city to do so. The place was uninviting and dangerous, and there was no ground for the city to anticipate that parents would allow their children there, on very dangerous ground, or that one would crawl under the fence, through this single necessary opening. The city used all due precaution. This opening was at the remote end of the inclosure, away from houses a considerable distance, and at the end of the path. The path was along the fence, was only two feet wide, and very close to the fence, and the whole space between the fence and precipice was only that wide,—a path, not a highway, and unlikely to invite people. It was not bound to use the utmost possible care to guard infallibly against all possible accidents. In *Gavin v. City of Chicago*, 97 Ill. 66, it was held that the city must keep a bridge in a reasonably safe condition, and that, though it could be made to be free from accident to playing children, yet it was not bound to so construct it as to be safe for children playing upon and around it, or place guards or mechanical contrivances to keep children off the bridge. An owner is not required to provide against remote and improbable injuries to trespassing children. *Car Co. v. Cooper*, 60 Ark. 545, 31 S. W. 154, 46 Am. St. Rep. 216, and note. One using his property in a lawful way is not under obligation to save others from inevitable accident. "He performs his duty when he uses reasonable care and precaution." *Cosulich v. Oil Co.*, 122 N. Y. 118, 25 N. E. 250. Even if the city owed a duty to the child, it was only of ordinary care. 2 *Shear. & R. Neg.* (2d Ed.) § 705.

The city had a watchman there, though by no means was this required, as above authorities show. The watchman was not present or did not happen to see this child. The fact that it did keep a watchman did not bind the city to duty not fixed by law or a higher degree of duty than the law fixes, if any. The fact shows that the city took all reasonable precautions, and this is an unfortunate, inevitable accident, for which it is

not responsible. The South Carolina court stated the point clearly, saying, as to children, that there is a liability only "when, from the peculiar nature and open and exposed position of the dangerous defect or agent, the owner should reasonably anticipate such injury." How can we say in this case that a drain at the end of a narrow fringe of 2 feet, 200 yards long, between a fence and precipice, just where the fence butted up against a high hill cut down in the construction of the reservoir, not where people usually went, very inconvenient to walkers, we may say dangerous, where there was nothing to invite them, but everything to deter, and the common ground, if such, was on the other side of the reservoir inclosure, a good distance and cut off from this point,—the point where the drain emerged being secluded, and the best point for it, and where no one would be expected to go,—how can we say the city "should reasonably anticipate injury" there, in the language of the South Carolina court? Busw. Pers. Inj. § 77, states the rule, as to children trespassing, to be that, to charge the defendant, it must appear that the act was "willfully mischievous, as by leaving a ferocious dog at liberty," and that it is to be deemed mischievous or wanton only when "the act was done in the ordinary course of his business, and by the use of appliances which do not, obviously and of necessity, expose all persons who may approach them to peril, or the exposure of which is not attended with some concealed danger." That is the test.

Now, would a farmer or millowner be liable because he left a drain under his fence, and a child happened to crawl through it and fall into the pond? Certainly not. It is an unexpected, inevitable accident. Neither is Wheeling liable.

Counsel complain that the court would not allow as evidence a paper to show that the only title the city had to the land containing part of the reservoir was one vested in it in trust as a common, and that it misappropriated it when it devoted a part of it to use for a reservoir. The city had years ago made this reservoir; had been for years in actual use of it for the purpose. It never was used as a common, in the sense of a park. Now, if the party who conferred the land upon the city, or his heirs, could stop its use for a reservoir, or in any manner complain of the act as a misappropriation, or if any one could do so, while the city was in the exclusive, unrestrained occupation of it, for reservoir purposes, it has the right to be looked upon as owner, and entitled to the immunity from damages, like any owner. Its title could not be put in question in this collateral way in this action. I think the paper was irrelevant.

Late reference is made to the case of *Rowzee v. Pierce* (Miss.) 23 South. 307. That was an injunction to prevent a lot conveyed to a town for a park from being used as a site for a school house, and it was held that

the use proposed to be made of it was against the purpose of the grant. To me it is plainly not relevant to this case. To restrain a city from diverting property to a different use from that contemplated in the grant is one thing; but the question whether it is, while in actual use of the land for such purpose, liable for an act claimed to be a negligent use of the property, which negligence does not consist in the application of the property to a use not contemplated, but in its mere handling of the property, is another question. The question here is whether the act of having the drain renders the city liable, no matter how it came by the land. Would the city be liable if the conveyance to it had been general, and not for a special purpose? I oppose imposing upon the innocent public heavy damages for the accidents and misfortunes which always have and always will attend human existence. The safety of the many is to be preferred to even the suffering and misfortunes of individuals. Judgment affirmed.

(45 W. Va. 319)

ANDERSON v. HENRY et al.

(Supreme Court of Appeals of West Virginia.
Nov. 26, 1898.)

LANDLORD'S LIEN—DISTRESS WARRANT—JUSTICE'S DOCKET—EVIDENCE—CONSTITUTIONAL LAW.

1. Section 12, c. 93, Code 1891, gives a lien for one year's stipulated rent, whether accrued or not, upon the tenant's goods carried on the premises over liens created after the commencement of the tenant's term by deed of trust, mortgage, or otherwise, though no distress warrant has been issued for such rent.

2. A distress warrant, not being judicial process, need not be made returnable before a justice or court. If made returnable to the justice, it is good.

3. Where a justice's docket omits to enter a proceeding which should be entered, other proper evidence may be admitted to prove the proceeding.

4. Amendment 14 of the constitution of the United States does not render our statute law allowing distress warrant for rent unconstitutional and void.

(Syllabus by the Court.)

Appeal from circuit court, Mercer county; Saunders, Judge.

Bill by J. M. Anderson against Henry & Linkous to administer assets. Hannah Grinberg presented a claim. From a decree allowing only a part thereof, she appeals. Reversed.

Johnston & Hale, for appellant. John A. Douglass and A. W. Reynolds, for appellees.

BRANNON, P. A mercantile trading firm in the name of Henry & Linkous, by deed of lease dated April 18, 1894, leased of Hannah Grinberg a tenement in the city of Bluefield for a term of three years, beginning that date, for the sum of \$3,600, payable in semiannual installments of \$600 in advance, the first payable on the day of its date. On April 26,

1894, Goodman Bros. & Co. sued out an attachment for debt against Henry & Linkous, which was levied upon the stock of goods in the leased tenement. On April 27, 1894, Henry & Linkous made an assignment of said goods for the benefit of creditors. Under an order of court in the attachment case the goods were sold, and the proceeds are to be applied in this suit according to the rights of the parties. On July 23, 1894, Hannah Grinberg sued out from a justice a distress warrant against Henry & Linkous for the \$600 installment of rent payable April 18, 1894, which was levied on said goods while yet on said premises. Afterwards J. M. Anderson, the trustee in said assignment for creditors, brought a suit in the circuit court of Mercer county, in equity, to administer the assets conveyed in said assignment among all parties interested therein; and in this suit a reference to a commissioner was made to convene the creditors of Henry & Linkous, and report their debts and priorities; and Hannah Grinberg presented to the commissioner a claim for \$1,200 for one year's rent, and a decree in the case allowed her only \$600, and refused it any priority, but ranked it among the general creditors' debts. From this decree she appealed. Thus the questions we have to decide are: How much is Hannah Grinberg entitled to for rent? Is it a lien because rent, and entitled to preference over the general creditors taking under the assignment? I answer that she is entitled, as against these creditors, to \$1,200,—one year's rent,—and that she has priority over said trust creditors. As against the tenants themselves, Hannah Grinberg would be entitled to demand, as it accrued, the entire sum of rent stipulated for the whole term; but as against creditors of the lessees obtaining liens after the beginning of the term by deed of trust or otherwise against the goods on the premises, her rights are limited to one year's rent by sections 11, 12, c. 93, Code 1891. Section 11 provides how a distress warrant shall be enforced, saying that it may be levied on goods of the lessee or his assignee on the premises, or removed therefrom not more than 30 days, and provides that liens resting on the goods when taken to the premises shall not defeat a levy of the distress warrant, but only the lessee's interest after paying the prior lien shall be liable to distress, but as to liens created while the goods are on the premises, they shall be liable to distress, but not for more than one year's rent, "whether it shall have accrued before or after the creation of the lien." The office of section 11 is to say what goods may be taken, and to say how the distress shall affect goods under liens prior and subsequent, limiting it, as to liens arising after the commencement of term, not by amount in dollars, but by the time of accrual, and to the amount stipulated to be paid for one year by the lease. So a distress warrant actually sued out

could bind only for one year's rent actually accrued as against subsequent liens. More rent may have become payable, but as to subsequent liens it could operate only for a year's rent; but its positive effect is to give a levy for one year's rent against subsequent liens, whether the rent accrued before or after the birth of the liens. The section gives no limit as to the tenant. It may, as to him, be levied for rent for a period longer than a year. This section shows a clear intent to give a landlord preference for one year's rent. Such is the law as to rent actually accrued and in arrear, where a distress warrant is out. But suppose a year's rent has not become due, so that there can be no distress. The term is running, the goods on the premises, and, if uninterrupted, the landlord would get his whole rent for the whole period; and the legislature thought that at least one year's rent should be accorded him, but no more, though the term were longer, as that would give the rent debt too much preference over other debts. Section 11 gives it to him where it has accrued; section 12 gives it to him whether accrued or not, because accruing under a current tenancy. If the goods should remain on the premises, they would, when the rent should be due, be liable for one year's rent under a distress warrant in such case; and if any one under subsequent lien or legal process take the goods from the premises, and frustrate a distress warrant for the rent when due, this section places the landlord where he would be under section 11, giving him right to one year's rent; and that right is manifestly a preference. He must be paid, before removal under deed of trust, all rent in arrear, and secured what has not fallen due, not exceeding in all one year's rent. It gives the landlord right of payment and preference out of the goods themselves, and this operates as a lien. It gives right to the landlord to detain the goods on his premises against a removal of trust until paid and secured as prescribed, just like an innkeeper or tailor may detain goods until payment. If removed under legal process, it says that the officer, though he may remove them, shall, out of the goods, pay rent in arrear, and sell enough on credit to pay the balance when due. Why all this is not a lien, I fail to see. It makes no difference whether a distress warrant has been sued out or not, or can be sued out, for want of maturity of the rent. Indeed, the section contemplated that a distress will not be made, if it does not prohibit it, because it allows the property to be removed from the premises under legal process, and does not contemplate a clash between that process and a distress,—a seizure out of the officer's hands by an officer under distress warrant subsequently issued, whether for rent due at the removal or afterwards becoming due. It dispenses with such warrant by commanding the officer removing the property under the process to pay the rent

out of it. If levied on by a distress warrant before the levy of other process, I think there could be no removal under section 12, because, under section 11, the officer would complete the enforcement of his warrant; and so it is the office of section 12, without a distress warrant, and whether the rent is past due or not, to create a lien for rent for one year. This section, of its own force, gives a lien without a distress warrant. I think this view of the force of section 12 is sustained by *Wades v. Figgatt*, 75 Va. 575, holding that goods carried on leased premises and incumbered after the commencement of the tenancy, "are charged with a definite portion of the rent arising under the tenancy during the term" against the incumbrance, and that is one year's stipulated rent, whether partly or wholly due or not. The Virginia statute there construed is the same as ours. Also, by the case of *City of Richmond v. Duesberry*, 27 Grat. 210, where the court said: "The landlord is protected by the statute against all deeds of trust, mortgages, and other liens where the lien has been created after the commencement of the tenancy, upon goods on the leased premises which belong to the person liable for the rent, and where there is an existing liability for rent in arrear, or to become due at the time the lien is created."

Another objection made against the rent demand is that the distress warrant for it was made returnable before the justice who issued it. Now, first, I have shown that section 12 makes this demand a lien, without a warrant, for the whole \$1,200, part of it being due when the goods were removed from the premises under the attachment, and part afterwards falling due. But, second, the distress warrant need have no place of return, because it is not judicial process, and there need be—cannot be—a trial upon it. When a trial is to be had in a proceeding, process must have a time and place of return that such trial may be had then and there; but not so with a rent warrant. The form books give this warrant no return place. *Mayo's Guide*, 568; 4 *Minor*, Inst. 1619. At common law the landlord himself, without warrant, seized his tenant's goods, or some one authorized by him by his warrant. *Smith v. Ambler*, 1 *Munf.* 596; *Tayl. Landl. & Ten.* § 579; 2 *Tuck.* 11; *Wood, Landl. & Ten.* 940. By chapter 61, Acts 1834-35, in Virginia, this right of the lessor to make his own distress was abolished, and he was required to sue out a warrant from a justice upon affidavit. The act directed how it should be issued, upon what affidavit and to what officer directed, but did not say where or when returnable, but gave it "same force and effect as a like warrant issued by the lessor would have had prior to March 12, 1834," thus merely changing the source of the warrant from the lessor to a justice, leaving it an ex parte proceeding, a mere warrant for the performance of a purely ministerial act, not a judicial proceeding.

Our Code (chapter 93, § 10) directs about this warrant in several details, but does not provide when or where to be returned. This section is a law unto itself; and why, when it does not require a return day or place, and we know that it is a mere safe substitute for the warrant which before was issued by the landlord, should we overthrow a warrant for this cause, and add to the writ a requirement never before, in centuries, required? In some states this warrant by statute operates as a declaration in an action, but "at common law a distress for rent is not the commencement of a suit. It is a mandate authorized by law, to be issued in a proper case, to seize and sell the tenant's goods for the rent, just as if a judgment had been previously rendered therefor; and it is not returnable into any court, and, if returned into court, as other attachments, and judgment be rendered in that proceeding, the judgment will be void." 7 *Enc. Pl. & Prac.* 20. If, however, a place of return must be given, it can only be to the justice, under Code, c. 41, § 7. Mr. Hutchinson makes the form in his treatise 668 so returnable.

Another reason against so doing is that no hearing upon the warrant takes place, as it is no suit between parties. At common law, if the tenant disputed the right of distress, he gave a replevin bond, and the landlord restored to the tenant his property, and the tenant brought action to test the validity of the distress, and, if he succeeded, retained the property. The action of replevin was abolished by the Code of 1849, and in its place the well-known forthcoming bond was applied to a distress warrant, as well as an execution, the effect of which is to let the tenant keep the property till a given day; and, if he fails to deliver it for sale, the landlord cannot again take it, but is driven to a motion, or action on the bond, and in it the tenant can make "defense on the ground that the distress was for rent, not due in whole or in part, or was otherwise illegal." Code 1891, c. 142, §§ 1, 5; *Allen v. Hart*, 18 *Grat.* 726; 4 *Minor*, Inst. 189. If the tenant succeeds, he keeps the property. If he fails, he keeps it, but judgment goes on the bond. The tenant can only make defense to the distress warrant by giving a forthcoming bond, and resisting award of execution upon it. He has just as efficient remedy as the common law gave. In fact, he is more favored, because by it his bond bound him to prosecute successfully an action of replevin, but now he has only to defend the other party's suit on the bond, which may never be brought. He could always—can now—bring trespass for wrongful distress, which he could not do, if the distress were a judicial proceeding. It is urged that this proceeding is in violation of amendment 14 of the constitution of the United States, guarantying due process of law. The remedy of distress existed before the discovery of America, and was brought to Virginia by Capt.

Smith, and has never ceased; and it seems useless to argue to show that a remedy so long antedating said amendment, a remedy for and against all alike, is not destroyed by it. That amendment is not the "scare-crow" it is often represented to be; it does not overthrow state laws, rights and remedies, to the extent and purposes for which it is often cited. It respects the common law, the statute law, the remedies and procedure existing in the state at its adoption. Cooley, Const. Lim. 434, note 1. It came to preserve, not to destroy, existing rights. Just as well say that the tax bill seizing a horse for taxes is not due process of law.

As to the objection that the justice's docket showed no entry of the proceeding, that docket only applies to civil or criminal suits before him where he renders judgment, as section 176, c. 50, Code, requiring this docket, says, "It shall be used exclusively for entering his judicial proceedings." As shown above, a distress warrant is not a suit or judicial proceeding. The warrant was filed, and fully proven. In fact, it proves itself. It might be easy to show, if necessary, that, if it ought to be entered in the docket, other evidence could be heard to prove it, where a docket is silent. 12 Am. & Eng. Enc. Law, 502. Code, c. 50, § 182, makes the docket evidence, but not conclusive, and thus it is not exclusive evidence.

It is said there is no evidence that the first installment of \$600 was not paid. There is evidence in the affidavit made to get the distress warrant, which affidavit the statute makes evidence for this purpose. But no evidence is required. The undisputed lease under seal creates the debt, saying the \$600 is to be paid on the 18th day of April, 1894, but not acknowledging its receipt. Besides, when once a debt exists, he who asserts payment must prove it; and there is not a scintilla of evidence to prove it. The decree is reversed, and the cause remanded, with direction to enter a decree allowing Hannah Grinberg \$1,200, with interest on \$600 of it from 18th of April, 1894, and \$600 of it from 18th of October, 1894, and to provide for its payment as a preferred demand over other debts out of the fund arising from said stock of goods.

MEMORANDUM DECISIONS.

ALGER v. TURNER.

(Supreme Court of Georgia. July 23, 1898.)

EVIDENCE OF AGENCY.

This case is in all material respects similar to that of Alger v. Turner (this day decided) 31 S. E. 423, and is controlled by the decision therein rendered.

Action by H. L. Turner against R. A. Alger. Judgment for plaintiff. Defendant brings error. Reversed.

PER CURIAM. Judgment reversed.

HAMILTON v. STATE.

(Supreme Court of Georgia. Nov. 13, 1898.)

RIOT—EVIDENCE.

This case involves the same questions that were considered in the case of Dixon v. State, 31 S. E. 750, and is controlled by the ruling made in that case.

Error from city court of Cartersville; J. W. Harris, Judge.

Gene Hamilton was convicted of riot, and brings error. Reversed.

J. B. Conyers and Ben J. Conyers, for plaintiff in error. Sam F. Maddox, Sol. Gen., for the State.

PER CURIAM. Judgment reversed. All the justices concurring, except SIMMONS, C. J., absent, and LUMPKIN, P. J., absent on account of sickness.

PRICHARD v. REYNOLDS.

(Supreme Court of Georgia. July 23, 1898.)

SALE OF LAND—OUTSTANDING TITLE.

This case, upon its facts, is controlled by the decision of this court in Black v. Walker, 26 S. E. 477, 98 Ga. 31.

Error from superior court, Catoosa county; George F. Gober, Judge.

Action by H. B. Reynolds against J. K. Prichard. Judgment for plaintiff. Defendant brings error. Affirmed.

Payne & Payne and Shumate & Maddox, for plaintiff in error. W. E. Mann and R. J. & J. McCamy, for defendant in error.

PER CURIAM. Judgment affirmed.

ALLEN v. HAMMOND. (Supreme Court of North Carolina. April 23, 1898.) Appeal from superior court, Madison county. J. M. Gudger, for appellee. No opinion. Dismissed for defective record.

BLAKE v. BLAKE et al. (Supreme Court of North Carolina. March 2, 1898.) Appeal from superior court, Wake county. M. A. Bledsoe, for appellant. J. H. Fleming, for appellees. No opinion. Appeal dismissed.

BLEDSON v. SHAFFER. (Supreme Court of North Carolina. May 11, 1898.) Appeal from superior court, Wake county. M. A. Bledsoe, for appellant. W. N. Jones, for appellee. No opinion. Judgment affirmed.

CHATFIELD v. STRINGFIELD et al. (Supreme Court of North Carolina. April 27, 1898.) Appeal from superior court, Haywood county. H. R. Ferguson, for appellees. No opinion. Dismissed pursuant to the seventeenth rule.

CLONTZ v. SIMONDS. (Supreme Court of North Carolina. May 11, 1898.) Appeal from superior court, Cherokee county. J. W. Cooper, for appellant. No opinion. Judgment affirmed.

COLLINS v. PETTITT et al. (Supreme Court of North Carolina. Oct. 23, 1898.) Appeal from superior court, Halifax county; Norwood, Judge. Action by J. A. Collins against G. W. Pettitt and others. From a judgment for plaintiff, defendants appeal. Reversed. W. A. Dunn and Thos. N. Hill, for appellants. R. L. Travis and MacRae & Day, for appellee.

PER CURIAM. The questions presented in this case being the same as those presented in

Wilcox v. Leach (at this term) 31 S. E. 374, for the reasons set out in the opinion in that case, there is error.

COX v. DUNN. (Supreme Court of North Carolina. March 22, 1898.) Appeal from superior court, Lenoir county. Jones & Boykin, for appellant. George Rountree, for appellee. No opinion. Judgment affirmed.

DAVIS v. BEARD. (Supreme Court of North Carolina. Sept. Term, 1897.) Appeal from superior court, Cumberland county. No opinion. Dismissed pursuant to the seventeenth rule.

DAVISON et al. v. WEST OXFORD LAND CO. (Supreme Court of North Carolina. Sept. Term, 1897.) Appeal from superior court, Granville county. No opinion. Appeal dismissed pursuant to the seventeenth rule.

DOVER et ux. v. RAY. (Supreme Court of North Carolina. Sept. Term, 1897.) Appeal from superior court, Madison county. No opinion. Appeal dismissed pursuant to the sixteenth rule.

DUNN v. UNDERWOOD et al. (Supreme Court of North Carolina. Sept. Term, 1897.) Appeal from superior court, Sampson county. No opinion. Dismissed.

EVERETT et al. v. SHUFFLER. (Supreme Court of North Carolina. May 3, 1898.) Appeal from superior court, Swain county. G. S. Ferguson, for appellant. No opinion. Judgment affirmed.

FULP v. ROANOKE & S. R. Co. (Supreme Court of North Carolina. April 5, 1898.) Appeal from superior court, Forsyth county. Watson, Buxton & Watson, for appellee. No opinion. Judgment affirmed.

GARRISON et al. v. BLANKENSHIP et al. (Supreme Court of North Carolina. Sept. Term, 1897.) No opinion. Judgment affirmed.

GINGERY v. SMITH. (Supreme Court of North Carolina. Sept. Term, 1897.) Appeal from superior court, Robeson county. No opinion. Dismissed pursuant to the fifteenth rule.

GOOCH v. BOONE et al. (Supreme Court of North Carolina. Feb. 15, 1898.) Appeal from superior court, Northampton county. No opinion. Dismissed pursuant to the seventeenth rule.

HARTSELL v. COLEMAN et al. (Supreme Court of North Carolina. March 25, 1898.) Appeal from superior court, Cabarrus county. W. G. Means, for appellants. Montgomery & Crowell, for appellee. No opinion. Judgment affirmed.

HENDREN v. ALSPAUGH et al. (Supreme Court of North Carolina. May 13, 1898.) Appeal from superior court, Guilford county. C. M. Stedman, for appellants. J. A. Barringer and L. M. Scott, for appellee. No opinion. Judgment affirmed.

HENKEL v. PULLMAN PALACE-CAR CO. (Supreme Court of North Carolina. April 15, 1898.) Appeal from superior court, Caldwell county. Edmund Jones, for appellee. No opinion. Dismissed pursuant to the seventeenth rule.

HENRY v. HILLIARD et al. (Supreme Court of North Carolina. May 3, 1898.) Appeal from superior court, Haywood county. T. H. Cobb, for appellant. No opinion. Motion allowed pursuant to the thirty-first rule.

HULLEN v. CITY OF WILMINGTON. (Supreme Court of North Carolina. March 22, 1898.) Appeal from superior court, New Hanover county. Ricard & Bryan, for appellant. J. D. Bellamy, for appellee. No opinion. Judgment affirmed.

JAMES et al. v. WITHERS et al. (Supreme Court of North Carolina. Sept. Term, 1897.) Appeal from superior court, Stokes county. No opinion. Judgment affirmed.

KILLAM et al. v. BROWN. (Supreme Court of North Carolina. March 22, 1898.) Appeal from superior court, Duplin county. Jones & Boykin and A. C. Davis, for appellants. Stevens & Beasley, for appellee. No opinion. Judgment affirmed.

KLINE et al. v. FRENCH BROAD LUMBER CO. (Supreme Court of North Carolina. Sept. Term, 1897.) Appeal from superior court, Swain county. No opinion. Appeal dismissed pursuant to the seventeenth rule.

LESTER v. NORFOLK & S. RY. CO. (Supreme Court of North Carolina. May 11, 1898.) Appeal from superior court, Dare county. Shepherd & Busbee, for appellee. No opinion. Affirmed.

LIDDEN v. MYERS. (Supreme Court of North Carolina. April 28, 1898.) Appeal from superior court, Beaufort county. J. H. Small, for plaintiff. W. B. Rodman, for defendant. No opinion. Affirmed.

MCDOWELL v. MAXWELL. (Supreme Court of North Carolina. Dec. 20, 1898.) Appeal from superior court, Burke county; Starbuck, Judge. Action by O. W. McDowell against W. C. Maxwell, trustee, to restrain a foreclosure sale. From a judgment for defendant, plaintiff appeals. Affirmed. Avery & Ervin, for appellant. A. Burwell, P. D. Walker, and F. I. Osborne, for appellee.

FURCHES, J. This case presents substantially the same facts as *Williams v. Maxwell*, 31 S. E. 821, and is governed by the opinion in that case. The judgment of the court refusing an injunction is affirmed.

McNAIR v. PUROELL. (Supreme Court of North Carolina. Sept. Term, 1897.) Appeal from superior court, Cumberland county. No opinion. Appeal dismissed pursuant to the seventeenth rule.

MARCOM v. WYATT et al. (Supreme Court of North Carolina. Sept. Term, 1897.) Ap-

peal from superior court, Wake county. No opinion. Appeal dismissed pursuant to the sixteenth rule.

MILLER v. ELLIS et al. (No. 333.) (Supreme Court of North Carolina. Sept. Term, 1897.) Appeal from superior court, Forsyth county. No opinion. New trial ordered.

MILLER v. ELLIS et al. (No. 338.) (Supreme Court of North Carolina. Sept. Term, 1897.) Appeal from superior court, Forsyth county. No opinion. New trial ordered.

MOSELY v. CROSS. (Supreme Court of North Carolina. March 2, 1898.) Appeal from superior court, Wake county. No opinion. Judgment affirmed.

MOSS v. LEATHERWOOD. (Supreme Court of North Carolina. Sept. Term, 1897.) Appeal from superior court, Clay county. No opinion. Appeal dismissed pursuant to the fifteenth rule.

(123 N. C. 773)

MULLEN et al. v. MORROW et al.
(Supreme Court of North Carolina, in Chambers.)

ELECTIONS—REGISTRARS—QUALIFICATIONS—APPOINTMENT—REMOVAL—PROCEEDINGS—EVIDENCE.

1. Acts 1897, c. 185, § 7, providing that the county board shall appoint one member of each political party to act as registrars of election in each precinct, does not require three members for each precinct; and, where there are but two parties in the precinct, more than one member cannot be appointed from the same party.

2. Under Acts 1897, c. 185, § 7, providing that the county board shall appoint one member of each political party to act as registrars of election in each precinct, the state chairmen or county chairmen of the parties have no right to designate the persons to be appointed.

3. In a proceeding against a county board to show cause why registrars of election appointed by them (one from each political party) should not be removed, the burden is on petitioners to show that an appointee is not a member of the party from which he is appointed, or is otherwise disqualified.

4. Under Acts 1897, c. 185, § 7, providing for the appointment of one member of the board of registrars of election for each precinct from each political party, a person who votes with one party on the national tickets, and with another on the state tickets, is not qualified.

5. Acts 1897, c. 185, § 7, provides that, when a registrar of election appointed by the county board refuses to serve, the clerk shall appoint a member in his place. *Held* that, where the board reappoints a member instead, the appointment will be ratified, if there are no objections to the member so appointed.

6. In a proceeding for the removal of a registrar of election, one affidavit was to the effect that he was an inebriate, while there were several others to the effect that, while he occasionally became intoxicated, he was industrious and supported his family. *Held* that he was qualified.

7. A person who cannot read or write, except to write his name, is not qualified to act as registrar of election, under Acts 1897, c. 185, § 7, which requires that such registrar "shall be able to read and write the English language."

8. Where the only evidence that a registrar of election is a member of the political party from which he was appointed is that he was a registrar from that party at a previous election, and that since that time he has stated that he was a member of a different party, he will be removed.

9. When a registrar of election offers no evidence that he is a member of the political party from which he was appointed, and there is evidence that he had been a delegate to a county convention of another party, he will be removed.

10. One affidavit stated that a registrar of election had voted and acted with the party from which he was appointed. Another stated when he was served with the notice of his appointment he said that he

was not a member of that party. *Held*, that he would be removed.

11. In filling vacancies in the office of registrars of election caused by the removal of some of the appointees, the court is not bound by the recommendation of the chairmen of the parties from which the appointments are to be made.

Proceeding by J. W. Mullen and another against J. M. Morrow and another.

FURCHES, J. Under chapter 185, Acts 1897, amending chapter 159, Acts 1895, and upon the application of J. W. Mullen, chairman of the Republican party of Mecklenburg county, and T. S. Cooper, chairman of the Populist party of said county, I issued a rule upon the defendants on the 20th day of September, 1898, returnable before me at Raleigh on the 27th day of September, in which they are required to show cause why the prayers of the petitioners should not be granted. At the time and place designated, the defendants appeared and answered; being represented by P. D. Walker and F. M. Shannonhouse, as their attorneys, while the petitioners were represented by J. W. Graham and D. K. Pope, as their attorneys.

This statute, being of recent date, has received no construction from the courts, so far as I know; and it becomes my duty to put a construction upon it for the first time.

The board, in making the appointments of registrars for Mecklenburg county, have acted upon the idea that it was their duty to appoint three registrars for each voting precinct. This is so, if there is any one in the precinct, filling the requirements of the law, to appoint, but not if there is not. The act (chapter 185, § 7) says they "shall appoint one citizen and qualified voter for each of the political parties of and for each election precinct, who shall be able to read and write the English language, and who shall be known, for the duties required of them under this act, as registrars of election in their respective precincts." Thus, it appears that the board are not required to appoint three registrars for each voting precinct, but to appoint one qualified voter of the precinct from each one of the political parties.—Democrat, Populist, and Republican,—and that the board had no right or authority to appoint a member of one party for another party; that the board had no authority to appoint two registrars from the same party in the same voting precinct. And it being admitted by defendants that J. A. Blackney, J. R. Porter, and Banks Potts are Democrats, but were appointed in the place of Populists, there being no Populists to appoint, thus making two Democratic registrars and one Republican in the precinct, which was not authorized by the law, they are hereby removed.

W. S. Liddell was appointed in the place of a Populist for the reason that there was no Populist in the precinct to appoint. The defendants say he is a Republican, and the petitioners say he is a Democrat. I shall not decide this question, as it makes no difference which he is. If he is a Republican, as defendants allege, the Republicans have two; and if he is a Democrat, as petitioners allege, the Democrats have two. Let it be the one way or the other; the appointment is unauthorized, and he is hereby removed.

The act of 1897, amending the act of 1895, makes a material change in regard to the appointment of registrars and judges of election. Under the act of 1895 the chairmen of the different political parties had the right to designate the registrars and judges to be appointed for their respective parties, and the clerk was only his agent, and had no discretionary powers, if the wishes of the chairmen were made known on or before the first Monday in September. *Harkins v. Cathey*, 119 N. C. 649, 26 S. E. 136. But under the act of 1897 neither the state chairmen nor the county chairmen have any legal right to designate the parties to be appointed. This is left with the

board within prescribed limits. The board now occupy very much the same position the clerk did under the act of 1895, where the chairman of a party did not file his lists in time. *Harkins v. Cathey*, supra.

R. W. Smith swears that he is a Republican, has always voted that ticket, and expects to do so now. As the presumption is with defendants, the burden is on the petitioners to show the error, and that they are entitled to the relief asked. I will give Mr. Smith credit for knowing what he is, and that he correctly states the same. His appointment is sustained. *Harkins v. Cathey*, supra.

No. 2 is withdrawn, as Wood refused to act, and another registrar has been appointed in his place, that seems not to be objected to.

No. 4. J. P. Wilson says he is a Republican in national politics, but in state and county politics he votes the Democratic ticket. This, in my opinion, disqualifies him as a Republican registrar. It is like a juror when two parties are on trial in the same case; though he may be favorably disposed as to one of them, if he has formed and expressed an opinion adverse to the other he would be disqualified.

No. 5. T. B. Guthrie stands on the same footing as J. P. Wilson, and my opinion as to him is the same as in the Wilson case.

No. 6. Fred Oliver has refused to serve, and John C. Davidson has been appointed in his place by the board. It seems this should have been done by the clerk. But, as there seems to be no objection to him, this appointment is ratified by me.

No. 7. Walter Donaldson is asked to be removed on account of inebriety. The burden is on the petitioners. They have one affidavit to that effect, but the defendants have several affidavits going to show that, while he does become intoxicated, he is not usually so; that he is industrious, supports his family, and is qualified to act as registrar. This is an important appointment he has, and, if he has any pride of character, he will not get drunk while he is acting as registrar. I think the petitioners have failed, and I decline to remove him.

No. 8. R. J. Ferguson seems to me to be a Republican. Petitioners have failed to show that he is not, and I decline to remove him.

No. 9. S. W. Stewart says that he cannot read and write sufficiently to discharge the duties of registrar; that he can write his name, but this is only done mechanically. I must take what he says to be true. *Harkins v. Cathey*, supra. And it does not seem to me that a man that can only write his own name is qualified to register the names of others. I must remove him.

No. 10. J. O. Turbeyfill: Respondents offer no affidavit to sustain their allegation that he is a Republican. The only evidence they offer of this is an exhibit showing that he was appointed as a Republican registrar in 1896, when the petitioners show by the affidavit of W. B. Williamson that Turbeyfill on the 15th of September, 1898, told him that he was a Democrat. He may not have been a Republican in 1896 or, if he was, he seems to have changed since that time, and is a Democrat now. *Harkins v. Cathey*, supra. He is removed.

No. 11. G. A. Morrow: This allegation in the petition must have been made under a mistake as to what party he was appointed for. It seems he was appointed as a Populist, and that he is a Populist. I decline to remove him.

Nos. 12 and 13 withdrawn as to Osborne White and W. R. Barnett, and these appointments stand.

Populist demands:

No. 1. J. W. Moore, appointed as a Populist, having declined to serve, and J. H. Wilson having been appointed in his place, this objection is withdrawn, and I approve and ratify this appointment.

No. 2. J. F. Woodsidess objected to as being a Democrat: Respondents offer no evidence

tending to show that he is not a Democrat, while petitioners offer the affidavit of T. A. Austin that Woodsidess told him that he was not a Populist; that he had been a Prohibitionist, "but was now a Democrat, and one of the managers in the late Democrat primaries." He must be removed.

No. 3. J. H. Hutchinson, appointed as a Populist: Respondents offer no evidence tending to show that he is a Populist, while petitioners offer the affidavit of W. S. Clanton that he saw said Hutchinson in the Democratic county convention representing his township as a delegate. He is removed.

No. 7. J. O. Dennis appointed as a Populist: There is no direct evidence as to what he is now, and, as the burden is on the petitioners, I think they fail to make good their allegation. *Harkins v. Cathey*, supra. He is not removed.

No. 8. H. H. Hoover, appointed as a Populist: Defendants offer the affidavit of E. O. Johnson that Hoover had voted and acted with the Populist party, and the petitioners offer the affidavit of E. B. Spirris that he was present when E. O. Johnson served the notice on Hoover that he had been appointed a registrar for the Populist party on the 12th of September, when Hoover "then and there declared that he was a Democrat, and that he could not stand the Populists." From this evidence, I do not think him a Populist, and that he must be removed.

As to those removed for the reason that they were appointed in the place of Populists, where there were no Populists in the precinct, there will be no one appointed in their stead. As to the others removed under the rulings in this proceeding, there should be others appointed in their stead. This is the most difficult part of my duty, as I know few persons in the precincts from which they have been removed. These remarks have been made without intending to reflect upon the honor or integrity of the parties removed. It is probable that they would all have done their duty as registrars. But the law provides who may and who may not be registrars, and this we must all observe and obey. The learned counsel for defendants in his argument stated that in election times party feeling ran high, and, when questions came up to be decided, they were most likely to decide them in favor of their side. This should not be so, but unfortunately it is often too true. And for this reason, as I suppose, the legislature balanced the matter as best it could, by providing each party a representative on the board, if it be possible to have one. In filling the vacancies made by this order, I shall have to rely principally upon the recommendations made by the chairmen of the Populist and Republican parties. I am not bound by this, but it may serve as some evidence of fitness. *Harkins v. Cathey*, supra.

Order of the court: In addition to those removed where there will be no appointments to fill their places, to wit, W. S. Liddell, J. A. Blackney, J. R. Porter, and Banks Potts, the following other persons appointed registrars are removed, to wit: J. P. Wilson, Charlotte township, ward 2, precinct 2; and J. S. Leary is appointed in his stead. In ward 2, precinct 3, Charlotte township, T. B. Guthrie is removed, and R. E. McDonald is appointed in his stead. In Providence township, precinct No. 1, S. W. Stewart is removed, and W. M. Kiser, appointed in his stead. In Dewese township, precinct 2, J. O. Turbeyfill is removed, and W. B. Sims appointed in his stead. In Charlotte township, ward No. 1, precinct No. 2, J. F. Woodsidess is removed, and J. P. Sossaman is appointed in his stead. In ward 4, precinct 3, Charlotte township, J. W. Hutchinson is removed, and J. W. Meacham is appointed in his stead. In Paw Creek township, precinct No. 2, H. H. Hoover is removed, and M. L. Kistler appointed in his stead. All the appointments made in this order are appointments of the parties named, to

be and act as registrars of election for the fall election in 1898,—county, state, and national. The sheriff of Mecklenburg county will serve this order upon the defendants and the parties herein appointed registrars immediately upon the receipt of the same, and make due return to me as to the manner and time of serving the same. The clerk of the supreme court will at once issue this order to said sheriff. The defendants are adjudged to pay the costs of this proceeding, to be taxed by the clerk of the supreme court of North Carolina. This September 28, 1898.

NATIONAL BANK OF CHAMBERSBURG v. SEAWELL. (Supreme Court of North Carolina. Sept. Term, 1897.) Appeal from superior court, Moore county. No opinion. Dismissed pursuant to the seventeenth rule.

NEW HOME SEWING-MACH. CO. v. THOMAS. (Supreme Court of North Carolina. March 22, 1898.) Appeal from superior court, Monroe county. W. E. Murchison for appellant. W. C. Douglass and Seawell & Burns, for appellee. No opinion. Dismissed for failure to print the record.

NICHOLSON v. COMMISSIONERS OF DARE COUNTY. (Supreme Court of North Carolina. Oct. 11, 1898.) Appeal from superior court, Currituck county; Norwood, Judge. Action by Lovey W. Nicholson against the commissioners of Dare county. Judgment for plaintiff. Defendants appeal. Affirmed. B. F. Aylett, for appellants. W. B. Shaw, for appellee.

PER CURIAM. Affirmed.

FURCHES, J. (dissenting). This case is here for the fourth time. A majority of the court have affirmed the judgment appealed from by a "per curiam" order. I cannot concur in this summary manner of disposing of this appeal. In my opinion, it overrules all three of the former opinions of this court, without giving any reason for doing so. If these opinions are erroneous and are overruled, the court should have said so. I do not propose to discuss the case in this opinion. Were I to do so, it would be but to repeat the arguments contained in the opinions rendered upon former hearings, and reported in 118 N. C. 30, 24 S. E. 728; 119 N. C. 20, 25 S. E. 719; and 121 N. C. 27, 27 S. E. 996.

NORRIS v. WILMINGTON & W. R. CO. (Supreme Court of North Carolina. Feb. 28, 1898.) Appeal from superior court, Pitt county. John L. Bridgers, R. O. Burton, and B. M. Gatling, for appellant. Bond & Fleming, for appellee. No opinion. Judgment affirmed.

PARKER et al. v. ALBERTSON. (Supreme Court of North Carolina. Sept. Term, 1897.) Appeal from superior court, Duplin county. No opinion. Dismissed pursuant to the seventeenth rule.

POLLOCK v. WADSWORTH. (Supreme Court of North Carolina. Sept. Term, 1897.) Appeal from superior court, Jones county. No opinion. Appeal dismissed pursuant to the thirtieth rule.

POPE et al. v. OATES et al. (Supreme Court of North Carolina. Sept. Term, 1897.) Appeal from superior court, Harnett county. No opinion. New trial granted.

SCOTT et al. v. DUKE et al. (Supreme Court of North Carolina. May 12, 1898.) Appeal from superior court, Guilford county. R. R. King and John N. Wilson, for appellants. Winston & Fuller, for appellees. No opinion. Judgment affirmed.

Douglas, J., dissenting.

SHAFFER v. BLEDSOE. (Supreme Court of North Carolina. March 2, 1898.) Appeal from superior court, Wake county. M. A. Bledsoe, for appellant. W. N. Jones, for appellee. No opinion. Judgment affirmed.

SLATER et al. v. STEWART et al. (Supreme Court of North Carolina. Oct. 25, 1898.) Appeal from superior court, Edgecombe county; Brown, Judge. Action by W. L. Slater and others against J. P. Stewart and others. From a judgment for plaintiffs, defendants appeal. Modified and affirmed. H. G. Connor, for appellants. Jacob Battle, for appellees.

FUROHES, J. The facts governing this case are substantially the same as those in the case of Mahoney v. Stewart (at this term) 81 S. E. 884. This was admitted by counsel on the argument here. This being so, this case is governed by that case. Therefore the injunction and order appointing a receiver are continued as to the defendant Stewart, but are dissolved and vacated as to the administrator, Braswell, and the administration of his intestate's estate. The judgment appealed from will be so modified, but the plaintiffs will be taxed with the costs of this appeal. Modified and affirmed.

SMITH v. MONTAGUE. (Supreme Court of North Carolina. March 2, 1898.) Appeal from superior court, Wake county. M. A. Bledsoe, for appellant. Jones & Boykin, for appellee. No opinion. Action dismissed on motion of defendant on the ground that complaint does not state a cause of action.

SORRELL v. STINSON et al. (Supreme Court of North Carolina. March 28, 1898.) Appeal from superior court, Moore county. Womack & Hayes, A. P. Gilbert, and W. E. Murchison, for appellants. Douglass & Spencer and Black & Adams, for appellee. No opinion. Appeal dismissed.

STAGG v. EINSTEIN et al. (Supreme Court of North Carolina. Sept. Term, 1897.) Appeal from superior court, Lenoir county. No opinion. Dismissed pursuant to the seventeenth rule.

STATE v. AUSTIN. (Supreme Court of North Carolina. Dec. 13, 1898.) Appeal from superior court, Union county; Green, Judge. J. E. Austin was convicted of crime, and appealed. Error. Osborne, Maxwell & Keerans, for appellant. The Attorney General, for the State.

PER CURIAM. This case is governed by the foregoing opinion (31 S. E. 731), and is a part of the same transaction; the only difference being that here the landlord was obstructed in taking possession of another basket of cotton by the daughter of Henry Keziah sitting down on it. According to her testimony, the defendant told her to get up, and threatened to hit her with a stick which he had in his hand if she did not, and she jumped up and ran off. The defendant denies threatening to strike her with the stick. But, in any aspect of the evidence, Henry Keziah and his force of hands were on the old man's land, without a shadow of right, forcibly taking possession of the crop to which

they had no legal claim, and after being forbidden the premises. The defendant used no more force than was reasonably necessary to protect his possession. The court should have instructed the jury to return a verdict of not guilty. Error.

STATE v. BUTNER. (Supreme Court of North Carolina. Sept. Term, 1897.) Appeal from superior court, Yancey county. No opinion. Appeal dismissed pursuant to the sixteenth and thirtieth rules.

STATE v. CAIN. (Supreme Court of North Carolina. Sept. Term, 1897.) Appeal from superior court, Catawba county. No opinion. Dismissed on motion of attorney general.

STATE v. CASE et al. (Supreme Court of North Carolina. Sept. Term, 1897.) Appeal from superior court, Transylvania county. No opinion. Judgment affirmed.

STATE v. COLLINS. (Supreme Court of North Carolina. Sept. Term, 1897.) Appeal from superior court, Onslow county. No opinion. Appeal dismissed pursuant to the sixteenth and thirtieth rules.

STATE v. DICKSON et al. (Supreme Court of North Carolina. Sept. Term, 1897.) Appeal from superior court, Burke county. No opinion. Appeal dismissed on motion of attorney general.

STATE v. HAGAMAN. (Supreme Court of North Carolina. Sept. Term, 1897.) Appeal from superior court, Caldwell county. No opinion. New trial ordered.

STATE v. HANNA. (Supreme Court of North Carolina. March 15, 1898.) Appeal from superior court, New Hanover county. John D. Bellamy, for appellant. Zeb. V. Walser, Atty. Gen., and Brown Shepherd, for the State. No opinion. Dismissed.

STATE v. PEGRAM. (Supreme Court of North Carolina. Feb. 15, 1898.) Appeal from superior court, Warren county. Cook & Green, for appellant. Zeb. V. Walser, Atty. Gen., for the State. No opinion. Appeal dismissed by consent.

STATE v. POTSELL. (Supreme Court of North Carolina. April 26, 1898.) Appeal from superior court, Buncombe county. Zeb. V. Walser, Atty. Gen., for the State. H. B. Stevens, for appellant. No opinion. Appeal dismissed under ruling in *State v. Ray*, 122 N. C. 1097, 29 S. E. 61.

STATE v. RUMBOUGH. (Supreme Court of North Carolina. April 26, 1898.) Appeal from superior court, Madison county. E. C. Smith, for appellant. Zeb. V. Walser, Atty. Gen., and J. M. Gudger, for appellee. No opinion. Appeal dismissed under ruling in *State v. Ray*, 122 N. C. 1097, 29 S. E. 61.

STATE v. SCRONCE. (Supreme Court of North Carolina. Sept. Term, 1897.) Appeal from superior court, Lincoln county. No opinion. Judgment affirmed.

STATE ex rel. WRAY v. DAVIS SEWING-MACH. CO. (Supreme Court of North Carolina. Sept. Term, 1897.) Appeal from superior court, Rockingham county. No opinion. Judgment reversed.

SURRATT v. BADGETT. (No. 303.) (Supreme Court of North Carolina. Sept. Term, 1897.) Appeal from superior court, Davidson county. No opinion. Judgment affirmed.

SURRATT v. BADGETT. (No. 304.) (Supreme Court of North Carolina. Sept. Term, 1897.) Appeal from superior court, Davidson county. No opinion. Judgment affirmed.

TABOR v. CLARK. (Supreme Court of North Carolina. Sept. Term, 1897.) Appeal from superior court, Swain county. No opinion. Appeal dismissed pursuant to the seventeenth rule.

TETTER v. HEATH et al. (Supreme Court of North Carolina. March 26, 1898.) Appeal from superior court, Stanly county. J. M. Brown, for appellant. S. J. Pemberton and T. J. Jerome, for appellees. No opinion. Judgment affirmed.

WAGNER v. HERBIN. (Supreme Court of North Carolina. March 24, 1898.) Appeal from superior court, Guilford county. John A. Barringer, for appellant. L. M. Scott, for appellee. No opinion. Judgment affirmed.

WHITEHURST v. EAST CAROLINA LAND & RAILWAY CO. (Supreme Court of North Carolina. Sept. Term, 1897.) Appeal from superior court, Craven county. No opinion. Dismissed by consent of appellant.

WHITNEY GLASS WORKS v. SNEED. (Supreme Court of North Carolina. March 9, 1898.) Appeal from superior court, Durham county. Graham, Green & Graham, for appellee. No opinion. Dismissed pursuant to the seventeenth rule.

WILSON v. FARMERS' & TRADERS' NAT. BANK et al. (Supreme Court of North Carolina. Feb. 22, 1898.) Appeal from superior court, Pitt county. Harding & Harding, for appellants. No opinion. Affirmed.

YARBOROUGH et al. v. MILLS et al. (Supreme Court of North Carolina. Sept. Term, 1897.) Appeal from superior court, Moore county. No opinion. Affirmed.

STATE ex rel. ROGERS et al. v. ELLIOT et al. Board of Com'rs. (Supreme Court of South Carolina. Jan. 4, 1899.) Mandamus on relation of L. B. Rogers and another against B. F. Elliot and others as board of commissioners of election for Marion county. Heard on return to writ. Dismissed. T. W. Bonchier, J. H. Hudson, and Knox Livingston, for interveners. Geo. G. Thompson, for relators. W. J. Montgomery, J. W. Johnson, H. Woods, and R. W. Shand, for respondents.

McIVER, C. J. It having been stated in the return filed by the respondents in this case that an election on the question of forming the proposed new county of Pee Dee out of a portion of Marion county was held on January 12, 1897, and that the result of such election was

tabulated and certified by the commissioners of election for Marion county to the secretary of state, and by such officer was transmitted to the general assembly in 1897, and that the result of the election so tabulated, certified, and transmitted showed that at such election the proposed new county did not receive a two-thirds affirmative vote; and these facts being now admitted by the relators to be true; and the constitutional court, composed of all the justices of the supreme court and seven of the circuit judges, in the case of *Segars v. Parrott*, having held, by the opinion of a majority of said court, filed December 8, 1898 (31 S. E. 677), that, in determining the result of an election on the question of forming a new county, the general assembly has no judicial powers, nor is invested with any power to determine the result of such an election, and "has no right either to set aside or disregard such return," to wit, the return by the commissioners of election for the old county in which such election was held,—it is, by the consent of all the counsel in this case, ordered that the said return of respondents be sustained, and the proceedings dismissed, upon

the aforesaid legal ground, but without reference to any questions of fact raised in said petition and return, save as hereinbefore stated.

FRANKLIN COUNTY et al. v. SAUNDERS. (Supreme Court of Appeals of Virginia. Sept. 15, 1898.) Appeal from circuit court, Franklin county. Ejectment by Franklin county and others against E. W. Saunders. There was a judgment for defendant, and plaintiffs appeal. Reversed. L. W. Anderson, for appellants. E. W. Saunders, for appellee.

BUCHANAN, J. This case was heard in this court with the case of *Franklin Co. v. Gills*, 31 S. E. 507. The question involved in each case is the same, and was decided in the circuit court in the same way. For reasons stated in writing and filed with the record in that case, the judgment of the circuit court was reversed. For like reasons the judgment in this case must be reversed, the verdict of the jury set aside, and the cause remanded for a new trial.

CARDWELL, J., did not sit.

END OF CASES IN VOL. 31.

